BIS | Department for Business Innovation & Skills

EMPLOYMENT TRIBUNAL RULES: REVIEW BY MR JUSTICE UNDERHILL

Consultation

SEPTEMBER 2012

Contents

Employment Tribunal Rules: review by Mr Justice Underhill

Following the Resolving Workplace Disputes consultation in 2011, stakeholder feedback was that the rules that govern employment tribunals had, over recent years, become over elaborate and could sometimes act as a barrier to effective case management. Government asked Mr Justice Underhill to lead a thorough review of the employment tribunal rules, as set out in Schedule 1 of the 2004 Employment Tribunal regulations. This report was received by Government in July 2012.

The review sought to make recommendations in order to develop a new set of rules that ensure employment tribunal cases can be managed effectively, flexibly, proportionately and consistently in order to ensure a system that is fair to all parties. In making these recommendations, Mr Justice Underhill was also asked to have specific regard to the cost-effectiveness of the system. The rules were also reviewed to ensure that they are simple and simply expressed addressing concerns from stakeholders that the employment tribunal system is becoming over- legalistic, particularly for parties who choose to represent themselves at a hearing.

In making his recommendations, Mr Justice Underhill has worked with a group of legal experts, and in conjunction with an expert users group made up of interested parties from business, employer organisations, trade unions and the legal profession.

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This consultation is relevant to: employers, employees and trade unions

1. Foreword from the Minister

By Jo Swinson MP, Minister for Employment Relations and Consumer Affairs

The Government's work on resolving workplace disputes forms an important plank of the cross-Government review into all aspects of employment related law which will last for the duration of this Parliament.

The review of employment tribunal rules is one part of this work. Creating an efficient, effective and proportionate employment tribunal system feeds into this Government's wider aims. Employers, particularly smaller businesses told us that a fear of employment tribunals was affecting their decision to take on new staff. Our growth strategy is therefore focused on making it easier for business to recruit and giving them the confidence to do so, without compromising fairness for employees.

We have already announced a host of measures trying to simplify tribunal procedures and make sure that when workplace disputes happen, employers and employees try to find other ways to resolve their problems. However, it is only sensible that we also look at the rules when both parties set foot inside the tribunal and make it simpler for everyone involved.

Responses to the Resolving Workplace Disputes consultation told us that a comprehensive review of the procedures for employment tribunals was required. That is why the Government asked Mr Justice Underhill to carry out a fundamental review of the rules of procedure. We wanted to ensure that the rules were simplified and provided the framework to manage cases flexibly, efficiently, proportionately and where possible, consistently, providing certainty to all parties who participate in the employment tribunal process.

The outcome of the review was published on 11 July 2012. The length of the legislation has been cut in half, and the language substantially simplified. Mr Justice Underhill has suggested a number of significant changes that he believes should bring about a better functioning employment tribunal system.

Mr Justice Underhill's new rules give employment tribunals a more formal role in promoting alternative forms of dispute resolution. He has also proposed a greater role for presidential guidance, which will be designed to give all parties a better idea of what to expect at an employment tribunal, and what is expected of them, while also promoting consistent case handling by employment judges.

The combined effect of these recommendations should be more efficient and effective disposal of cases, and an overall legislative framework that is simpler for all parties to understand.

This consultation is a chance to provide your views on these recommendations and identify any practical issues that may arise from them. The rules have been drafted to be simpler and easier to follow so we are interested in whether there are any areas of ambiguity or loopholes that need to be addressed.

Mr Justice Underhill also identified a number of issues outside of his original terms of reference that we feel are worth considering further. We look forward to hearing your views on these subjects and also on further improving the enforcement regime for employment tribunals.

Jo Swinson MP
Minister for Employment Relations and Consumer Affairs

2. Executive Summary

1. In response to the Resolving Workplace Disputes consultation exercise in 2011, many stakeholders from the judiciary, the legal profession and business told us that the rules for employment tribunals needed reviewing. It was felt that as a whole, the rules had become unduly prescriptive, inflexible and could sometimes act as a barrier to effective and proportionate case management. Further amendments would not be welcomed without a comprehensive review of the procedural code as a whole.

2. These were the terms of reference that Mr Justice Underhill was given by Government. He was also asked to consider the cost-effectiveness and proportionality of the employment tribunal system, both in terms of the taxpayer and the individual parties themselves. His review has considered all areas of the employment tribunal system, and has made some additional recommendations on matters which are not currently in the 2004 regulations that contain the rules for the employment tribunal system. Government is seeking views on the new draft rules and all of the issues summarised below:

3. **Effective case management** - This forms the main part of Mr Justice Underhill's recommendations, and includes redrafted rules on:

    a. An initial paper sift carried out by a judge

    b. Tribunal powers to strike out claims

    c. A lead case mechanism for dealing with multiple claims

    d. A simplified procedure for withdrawing claims

    e. A new procedure for preliminary hearings that combine separate pre hearing reviews and case management discussions

    f. A clear rule on the provision of written reasons

    g. A rule on limiting oral evidence and submissions leading to more efficient timetabling of cases

4. **Presidential guidance** – and whether this will help both to give all parties a better idea of what to expect at tribunal and what is expected of them. It is also designed to help ensure that employment judges are managing cases in a consistent manner.

5. **Alternative Dispute Resolution** – a new rule that gives employment tribunals and employment judges a clear mandate to encourage and facilitate the use of alternative forms of dispute resolution at all appropriate stages of the tribunal process.

6. **Costs regime** – the new rules simplify the overly complex cost regime and we invite views on its usage.

7. **Lay representation** – the government agrees with the review's suggestion that the position of lay representatives at tribunal needs to be reassessed, to ensure similar

treatment to legal representatives, particularly when awarding costs, and invites comments on implementation.

8. **Use of deposit orders** –the review suggests a more flexible regime to provide judges with the power to require a financial outlay of someone who wishes to continue to pursue a weak element of a claim.

9. **Forms –** the review has taken the opportunity to consider both the form that claimants use to submit a claim (ET1), and that a respondent completes (ET3), to ensure that they are providing the most useful information to the employment tribunal.

10. **Compliance with employment tribunal orders –** in light of concerns about non-payment of awards, Government is proposing legislative changes to encourage the prompt payment of awards. Government also seeks suggestions on how to ensure that a greater number of awards are paid.

11. Mr Justice Underhill's review of the procedural rules for employment tribunals is separate from the work the Ministry of Justice is undertaking to introduce fees for the use of Employment Tribunals and the Employment Appeals Tribunal, expected in the summer of 2013.[1] Where there is overlap between the fees work and Mr Justice Underhill's recommendations, this is outlined below. The government response on fees undertook to review some of its recommendations in light of the Underhill review and the final decisions made in relation to the employment tribunal rules.

12. This consultation covers the rules that govern both employment tribunals in England & Wales and in Scotland. Responses will be used to determine whether the Government will take forward some or all of Mr Justice Underhill's recommendations. It will also help inform our approach on wider issues related to the employment tribunal system, such as encouraging better compliance with employment tribunal orders for awards

3. How to respond

13. When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.

14. A copy of the Consultation Response form is attached, or available electronically at http://www.bis.gov.uk/assets/biscore/employment-matters/docs/e/12-1039rf-employment-tribunal-rules-underhill-review-form (until the consultation closes). If you decide to respond this way, the form can be submitted by letter, fax or email to:

[1] https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011

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15. A list of those organisations and individuals consulted is in Annex D. We would welcome suggestions of others who may wish to be involved in this consultation process.

4. Additional copies

16. You may make copies of this document without seeking permission. Further printed copies of the consultation document can be obtained from:

    BIS Publications Orderline
    ADMAIL 528
    London SW1W 8YT
    Tel: 0845-015 0010
    Fax: 0845-015 0020
    Minicom: 0845-015 0030
    www.bis.gov.uk/publications

17. An electronic version can be found at:
    http://www.bis.gov.uk/assets/biscore/employment-matters/docs/e/12-1039-employment-tribunal-rules-underhill-review

18. Other versions of the document in Braille, other languages or audio-cassette are available on request.

5. Confidentiality & Data Protection

19. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

20. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

6. Help with queries

21. Questions about the policy issues raised in the document can be addressed to:

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22. A copy of the Code of Practice on Consultation is in Annex C.

7. The proposals

23. Government asked Mr Justice Underhill, former President of the Employment Appeal Tribunal to assess the effectiveness of the rules that govern employment tribunals in response to the 2011 consultation on Resolving Workplace Disputes. The overriding criticism during this consultation was that further reforms to the system would not be welcomed without an overarching review of the framework principles that underpin the system. In November 2011, Mr Justice Underhill kindly agreed to perform the review.

24. The working group that supported Mr Justice Underhill on the recommendations consisted of the Presidents of the Employment Tribunals in England and Wales, and in Scotland, David Latham and Shona Simon, plus Brian Napier QC and Angharad Harris Chair of the Law Society (England and Wales) Employment Law Committee. In addition, the working group was supported by officials from the Department for Business, Innovation and Skills and the Ministry of Justice and an expert users group (consisting of legal, business and employee representatives such as the CBI and TUC) who helped inform discussions.

25. Mr Justice Underhill made a number of recommendations designed to ensure the employment tribunal system operates in a more effective and efficient manner. His central aim in this work has been to ensure that the new employment tribunal rules should be simpler and easier to understand, particularly for non lawyers. His recommended rules half the length of the current ones and are attached at Annex A. In reassessing the rules framework, Mr Justice Underhill has also worked to ensure that the legislation lends itself to a system that has efficient, effective and proportionate case management as one of its overriding principles.

Question 1:

Are the new rules less complex and easier for non-lawyers to understand? Could the drafting style be further improved?

26. The individual areas in which Mr Justice Underhill has recommended changes to the rules are dealt with in turn.

Introduction of Presidential guidance (rule 7)

27. Concern from some users of the Employment Tribunal system has been around issues of individuals' expectations of what an employment tribunal can achieve and consistency in decision making between different employment tribunals. Some respondents to the Resolving Workplace Disputes consultation felt that parties were sometimes pursuing or responding to a claim with unrealistic expectations, both in terms of what the process would involve, and what the end result of a hearing at tribunal might be. Media reporting of large awards were unhelpful, and masked the reality that of those cases that were won by a claimant, the average award for single claims across all the types of jurisdictions is £5,000. It was felt that parties needed more information on both what to expect if pursuing a case at employment tribunal, and also, what would be expected of them by the process itself.

28. In addition, business stakeholders also raised concerns about the consistency of case management and decision making at different tribunals in their responses to Resolving Workplace Disputes. The CBI, in particular has argued that some of their members perceive there to be differences in the way in which employment judges are dealing with cases. The Government agreed that if there were concerns about consistency, then this was an important issue that needed to be addressed in order to ensure that all parties had confidence that the system provided a level playing field.

29. Mr Justice Underhill suggested that the new rules provide for the respective judicial Presidents of the Employment Tribunals in England & Wales and Scotland to issue Presidential guidance on different procedures in the employment tribunal system, and give good practice examples of what to expect at various stages. The Presidential guidance is intended to provide illustrative guidance to all parties, and employment judges, through the tribunal process.

30. Effective Presidential guidance needs to be flexible and user-friendly. There is no direct equivalent in the wider civil or administrative justice system, although the nearest comparator is the judicial Practice Directions issued by senior judges in other court and tribunal jurisdictions.[2] MoJ will continue to work with the senior employment judiciary and others to consider what, if any formal process should be established to make, ratify and publish Presidential guidance for employment tribunals.

31. The Presidents of the Employment Tribunals in England and Wales and Scotland have provided examples of draft Presidential guidance covering what to expect when seeking the postponement of a hearing and default judgments. This is attached at Annex B and is provided to give an indication of the format which Presidential guidance might take. It does not constitute a final draft.

[2] See, for example, similar provisions in relation to other tribunals (section 23 of the Courts, Tribunals & Enforcement Act 2007) and in relation to the courts (Constitutional Reform Act 2005, section 13 and Schedule 2, Part I; and Civil Procedure Act 1997, section 5). The general rule covering these provisions is that, given resource implications and the need for accountability to Parliament, directions are agreed by the Lord Chancellor in most instances. In tribunals, the agreement of the Senior President of Tribunals may also be required.

Question 2

Do you think that Presidential guidance will provide all parties with clearer expectations about the employment tribunal system and ensure consistency in case management and decision making?

Do you have any comments on the draft example guidance on postponements and default judgments provided at Annex B?

Initial paper sift of cases and strike out powers (rules 22-24 and 34)

32. The new rules recommended by Mr Justice Underhill are designed to ensure that weak cases which should not proceed are identified and dealt with more effectively. Under the current system, tribunal staff can only reject a claim when it is submitted on the wrong form; if they think that it should be rejected for any other reason, they have to pass the matter to an employment judge for a decision. The new rule widens the powers of the tribunal staff slightly, and allows them to reject claims which should not proceed (e.g. because important data is missing), but do not need to be considered by a judge at this point. In addition, it will ensure that employment judges are considering the file earlier in the process, and dismissing any claim or response where there is no arguable complaint or response.

33. Alongside this early sift of cases, Mr Justice Underhill has also recommended a new stand alone rule that allows judges to strike out a case at any point in proceedings when they decide it should not continue. Whilst this power already exists within the current system, the new rule 34 gives the power more prominence, and should lead to increase awareness by all parties and potentially more consistent use by employment judges.

Question 3

Will the recommendations for new rules on the initial paper sift and strike out powers lead to better case management early in the tribunal process?

Combining case management discussions and pre-hearing reviews

34. The current system, can, in certain circumstances, mean that a judge is required to hold separate case management discussions and pre hearing reviews before a claim is considered at a full hearing. Two separate considerations for the management and substantive preliminary issues for the claim mean that both parties incur costs, both for the time taken, and the expense of preparing for each meeting.

35. These procedures will, under the new rules, be combined into a ‘preliminary hearing’, which will consider any case management issues alongside the detail of the case itself. This change is likely to lead to the quicker disposal of cases and provide clear cost savings to all parties. The requirement for the preliminary hearing to be held in private will be similar to that of the current case management discussions, where meetings are held in private, but where the preliminary hearing will determine a preliminary issue or consider a strike out, that hearing must be in public.

36. As part of the review, some stakeholders highlighted concerns that the combining of pre-hearing reviews and case management discussions could increase costs because parties might need to prepare to cover more issues at hearing. Mr Justice Underhill took account of these concerns by ensuring that his proposals included a requirement that, in most circumstances, notice would be given to parties in advance of a preliminary hearing, so it would be clear what would be covered at hearing and what would not.

Question 4

Are there any practical problems with combining pre-hearing reviews and case management discussions into a single preliminary hearing?

Alternative dispute resolution (rule 2)

37. Encouraging parties to resolve their disputes at the earliest possible opportunity remains a commitment for government. Changes being made to ensure that claims will need to be lodged with Acas in the first instance (early conciliation) through the Employment and Regulatory Reform Bill currently before Parliament, will help contribute to this goal. In addition, we seek to encourage parties to look to tackle disputes before they get to the stage where parties are considering taking their complaint to an employment tribunal. Independent mediation at this stage of a dispute can mean that the employment relationship is preserved, productivity is maintained, sick absences are reduced and employees feel engaged in the process. To this aim, we encourage the use of independent mediation services as a low cost way of ensuring the least detrimental effect to working relationships.

38. In recognition of this priority, the new rules contain a specific requirement for judges to further encourage all parties to consider the alternatives to resolving disputes outside of the tribunal system. Whilst Mr Justice Underhill recognises that greater use of alternative dispute mechanisms is largely about creating a cultural shift in attitudes to dispute resolution, a stand alone rule to this effect should help encourage such a shift.

Question 5

Will a stand alone rule help to encourage parties to consider alternative such as independent mediation to resolving their workplace disputes?

Default judgements and withdrawals (rules 17-21 and 37-38)

39. Mr Justice Underhill has changed the drafting of the current rules around setting aside of default judgements to ensure that the regime is much simpler, yet also provides flexibility for judges to deal with cases in the most appropriate way.

40. Under the current rules, when a claimant decides that they no longer wish to pursue a claim against their employer, the case will not be dismissed (subject to any respondent application for costs) until the employer (the respondent) has applied to the Tribunal for the case against them to be dismissed. This is a process which the new rules consider to be unnecessary towards disposing of a case. This new rule provides that in most circumstances, the claim will be considered dismissed without any action being taken by the respondent. There is a clear cost saving to both the respondent and the tribunal

from taking this approach, particularly given that withdrawals made up nearly 30% of all complaints that were disposed of in 2011-12.

41. The Ministry of Justice's final policy proposals for the implementation of fees in employment tribunals and the Employment Appeals Tribunal included a proposal for a fee to be paid by respondents applying to have a claim dismissed following withdrawal or settlement of the claim. The government's response to the fees consultation stated that this particular proposal would be reviewed in the light of Mr Justice Underhill's recommendations.

42. The proposed rule change is likely to lead to a reduction in the number of instances where a respondent applies to the employment tribunal for the claim to be dismissed, because the process is no longer required of them to ensure the case is dismissed. In light of the decision in relation to this proposal, the Government will consider what corresponding changes if any are necessary to the charging system set out in response to the fees consultation.

Question 6

Do you agree that a respondent should not be required to apply to the tribunal to have their case formally dismissed when the claimant has chosen to withdraw? Are there any disadvantages to this approach?

Timetabling of hearings (rule 50)

43. Mr Justice Underhill felt that, in some cases, disproportionately long oral evidence sessions at hearings meant that cases were not conducted in the most effective manner. Cases that run over schedule have a detrimental effect on the efficient listing of cases by employment tribunals, which has cost and resource implications for all parties involved.

44. A new rule 50 has been recommended which would give employment tribunals a clear power to prevent over long and disproportionate oral evidence, questioning of witnesses, and submissions, and this can be enforced by the judge or panel guillotining the session if required. Whilst judges already have the power to limit over long sessions, a specific rule to this effect should help to encourage greater consistency.

Question 7

Should judges, where appropriate, limit oral evidence, questioning of witnesses, and submissions in the interests of better case management?

Privacy (rule 55)

45. The recommendations that Mr Justice Underhill makes on privacy seek to bring the employment tribunal system more into line with the requirements of the Human Rights Act and EU jurisprudence. The current rules have tightly defined criteria for the sort of cases in which there might be a requirement for anonymity and restricted reporting orders, which were largely restricted to cases that involved sexual misconduct or disability discrimination issues. The suggested changes seek to widen this provision, and give judges more discretion and flexibility in deciding whether anonymity or

restricted reporting orders are required. In making these recommendations, Mr Justice Underhill has sought to balance the needs for open justice on one side with the need for privacy and an effective tribunal system on the other.

Question 8

Do you agree with the recommended approach to make the privacy and restricted reporting regime more flexible?

Lead case mechanism (rule 31)

46. Employment tribunals have dealt with 'multiple' actions for many years. But to date, there have not been any rules to set out how they should be dealt with. This limits the powers judges and panels have to manage cases in the most effective way, and could provide uncertainty to users of the system.

47. Mr Justice Underhill has recommended a new rule that will give a clear legal structure to the handling of 'multiple' cases or where several cases raise the same point of law. A large proportion of the cases in the employment tribunal system in any one year are multiple cases brought by a number of individuals against the same employer on the same point of (undecided) law or fact, or cases brought against different employers, which raise the same point of (undecided) law. In practice, most tribunals already deal with a nominated lead or head claim and 'stay' all associated claims. The result of the lead case should then influence the outcome of the other claims without the need for separate hearings.

48. The new rule suggested by Mr Justice Underhill means that where the tribunal identifies a lead claim, the relevant decision in that case will automatically be binding on the related claims, which removes the need for additional hearings. This brings employment tribunal practice into line with other types of tribunals.[3] It should also provide for a clearer process and more effective management of such cases. Some tribunals already deal with multiple cases in this way, but a new rule should formalise this arrangement and ensure it is applied consistently. In line with best practice elsewhere, the proposed rule includes a specific provision which allows parties to ask the tribunal to have binding directions or decisions disapplied in respect of their own individual claim.

49. MoJ will consider also consider what implications, if any, these proposals will have on the current plans for charging for multiple claims. If the Government considers that changes are necessary to the proposal set out in the government response to the fees consultation, MoJ will conduct this work with BIS.

Question 9

Is there a need for a lead case mechanism for dealing with multiple claims? What are the potential impacts of this approach?

[3] See, for example, Rule 18 of the General Regulatory Chamber (First Tier Tribunal) Rules; and Rule 18 of the Tax Chamber (First Tier Tribunal) Rules

Written reasons (rule 58)

50. This review considered the procedures for judges giving written reasons for decisions made at all stages of taking a case through the tribunal process. Reasons can be requested by either party at any stage of the process, be it for a judge's final decision or for smaller issues (e.g. for granting an adjournment to a hearing). In practice, some decisions and reasons are given in writing and others are given to parties orally.

51. Mr Justice Underhill sought to clarify the rules in this area, and ensure that judges were dealing with requests consistently. His recommended rule seeks to clarify that written reasons should be provided on all issues where they are requested. However, the new rule states that judges can take a proportionate approach, and that where appropriate, written reasons can be very short.

52. As part of its fees consultation, MoJ had been considering whether it was appropriate to charge a fee for the provision of written reasons. The Government's response to that consultation concluded that it is not consistent with the principle of access to justice to levy a charge for this service. Written reasons will therefore continue to be provided without the requirement to pay a fee.

Question 10

Do you agree that written reasons should be provided, where requested to parties, but in a manner which is proportionate to the matter concerned?

Costs (rules 69-75)

53. Costs form an important part of the employment tribunal structure. It is important for both sides to have the reassurance that if another party behaves in a way that is considered vexatious, abusive, disruptive or unreasonable in bringing a case to, or in conducting a case before, tribunal, an employment judge has the power to impose a financial sanction on this sort of behaviour. This is designed to provide certainty to all sides that there are checks and balances in the tribunal system to ensure that parties conduct themselves in an appropriate manner.

54. Mr Justice Underhill has made two changes to the costs regime, to ensure that it is better understood and utilised by all parties concerned. The first is to simplify what is currently a complex regime, and ensure it is easier to navigate for all parties. The second is to provide that an Employment Tribunal may do a detailed assessment and award costs in excess of £20,000, removing the need for detailed assessment by a county court (or in Scotland, the Sheriff Court Auditor). The review felt that in some instances, this was an unnecessary process that caused undue delay, and could properly be dealt with by the employment tribunal.

55. Estimations based on the 2010-11 figures available for Employment Tribunals suggest that costs are only awarded in around 0.5% of cases that proceed to full hearing. Anecdotal evidence from the judiciary suggests that there may be more cases than this where a cost award might be warranted by an individual's behaviour at tribunal, but judges are not making orders. Presidential guidance may address this issue further, and could be used to encourage judges to, where appropriate, make greater use of cost awards.

Question 11

Are there any disadvantages to removing the £20,000 cap for awards before they are referred to the county or sheriff court (please provide examples where possible)?

Question 12

Are there other measures that can be taken to ensure greater use of the costs regime?

56. In addition to the proposals put forward by Mr Justice Underhill as part of the rules review, there are a number of other issues that affect the way in which employment tribunals operated that were noted as part of this work. Mr Justice Underhill has not drafted rules for these amendments because they require changes to the primary legislation that govern employment tribunals, the Employment Tribunal Act, 1996. These changes would need to be taken forward initially as amendments to the Employment and Regulatory Reform Bill, which will soon enter its report stage in the House of Commons.

Lay representatives, preparation time orders and witness expenses

57. One of the overarching aims of the employment tribunal system is that the treatment of both claimants and respondents is even handed. The current rules could be interpreted to provide for awards of costs (or in Scotland, expenses), only when a party is legally represented. Those parties who choose, for whatever reason to be represented by a non lawyer (referred to here as a "lay representative"), may not be able to claim costs when the other party has acted unreasonably, even though they may have incurred the charge of a lay representative.

58. In addition, the provisions in the current system mean that when a party does not have representation at an employment tribunal, that party cannot request an order for preparation time (for the time a party has spent preparing to represent themselves) and an order to cover witness expenses. Witness expenses are costs and are included in costs orders. An employment tribunal cannot make an order for preparation time and a costs order in favour of the same party.

59. Mr Justice Underhill's view, which the Government agrees with, is that these potential restrictions on parties who do not engage a legal representative are unfair and contrary to the overarching aim of employment tribunals that parties who are unable or unwilling to engage a lawyer to represent them should still be able to make a claim or response and have the opportunity of representing themselves at a hearing or engaging a lay representative. The absence of legal representation should not put them at any disadvantage during the proceedings, be that during the proceedings themselves, or in respect of orders for costs (including witness expenses).

60. The Employment and Regulatory Reform Bill represents an opportunity to make the required amendments to the Employment Tribunal Act, so that Government is able to address the points above identified by Mr Justice Underhill. The current legislation does

not restrict who can act as a representative at tribunal, but the existing powers in the Act may be interpreted to mean that the rules on costs are currently limited to cases where the party has paid a fee for representation or advice. This would exclude trade union representatives because they are not charging an individual fee for their advice or representation at tribunal, or companies who provide businesses and individuals with a range of HR and management services.

61. The costs that could be claimed for lay representatives would need to be limited, and might best be calculated using an hourly rate for work for representing a party at tribunal which the new rules could cap with an upper limit. We would expect that costs for lay representatives would be lower than that for lawyers, in that the service and advice that parties have received in these cases cannot be equated with the service and advice that would have been received from a solicitor.

Question 13

How should the tribunal calculate awards for costs for lay representatives?

Question 14

Are there any disadvantages to allowing those who choose to represent themselves be able to claim both for preparation time and witness expenses (as part of a claim for costs)?

Deposit orders against part of a claim

62. The employment tribunal rules need to provide for the most effective way of managing weaker cases, whilst still ensuring access to justice. One way this is done currently is that when an employment judge regards a party's contentions as having little reasonable prospect of success, the judge can require a party to submit a deposit to the tribunal if they wish to pursue this case. This is fully refundable if the case is won, and can be paid to the other party if the case is lost. However, in some cases, a claimant's claim may include multiple allegations and a claim form may include a number of different jurisdictions, and whilst some allegations in the claim, or some claims on the form, are weak, others may appear stronger.

63. Under the existing legislation, it is possible to attach a deposit order to an entire claim or response, but an employment judge cannot order a deposit to be paid in respect of a particular allegation within a claim only. Mr Justice Underhill feels that there are sometimes cases in which it would be useful to able to make a deposit order as a condition of pursuing a particular issue and this would allow for better management of such claims, and act as a disincentive for claimants to pursue weak elements of cases.

Question 15

Do you agree that employment judges should be able to require deposit orders on a weak part of a claim or response as a condition of it continuing through the tribunal process?

Forms

64. As part of his review, Mr Justice Underhill undertook to review both the claim (ET1) and response (ET3) forms that are the first stage in any employment tribunal case. He considered whether the information collected on the form was all utilised effectively by the employment tribunal, and reviewed whether the forms are as clear as possible for the parties completing them.

Question 16

Do you have any comments on the ET1 and ET3 forms attached separately (including the provision for multiple claims)?

Role of legal officers

65. The Employment Tribunals Act 1996 includes provisions that would permit any interlocutory (eg. case management) action that an employment judge or tribunal can take to be taken by a legal officer. However, until now, the procedural rules made under that Act have not included reference to legal officers, and so they have not been established as part of the tribunals system. Mr Justice Underhill was asked to consider the issue of legal officers as part of his review. However, he felt that it was a separate issue from the rules which should be considered by government.

66. Consistent with the wider tribunals system, we propose to include specific provision in the rules of procedure to allow legal officers to undertake case management functions in employment tribunals. Any rule would follow the template of the First Tier Tribunal rules, and would (subject to consideration following this consultation) provide that:

- Legal Officers appointed under section 4(6B) of the Employment Tribunals Act may, with the approval of the Senior President of Tribunals, carry out functions of a judicial nature permitted or required to be done by the Tribunal;
- This approval may apply generally to the carrying out of specified functions by a legal officer of a specified description in specified circumstances; and that
- Within 14 days after the date on which the Tribunal sends notice of a decision made by a legal officer, a party may apply in writing to the Tribunal for that decision to be considered afresh by a judge.[4]

67. Government will be consulting more widely on the proposed Rapid Resolution scheme, where legal officers would be deployed to determine certain types of proceedings in a fast track process. This consultation is likely to take place later this year

Question 17

[4] Examples of practice statements on the use of legal officers made by the Senior President of Tribunals in other jurisdictions may be seen at http://www.judiciary.gov.uk/publications-and-reports/practice-directions/tribunals/tribunals-statements

Do you agree that any power to deploy legal officers in employment tribunals in relation to interlocutory functions should be modelled on the wider tribunals' template under the Tribunals Courts & Enforcement Act?

Consistency with EAT

68. Whilst Mr Justice Underhill's review concentrated on the detail contained in the rules for employment tribunals, it is important that any changes made are consistent with the separate rules governing the employment appeal tribunal (EAT)[5]. The principle of consistency with the EAT rules should be applied wherever it makes sense to do so.

Question 18

What changes should be made to the EAT rules to ensure consistency with the new rules of procedure for employment tribunals?

Compliance with Employment Tribunal Orders for awards

69. In the responses government received to Resolving Workplace Disputes consultation, and in the second session debates in the House of Commons for the Employment and Regulatory Reform Bill, the issue of the enforcement of employment tribunal awards has been raised by a number of interested parties. Figures from the Ministry of Justice's 2009 independent study of unpaid employment tribunal awards demonstrated that 39% of interviewees had not been paid in full.[6] Of those 39%, only 36% had attempted to enforce the award through the county court. The interviewees who had not attempted to use county court led enforcement felt that the process was too expensive and time consuming.

70. In response to this, Government introduced the Fast Track Scheme in 2010. It was designed to speed up and simplify the process of enforcing an award by allowing a High Court Enforcement Officer (HCEO) to take things belonging to the employer and sell them to pay the amount owed if required. Figures from the Ministry of Justice for 2011-12 have shown that 1,438 unpaid employment tribunal awards and Acas settlements were passed to HCEOs.[7] Of those 35% were paid in full and another 35% were unenforceable.

71. Employers who meet their legal obligations to their employees and engage with the employment tribunal process should not feel disadvantaged in any way. Equally, individuals claimants who are successful at bringing a case should receive the financial compensation that has been awarded to them. However, employment tribunals differ from courts in that they do not have an enforcement power similar to that of the network of HCEOs.

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[5] Employment Appeal Tribunal Rules 1993 (S.I. 1993/2687)

[6] Research into enforcement of employment tribunal awards in England and Wales (http://www.justice.gov.uk/publications/docs/employment-tribunal-awards.pdf

[7] Hansard source (Citation: HC Deb, 11 June 2012, c349W). Covers England and Wales

72. There are some measures that the government thinks it can take to ensure that the law supports prompt payment. This includes introducing a deadline for the payment of awards, similar to the 14 days that are stipulated in the civil courts for complying with a judgment. Government feels that a specified deadline within the rules will have the effect of both encouraging prompt payment and providing certainty to claimants to know when they should be pursuing enforcement action. The Government proposes that the new rules should require judgments to include such a 14 days deadline for payment.

73. In addition, government believes that there is a case for changing the current provisions on the payment of interest on awards contained in the Employment Tribunals (Interest) Order 1990. The current legislation provides for interest to start accruing 42 days after the judgment is sent to the parties, apart from in equal pay and discrimination cases. We propose that this should be amended, so that interest starts to accrue 14 days from the day after the date on which the judgement was sent to the parties, unless the award is paid in full within this period. Again, this should help to encourage prompt payment of awards and provide certainty to both parties. We propose to address this by amending the Employment Tribunals (Interest) Order 1990.

74. However, whilst these measures are designed to address the prompt payment of awards, they may not address the issue of non payment. If more action is required to ensure that awards can be enforced more effectively, government needs to make sure that it fully understands the nature of the problem before bringing forward further proposals. More evidence is needed to understand why some respondents are not paying. We also need to understand why some of those claimants who are not paid do not pursue the fast track enforcement option. We intend to discuss the issue further with the Ministry of Justice going forward.

Question 19

Do you agree that the introduction of a time limit of 14 days for the payment of awards, (with interest also accruing from this date), will encourage more prompt payments from parties?

Question 20

What, in your view, are the main reasons for non payment of awards? What more can be done within the current employment tribunal system to better enforce these awards?

Question 21

Do you have any other views on Mr Justice Underhill's recommendations?

8. Consultation questions

Question 1: Are the new rules less complex and easier for non-lawyers to understand? Do you think that the drafting style could be further improved and if so how?

Question 2: Do you think Presidential guidance will provide all parties with clearer expectations about the employment tribunal system and ensure consistency in case management and decision making?

Do you have any comments on the draft example guidance on postponements and default judgments provided at Annex B?

Question 3: Will the recommendations for new rules on the initial paper sift and strike out powers lead to better case management early in the tribunal process?

Question 4: Are there any practical problems with combining pre-hearing reviews and case management discussions into a single preliminary hearing?

Question 5: Will a stand alone rule help to encourage parties to consider alternative such as independent mediation to resolving their workplace disputes?

Question 6: Do you agree that a respondent should not be required to apply to the tribunal to have their case formally dismissed when the claimant has chosen to withdraw? Are there any disadvantages to this approach?

Question 7: Should judges, where appropriate, limit oral evidence and questioning of witnesses and submissions in the interests of better case management?

Question 8: Do you agree with the recommended approach to make the privacy and restricted reporting regime more flexible?

Question 9: Is there a need for a lead case mechanism for dealing with multiple claims? What are the potential impacts of this approach?

Question 10: Do you agree that written reasons should be provided, where requested to parties, but in a manner which is proportionate to the matter concerned?

Question 11: Are there any disadvantages to removing the £20,000 cap for awards before they are referred to the county or sheriff court (please provide examples where possible)?

Question 12: Are there other measures that can be taken to ensure greater use of the costs regime?

Question 13: How should the tribunal calculate awards for costs for lay representatives?

Question 14: Are there any disadvantages to allowing those who choose to represent themselves be able to claim both for preparation time and witness expenses (as part of a claim for costs)

Question 15: Do you agree that employment judges should be able to require deposit orders on a weak part of a claim or response as a condition of it continuing through the tribunal process?

Question 16: Do you have any comments on the ET1 and ET3 forms attached separately (including the provision for multiple claims)?

Question 17: Do you agree that any power to deploy legal officers in employment tribunals in relation to interlocutory functions should be modelled on the wider tribunals' template under the Tribunals Courts & Enforcement Act?

Question 18: What changes that should be made to the EAT rules to ensure consistency with the new rules of procedure for employment tribunals?

Question 19: Do you agree that the introduction of a time limit of 14 days for the payment of awards, (with interest also accruing from this date), will encourage more prompt payments from parties?

Question 20: What, in your view, are the main reasons for non payment of awards? What more can be done within the current employment tribunal system to better enforce these awards?

Question 21: Do you have any other views on Mr Justice Underhill's recommendations?

9. What happens next?

75. This consultation exercise will close on 23rd November 2012. The Government will publish all of the responses received, unless specifically notified otherwise (see data protection section above for full details).

76. The Government will, within 3 months of the close of the consultation, publish the consultation response. This response will take the form of decisions made in light of the consultation, a summary of the views expressed and the reasons given for decisions finally taken. This document will be published on the BIS website with paper copies available on request.

Annex A: Employment Tribunal draft rules of procedure

INTRODUCTORY AND GENERAL

1. *Overriding Objective*. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
   (a) ensuring that the parties are on an equal footing;
   (b) dealing with the case in ways which are proportionate to the complexity and importance of the issues;
   (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
   (d) avoiding delay, so far as compatible with proper consideration of the issues; and
   (e) saving expense.

   A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties shall assist the Tribunal to further the overriding objective and shall co-operate generally.

2. *Alternative dispute resolution.* A Tribunal shall wherever practicable and appropriate encourage and facilitate the use by the parties of the services of Acas, judicial or other mediation, or other means of resolving their disputes by agreement.

3. *Interpretation*

   (1) In these Rules—

   "Acas" means the Advisory, Conciliation and Arbitration Service referred to in section 247 of the Trade Union and Labour Relations (Consolidation) Act 1992;

   "claim" means any proceedings before an Employment Tribunal making a complaint or complaints;

   "claimant" means the person or persons bringing the claim;

   "complaint" means anything that is referred to in the relevant legislation as a claim, complaint, reference, application or appeal;

"Convention rights" has the same meaning as in section 1 of the Human Rights Act 1998;

"electronic communication" has the meaning given to it by section 15(1) of the Electronic Communications Act 2000;

"employee's contract claim" means a claim brought by an employee in accordance with articles 3 and 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1990 or articles 3 and 7 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1990;

"employer's contract claim" means a claim brought by an employer in accordance with articles 4 and 8 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1990 or articles 4 and 8 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1990;

"Employment Judge" or "Judge" means an Employment Judge within the meaning of section 3A of the Employment Tribunals Act 1996;

"Employment Tribunal" or "Tribunal" means an employment tribunal established in accordance with regulation #, and in relation to any proceedings means the tribunal responsible for the proceedings in question;

"full tribunal" means a Tribunal constituted in accordance with section 4 (1) of the Employment Tribunals Act 1996;

"Health and Safety Act" means the Health and Safety at Work etc. Act 1974;

"improvement notice" means a notice under section 21 of the Health and Safety Act;

"inspector" means a person appointed under section 19(1) of the Health and Safety Act;

"levy" means a levy imposed under section 11 of the Industrial Training Act 1982;

"levy appeal" means an appeal against an assessment to a levy;

“prescribed form” means any appropriate form prescribed by the Secretary of State in accordance with regulation #;

“present” means deliver (by any means permitted under rule 80) to a tribunal office;

“President” means the President of Employment Tribunals (England and Wales) or President of Employment Tribunals (Scotland), as the case may be, appointed in accordance with regulation #;

“prohibition notice” means a notice under section 22 of the Health and Safety Act;

“Regional Employment Judge” means a person appointed or nominated to that position in accordance with regulation #;

“Register” means the Register of judgments and written reasons kept in accordance with regulation #;

“respondent” means the person or persons against whom a claim is made;

“tribunal office” means any Employment Tribunal office which has been established for any area in either England & Wales or Scotland specified by the President and which carries out administrative functions in support of the Tribunal, and in relation to particular proceedings it is the office notified to the parties as dealing with the proceedings;

“unlawful act notice” means a notice under section 21 of the Equality Act 2006;

“Vice President” means a person appointed or nominated to that position in accordance with regulation #;

“writing” includes writing delivered by means of electronic communication.

(2) Any reference in the Rules to a Tribunal applies to both a full tribunal and to an Employment Judge acting alone (in accordance with section 4 (2) or (6) of the Employment Tribunals Act 1996).

(3) Orders and other decisions of the Tribunal may be variously described, as seems most appropriate to the Employment Judge, but in these Rules the following terms have specific meanings—

"case management direction" means an order or decision of any kind in relation to the conduct of proceedings but does not include the determination of any substantive issue;

"judgment" means any decision which finally determines a claim, or part of a claim, as regards either liability, remedy or costs (including preparation time and wasted costs) or any issue which is capable of finally disposing of any such claim, even if it will not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue), whether made at a preliminary hearing or a final hearing (but not including any decision under rules 12 or 18).

(4) Where these Rules refer to the Tribunal carrying out administrative rather than judicial functions, those functions will be performed by the staff of the relevant tribunal office.

4. *Rules about time*

(1) An act required by these Rules or by any order of a Tribunal to be done on or by a particular day must be done before 5pm on that day.

(2) If the time specified by these Rules, a practice direction or a direction for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day. "Working day" means any day except a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday under section 1 of the Banking and Financial Dealings Act 1971.

(3) Where any act must or may be done within a certain number of days of or from an event, the date of that event shall not be included in the calculation. (For example, a response must be presented within 28 days of the date on which the respondent was sent a

copy of the claim: if the claim was sent on 1st October the last day for presentation of the response is 29th October.)

(4) Where any act must or may be done not less than a certain number of days before or after an event, the date of that event shall not be included in the calculation. (For example, if a party wishes to present representations in writing for consideration by a Tribunal at a hearing, they must be presented not less than 7 days before the hearing: if the hearing is fixed for 8th October, the representations must be submitted no later than 1st October.)

(5) Where the Tribunal imposes a time limit for doing any act, the last date for compliance shall, wherever practicable, be expressed as a calendar date.

(6) Where time is specified by reference to the date when a document is sent to a person by the Tribunal, the date when the document was sent shall, unless the contrary is proved, be regarded as the date endorsed on the document as the date of sending or, if there is no such endorsement, the date shown on the letter accompanying the document.

5. *Extending or shortening time.* The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision, whether or not (in the case of an extension) it has expired.

6. *Irregularities and non-compliance.* A failure to comply with any provision of these Rules or any order of the Tribunal does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include—
   (a) waiving or varying the requirement;
   (b) striking out the claim or the response, in whole or in part, in accordance with rule 34;
   (c) barring or restricting a party's participation in the proceedings; or
   (d) awarding costs in accordance with rules 69 - 75.

7. *Presidential Guidance.* The Presidents may publish guidance for England and Wales and for Scotland respectively as to matters of practice and as to how the powers conferred by these Rules may be exercised in typical situations. Tribunals must have regard to any such guidance, but they will not be bound by it.

STARTING A CLAIM

8. *Presenting the claim*

(1) A claim must be started by presenting a completed claim form (using the prescribed form) to a tribunal office.

(2) A claim may be presented to a tribunal office in England and Wales if—

(a) the respondent, or one of the respondents, resides or carries on business in England and Wales; or

(b) one or more of the acts or omissions complained of took place in England and Wales; or

(c) where neither (a) nor (b) applies, the connection with Great Britain by virtue of which the claimant is entitled to present the claim is at least partly a connection with England and Wales.

(3) A claim may be presented to a tribunal office in Scotland if—

(d) the respondent, or one of the respondents, resides or carries on business in Scotland; or

(e) one or more of the acts or omissions complained of took place in Scotland; or

(f) the connection with Great Britain by virtue of which the claimant is entitled to present the claim is at least partly a connection with Scotland.

9. *Multiple claimants.* Two or more claimants can make their claims on the same claim form if their claims are based on the same set of facts, or if it is otherwise reasonable for their claims to be made on a single form.

10. *Rejection*: *form not used or failure to supply minimum information.* The staff of the tribunal office will reject a claim if—

(a) it is not made on a prescribed form; or

(b) it does not contain all of the following information—

(i) each claimant's name;

(ii) each claimant's address;

(iii) the name of each respondent; and

(iv) each respondent's address.

The form will be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice should also contain information about how to apply for a reconsideration.

11. *Rejection*: *substantive defects.* A claim, or part of it, will also be rejected if an Employment Judge to whom the claim form has been referred by the staff of the tribunal office considers that the claim or part of it—
    (a) is one which the Tribunal has no jurisdiction to consider; or
    (b) is in a form which cannot sensibly be responded to or is otherwise an abuse of the process.

    The form will be returned to the claimant together with a notice of rejection giving the Judge's reasons for deciding that the claim, or part of it, should be rejected and enclosing a fresh claim form. The notice should also contain information about how to apply for a reconsideration.

12. *Reconsideration of rejection.* A claimant whose claim has been rejected (in whole or in part) under rule 10 or rule 11 may apply for a reconsideration on the basis that the decision to reject was wrong. The application must be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. The application must explain why the decision is said to have been wrong and state whether the claimant requests a hearing. If the claimant does not request a hearing, or the Employment Judge decides, on considering the application, that the claim should be accepted in full, the Employment Judge will determine the application without a hearing.

13. *Protected disclosure claims: notification to the regulator.* If the claim alleges that the claimant has made a protected disclosure, the Tribunal may, with the consent of the claimant, send a copy of any accepted claim, or part of it, to a regulator. (A regulator means a person listed in Schedule 1 to the Public Interest Disclosure (Prescribed Persons) Order 1999; and a protected disclosure has the meaning given by section 43A of the Employment Rights Act 1996.)

THE RESPONSE TO THE CLAIM

14. *Sending claim form to respondents.* Unless a claim is rejected, the Tribunal will send a copy of the claim form, together with a prescribed response form, to each respondent with a notice which includes information on—
    (a) whether any part of the claim has been rejected;
    (b) how to submit a response to the claim, the time limit which applies for doing so and what may happen if a response is not received by the Tribunal within that time limit.

15. *Response.* The respondent's response must be on the prescribed form and must be presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal.

16. *Rejection: form not used or failure to supply minimum information.* The staff of the tribunal office will reject a response if—
    (a) it is not made on the prescribed form; or
    (b) it does not contain all of the following information:
        (i) the respondent's full name;
        (ii) the respondent's address; and
        (iii) whether the respondent wishes to resist any part of the claim.

    The form will be returned to the respondent with a notice of rejection explaining why it has been rejected and enclosing a fresh response form. The notice should explain what steps may be taken by the respondent, including the need (if appropriate) to apply for an extension of time, and how to apply for a reconsideration.

17. *Rejection: form presented late.* A response will also be rejected if it is received outside the time limit in rule 15 (or any extension of that limit granted within the original limit) unless it includes or is accompanied by an application for an extension (in which case the response will not be rejected pending the outcome of the application). The response will be returned to the respondent together with a notice of rejection explaining that the response has been presented late. The notice should explain—
    (a) how the respondent can apply for an extension of time;
    (b) how to apply for a reconsideration if the respondent contends that the response was in fact within time.

18. *Reconsideration of rejection.* A respondent whose response has been rejected under rule 16 or rule 17 may apply for a reconsideration on the basis that the decision to reject was wrong. The application must be in writing and presented within 14 days of the date that the notice of rejection was sent. The application must explain why the decision is said to have been wrong and state whether the respondent requests a hearing. If the respondent does not request a hearing, or the Employment Judge decides, on considering the application, that the response should be accepted, the Judge will determine the application without a hearing.

19. *Applications for extension of time for presenting response.* An application for an extension of time for presenting a response must be presented in writing and copied to the claimant. It must set out the reason why the extension is sought and must, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and state whether the respondent requests a hearing. The claimant may within seven days of receipt of the application present a reply to the application and may request a hearing. If none of the parties requests a hearing the Employment Judge may determine the application without a hearing. If the decision is to refuse an extension any prior rejection of the response will stand. If the decision is to allow an extension any judgment issued under rule 20 will be set aside.

20. *Effect of non-presentation or rejection of response/case not contested.* Where on the expiry of the time limit in rule 15 no response has been presented, or any response received has been rejected, and no application for a reconsideration is outstanding or where the respondent has stated that no part of the claim is contested—
    (a) An Employment Judge will decide whether on the available material (which may include further information which the parties are required by the Judge to provide), a determination can properly be made on the claim, or part of it. To the extent that it can the Judge will issue a judgment accordingly. Otherwise, a hearing will be fixed before an Employment Judge alone;
    (b) The respondent will be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, will only be entitled to participate in any hearing to the extent permitted by the Employment Judge.

21. *Notification of acceptance.* Where the Tribunal accepts the response it shall send a copy of it to all other parties.

INITIAL CONSIDERATION OF CLAIM FORM AND RESPONSE

22. *Consideration of the file.* As soon as possible after the acceptance of the response, the file will be considered by an Employment Judge, with a view to confirming that there are arguable complaints and defences within the jurisdiction of the Tribunal; and, if so, to giving case management directions. For that purpose the Judge may require any party to provide further information.

23. *Dismissal of claim (or part)*

(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal will send a notice to the claimant—

(a) setting out the Judge's view and the reasons for it; and

(b) ordering that the claim, or the part in question, will stand dismissed on such date as is specified in the notice unless before that date the claimant has presented a written request for a hearing.

(2) If no request for a hearing is received, the claim will stand dismissed from the date specified without further order (although the Tribunal will write to the parties to confirm what has occurred). If such a request is received within the specified time a hearing will be fixed for the purpose of deciding whether the claim, or part of it, should be permitted to proceed. The respondent may, but need not, attend and participate in the hearing. If any part of the claim is permitted to proceed the Employment Judge will give case management directions.

24. *Dismissal of response*

(1) If the Employment Judge considers that the response to the claim, or part of it, has no reasonable prospect of success the Tribunal will send a notice to the respondent—

(a) setting out the Judge's view and the reasons for it;

(b) ordering that the response, or the relevant part of it, will stand dismissed with effect from the date specified unless before that date the respondent presents a written request for a hearing; and

(c) specifying the consequences of the dismissal of the response, in accordance with (3) below.

(2) If no request for a hearing is received, the response will stand dismissed from the date specified without further order (although the Tribunal will write to confirm what has occurred). If such a request is received within the specified time, a hearing will be fixed for the purpose of deciding whether the response, or any part of it, has a reasonable prospect of success. The claimant may, but need not, attend and participate in the hearing. If any part of the response is permitted to proceed the Employment Judge will give case management directions.

(3) Where a response is dismissed, the consequences will be as if no response had been presented, as set out in rule 20 above.

25. *Case management directions.* Except in a case where notice is given under rule 23 or 24, the Employment Judge conducting the initial consideration will give written case management directions, which may include directions for the listing of a preliminary or final hearing, and/or propose judicial mediation or other forms of dispute resolution.

CASE MANAGEMENT DIRECTIONS AND OTHER POWERS

26. *General rule.* The Tribunal may at any stage of the proceedings, on its own initiative, or on application, give case management directions, including directions varying, suspending or setting aside an earlier direction. The particular powers identified in the following rules do not restrict that general power. If a direction is made without a hearing, or at a hearing at which a party was not present, an affected party can apply, within 14 days of the date that notice of the direction was sent, for it to be varied or revoked.

27. *Disclosure of documents and information.* The Tribunal may order any person to disclose documents or information to a party or to allow a party to inspect such material (by providing copies or otherwise) as might be ordered by a county court (or, in Scotland, by a sheriff).

28. *Requirement to attend to give evidence.* The Tribunal may order any person to attend to give evidence and produce documents at a hearing.

29. *Addition, substitution and removal of parties.* The Tribunal may on its own initiative, or on the application of a party or any other person, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.

30. *Other persons.* The Tribunal may permit any person to participate in proceedings, on such terms as may be specified, in respect of any matter in which that person has a legitimate interest.

31. *Lead cases*

(1) Where two or more claims pending before the Tribunal give rise to common or related issues of fact or law, the Tribunal or the President may give a direction specifying one or more of those claims as a lead case or lead cases and staying (in Scotland, sisting) the other claims ("the related cases").

(2) When the Tribunal makes a decision in respect of the common or related issues it must send a copy of that decision to each party in each of the related cases and, subject to paragraph (3), that decision shall be binding on each of those parties.

(3) Within 28 days after the date on which the Tribunal sent a copy of the decision to a party under paragraph (2), that party may apply in writing for a direction that the decision does not apply to, and is not binding on the parties to, a particular related case.

(4) If the lead case or cases are withdrawn before the Tribunal makes a decision in respect of the common or related issues, it must give directions as to—

(a) whether another claim or other claims are to be specified as a lead case or lead cases; and

(b) whether any direction affecting the related cases should be set aside or varied.

32. *Applications for case management directions.* An application by a party for particular case management directions may be made either at a hearing or by writing to the Tribunal. The

Tribunal may deal with such an application in writing or direct that it be dealt with at a preliminary or final hearing.

33. *Correspondence with the Tribunal: copying to other parties.* The general rule is that whenever any party sends any communication to the Tribunal (except an application under rule 28) it must send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may permit a departure from this rule where it considers it in the interests of justice to do so.

34. *Striking out*

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out (i.e. dismiss) all or part of any claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal (including a deposit order under rule 36);

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing of the claim or response (or the part struck out).

(2) A claim or response may not be struck out unless the party in question has been given the opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the consequences will be as if no response had been presented, as set out in rule 20 above.

35. *Unless orders.* An order may be made in terms that specify that if it is not complied with by the date specified the claim or response, or part of it, will stand dismissed without further order. If a claim or response is dismissed on this basis the Tribunal will give written notice to the parties confirming what has occurred. A party whose claim or response has been dismissed as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a

request for a hearing the Tribunal may determine it on the basis of written representations. Where a response is dismissed under this rule, the consequences will be as if no response had been presented, as set out in rule 20.

36. *Deposit orders*

(1) If at a preliminary hearing the Tribunal considers that any complaint has little reasonable prospect of success, it may make an order requiring that party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that complaint.

(2) The Tribunal must make reasonable enquiries into the paying party's financial means to pay the deposit and must take any such information into account in deciding the amount of the deposit.

(3) The deposit must be paid within 21 days of written notice of the deposit order being sent to the parties. The written notice must contain the reasons for making a deposit order and include a warning about the potential consequences for the paying party.

(4) If the paying party fails to pay the deposit within the relevant time period the complaint to which the deposit order relates will be struck out. Where a response is struck out, the consequences will be as if no response had been presented, as set out in rule 20.

(5) If the Tribunal at any stage following the making of a deposit order decides the complaint against the paying party for substantially the reasons given in the deposit order—

(a) the paying party will be treated as having acted unreasonably in pursuing that complaint for the purpose of rule 70, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if more than one, to such other party as the Tribunal directs); if an award of costs or for preparation time has been made in favour of that party, the amount of the deposit shall count against that liability.

Otherwise the deposit will be refunded.

<u>WITHDRAWAL</u>

37. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, thereupon comes to an end, subject to any

application that the respondent may make for a costs, preparation time or a wasted costs order.

38. Where a claim, or part of it, has been withdrawn under rule 37, the Tribunal will normally issue a judgment formally dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint or complaints) unless (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and (b) the Tribunal is satisfied that there would be a legitimate reason for doing so.

PRELIMINARY HEARINGS

39. *Scope of preliminary hearings.* A preliminary hearing is a hearing at which the Tribunal will do one or more of the following—
    (a) conduct a preliminary consideration of the claim with the parties and make case management directions (including directions relating to the conduct of the final hearing);
    (b) determine any preliminary issue – that is, as regards any complaint, any substantive issue which will not necessarily determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed);
    (c) consider whether a claim or response, or any part, should be struck out under rule 34;
    (d) make a deposit order under rule 36;
    (e) explore the possibility of settlement or alternative dispute resolution (including judicial mediation).

    There may be more than one preliminary hearing in any case.

40. *Fixing of preliminary hearings.* A preliminary hearing may be directed by the Tribunal on its own initiative following its initial consideration or at any time thereafter or as the result of an application by a party. Parties will be given reasonable notice of the date of the hearing and the notice will specify any preliminary issues (as defined in rule 39(b)) that will or may be decided at the hearing.

41. *Constitution of tribunal for preliminary hearings.* Preliminary hearings will be conducted by an Employment Judge alone unless a party has, at least ten days prior to the hearing, presented a written request that the hearing be conducted by a full tribunal and a Judge has determined that it would be desirable for that to be the case.

42. *When preliminary hearings will be in public.* Preliminary hearings shall be conducted in private, except that where the hearing involves issues of the kind identified at rule 39 (b) and (c), any part of the hearing relating to such an issue must be in public (subject to rule 55) and the Tribunal may direct that the entirety of the hearing be in public. A representative of Acas may attend the hearing.

FINAL HEARING

43. *Scope of final hearing.* A final hearing is a hearing at which the Tribunal will determine the claim or such parts as remain outstanding follow the initial consideration or any preliminary hearing. There may be different final hearings for different issues (for example, as between liability and remedy or for costs).

44. *Notice of final hearing.* The parties will be given not less than 14 days' notice of the date of the final hearing.

45. *Composition of Tribunal for final hearing.* Whether the Tribunal at a final hearing will consist of full tribunal or an Employment Judge alone will depend on section 4 of the Employment Tribunals Act 1996 (see Annex 1).

46. *When final hearing will be in public.* Any final hearing shall be in public, subject to rule 55.

RULES COMMON TO ALL KINDS OF HEARING

47. *General.* The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The particular powers identified in the following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. It shall not be bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.

48. *Written representations.* The Tribunal will consider written representations from a party who does not propose to attend the hearing if they are delivered not less than seven days before the hearing (and sent to all the other parties).

49. *Witnesses.* Where a witness is called to give oral evidence, any witness statement of that person shall stand as that witness's evidence in chief unless the Tribunal orders otherwise. Witnesses will be required to give their evidence on oath or affirmation. The Tribunal may exclude from the hearing any person who is to appear as a witness in the proceedings until such time as they give evidence if it considers it in the interests of justice to do so.

50. *Timetabling.* A Tribunal may impose limits on the time that a party may take in presenting evidence, or in questioning witnesses or in the presentation of submissions, and may prevent the party from proceeding beyond any time so allotted.

51. *Hearings by electronic communication.* A hearing may be conducted, in whole or in part, by use of electronic communication (including by telephone) provided that the Tribunal considers that to do so will not prejudice the fairness of the hearing and provided that members of the public present at the hearing are able to hear what the Tribunal hears and see what the Tribunal sees.

52. *Non-attendance.* If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party (as the case may be). Before doing so, however, it shall consider any information which is available to it, or which can be obtained by any enquiries that may be practicable, about the reasons for the party's absence.

53. *Conversion from preliminary hearing to final hearing and vice versa.* A Tribunal conducting a preliminary hearing may direct that it be treated as a final hearing, or vice versa, if the Tribunal is properly constituted for the purpose and if it is satisfied that neither party will be substantially prejudiced by the change.

54. *Majority decisions.* Where a Tribunal is composed of three persons any decision may be made by a majority. If it is composed of two persons only, the Employment Judge has a second or casting vote.

55. *Privacy and restrictions on disclosure*

(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make orders with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act 1996 (set out in Annex 1).

(2) Such orders may include—

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;

(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act 1996 (set out in Annex 1);

(e) an order having similar effect to such a restricted reporting order but made in circumstances other than those identified in those sections and/or extending beyond the date of promulgation of the decision of the Tribunal, either indefinitely or to such date as the Tribunal may specify.

(3) Before making any such order the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(4) Any party, or other person with a legitimate interest, who has not had the opportunity to make representations before an order under this rule is made may apply in writing for it to be revoked or discharged, either on the basis of written representations or, if required, at a hearing.

(5) Where an order is made under paragraph (2) (d) or (e) above—

(a) it must specify the persons whose identity is protected; and may (but need not) specify particular identifying matter whose publication is prohibited as likely to lead to their identification;
(b) it must specify the duration of the order;
(c) the Tribunal must ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place;
(d) the Tribunal may direct that the order applies also to any other proceedings being heard at the same time.

DECISIONS AND REASONS

56. *Decisions made without a hearing.* Decisions made without a hearing will be communicated in writing to the parties, identifying the Employment Judge who has made the decision.

57. *Decisions made at or following a hearing.* Where there is a hearing the Tribunal may either announce its decision in relation to any issue at the hearing or reserve it to be sent to the parties later in writing. If the decision is announced at the hearing, a written record (in the form of a judgment if appropriate) will be provided to the parties (and, where the proceedings were referred to the tribunal by a court, to that court) as soon as possible; but it will be effective as soon as announced. The record will be signed by the Employment Judge. If that is impossible as a result of death, incapacity or absence, the record will be signed by the other member or members (in the case of a full tribunal) or by the Regional Employment Judge, President or Vice President (in the case of a judge sitting alone).

58. *Reasons*

(1) The Tribunal will give reasons for its decision on any disputed issue, whether substantive or procedural, (including any decision on an application for reconsideration or for orders for costs, preparation time or wasted costs).

(2) In the case of a decision given in writing the reasons also will be given in writing. In the case of a decision announced at a hearing the reasons may be given orally at the hearing or

reserved to be given in writing later (which may, but need not, be as part of the written record of the decision provided to the parties). Written reasons will be signed by the Employment Judge (except where that is not possible, in which case the relevant provisions of rule 57 will apply).

(3) Where reasons have been given orally the Employment Judge may announce that written reasons will not be provided unless they are asked for by any party at the hearing itself or by a written request presented by any party within 14 days of the sending of the written record of the decision. The written record of the decision will repeat that information. If no such request is received the Tribunal will only be obliged to provide written reasons if so requested by the Employment Appeal Tribunal or a Court.

(4) The reasons given for any decision other than a judgment should be proportionate to the significance of the issue and in appropriate cases may be very short.

(5) In the case of a judgment the reasons should (though not necessarily in this order): identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons should identify, by means of a table or otherwise, how the amount to be paid has been calculated.

59. *Consent orders and judgments.* If the parties agree in writing upon the terms of any order or judgment a Tribunal may, if it thinks fit, make such order or judgment, in which case it will be identified as having been made by consent.

60. *The Register.* Subject to rule 55, a copy shall be entered in the Register of any judgment and of the written reasons for any judgment issued separately.

61. *Copies of judgment for referring court.* Where the proceedings were referred to the Tribunal by a court a copy of any judgment and written reasons (where issued separately) shall be provided to that court.

62. *Correction of clerical mistakes and accidental slips.* An Employment Judge may at any time correct any clerical mistake or other accidental slip or omission in any direction, judgment or other document produced by a Tribunal. If such a correction is made, any published version of the document will also be corrected. If any document is amended under this rule a copy of the amended version will be sent to all of the parties.

RECONSIDERATION OF DECISIONS

63. *Principles.* A Tribunal can, either on its own initiative or on the application of a party, reconsider any decision where it is in the interests of justice to do so. On reconsideration the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it can be taken again.

64. *Application.* Except where an application for reconsideration is made in the course of a hearing, it must be presented in writing (and copied to all the other parties). The application must be made within 14 days of the date on which the original decision, or the written record of it, was sent to the parties, except that where a request for written reasons has been made in accordance with rule 58 (3) an application may be made within 14 days from when the reasons were sent. The application must set out why the original decision is said to be wrong.

65. *Process*

(1) Stage 1. There will be an initial consideration of the application by an Employment Judge. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, absent special reasons, where substantially the same application has already been made and refused), the application will be refused. Otherwise

the Tribunal will send a notice to the parties (a) setting a time limit for any response to the application by the other parties and (b) seeking the views of all parties on whether the application can be determined without a hearing. The notice may, but need not, set out the Judge's provisional views on the application.

(2) Stage 2. If the application has not been refused at stage 1, the original decision will be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice under (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties will be given an opportunity to make further written representations.

(3) Where practicable, the consideration at stage 1 will be by the Employment Judge who made the original decision or, as the case may be, chaired the Tribunal which made it; and any reconsideration at stage 2 will be made by the Employment Judge or, as the case may be, the full Tribunal which made the original decision. Where that is not practicable the President, Vice President or Regional Employment Judge will appoint another Employment Judge or, in the case of the decision of a full tribunal, will either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

65. *Reconsideration by the Tribunal on its own initiative.* Where the Tribunal proposes to reconsider a decision on its own initiative all parties will be informed of the reasons why the decision is being reconsidered and will be given the opportunity to make written representations or to attend a hearing in accordance with stage 2 of the procedure set out in rule 65.

EMPLOYER'S CONTRACT CLAIMS

66. *Making an employer's contract claim.* An employer's contract claim must be made as part of the response, presented in accordance with rule 16, to a claim which includes an employee's contract claim and within the 28-day time limit there prescribed. An employer's contract claim may be rejected on the same basis as a claimant's claim may be rejected under rule 11, in which case rule 12 will apply.

67. *Notification of employer's contract claim.* When the Tribunal sends the response to the other parties in accordance with rule 21 it will notify the original claimant that the response includes an employer's contract claim, setting out how to submit a response to the claim, the time limit for doing so and what may happen if a response is not received by the Tribunal within that time limit.

68. *Responding to an employer's contract claim.* A claimant's response to an employer's contract claim must be presented to the tribunal office within 28 days of the date that the response was sent to the claimant. If no response is presented within that time limit, rules 19 and 20 will apply.

COSTS ORDERS AND PREPARATION TIME ORDERS

69. *Costs orders and preparation time orders*

(1) A costs order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's costs incurred while legally represented. "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). "Legally represented" means having the assistance of a person (including where that person is the receiving party's employee) who—

(a) has a right of audience in relation to any class of proceedings in any part of the Senior Courts of England and Wales, or all proceedings in county courts or magistrates' courts;
(b) is an advocate or solicitor in Scotland; or
(c) is a member of the Bar of Northern Ireland or a solicitor of the Court of Judicature of Northern Ireland.

In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of that party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case except for time spent at any final hearing.

(3) A costs order and a preparation time order may not be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

70. *When a costs order or a preparation time order may or must be made.*

(1) A Tribunal may make a costs order or a preparation time order, and must consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted, or

(b) any claim made in the proceedings by a party had no reasonable prospect of success.

It may also make such an order where a party has been in breach of any order or practice direction.

(2) A Tribunal must make such an order against a respondent where in proceedings for unfair dismissal a final hearing has been postponed or adjourned and—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than seven days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed, or of comparable or suitable employment.

71. *Procedure.* A party can apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party (being the determination of remedy where it arises) was sent to the parties. No such order shall be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may direct) in response to the application.

72. *The amount of a costs order.* A costs order may either—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party; or

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either (i) by a county court in accordance with the Civil Procedure Rules 1998 or (ii) by an Employment Judge applying the same principles; or, in Scotland by way of taxation according to such part of the table of fees prescribed for proceedings in the sheriff court as shall be directed by the Tribunal and in accordance with any directions given by the Tribunal as to modification or uplift.

If the paying party and the receiving party agree as to the amount payable an order may be made in that amount.

73. *The amount of a preparation time order.* The amount of a preparation time order shall be calculated as follows—

(1) The Tribunal shall assess the number of hours in respect of which payment should be made, on the basis of—

(a) information provided by the receiving party on time spent falling within rule 69 (2) above; and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) An hourly rate shall be applied to that figure. The rate at the date that these Rules are made is £31, but as from each 6 April that rate shall be increased by £1.

(3) The amount payable shall be the product of the number of hours assessed under (1) and the rate in accordance with (2).

74. *Allowances.* Where the Tribunal makes a costs order or preparation time order, it may also make an order that the paying party pay to the Secretary of State, in whole or in part, any allowances (other than allowances paid to members of tribunals) paid by the Secretary of State under section 5 (2) or (3) of the Employment Tribunals Act 1996 to any person for the purposes of, or in connection with, that person's attendance at the Tribunal.

75. *Paying party's ability to pay.* In deciding whether to make a costs order, a preparation time order, or an order under rule 74, and if so in what amount, the Tribunal may have regard to the paying party's ability to pay.

PERSONAL LIABILITY OF REPRESENTATIVE FOR COSTS

76. *When a wasted costs order may be made*

(1) A tribunal may make a wasted costs order against a representative in favour of any party ("the receiving party") where that party has incurred costs (as defined in rule 69 (1))—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or

(b) which, in the light of any such act or omission occurring after they were incurred, the tribunal considers it unreasonable to expect the receiving party to pay.

Costs so incurred are described as "wasted costs".

(2) "Representative" means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to those proceedings. A person acting on a conditional fee arrangement is considered to be acting in pursuit of profit.

(3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is an employee of a party.

77. *Effect of a wasted costs order.* A wasted costs order may—

(a) order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to his client any costs which have already been paid; and

(b) order the representative to pay to the Secretary of State, in whole or in part, any allowances (other than allowances paid to members of tribunals) paid by the Secretary of State under section 5 (2) or (3) of the Employment Tribunals Act to any person for

the purposes of, or in connection with, that person's attendance at the tribunal by reason of any conduct by the representative falling within the terms of rule 76 (1) (a).

The amount to be paid, repaid or disallowed must in each case be specified in the order.

78. *Procedure.* A wasted costs order may be made by the tribunal on its own initiative or on the application of any party. A party can apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party (being the determination of remedy where it arises) was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the tribunal may direct) in response to the application or proposal. The tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.

79. *Representative's ability to pay.* In deciding whether to make a wasted costs order, and if so in what amount, the tribunal may have regard to the representative's ability to pay.

DELIVERY OF DOCUMENTS

80. *Deliver to the Tribunal.*

(1) Documents may be delivered to the Tribunal—
  (a) by being sent by post;
  (b) by direct delivery to the appropriate tribunal office (including delivery by a courier or messenger service); or
  (c) by electronic communication (such as fax or email).

(2) The parties will be notified following the presentation of the claim of the address of the tribunal office dealing with the case (including any fax or email or other electronic address), and all documents must be sent or delivered to either the postal or the electronic address so notified. The Tribunal may from time to time notify the party of any change or address, or direct that a particular form of communication should or should not be used, and any documents must be delivered in accordance with that notification or direction.

81. *Delivery to parties.*

(1) Documents may be delivered to a party (whether by the Tribunal or by another party)—

(a) by being sent by post;

(b) by direct delivery to that party's address (including delivery by a courier or messenger service);

(c) by electronic communication (such as fax or email); or

(d) by being handed personally to that party, if an individual; or to the representative named in the claim form or response; or, on the occasion of a hearing, to any person identified by the party as representing that party at that hearing.

(2) In cases (a)-(c) the document must be sent or delivered to the address given in the claim form or response (which will be the address of the party's representative, if one is named), unless the party in question has subsequently notified the Tribunal and all other parties in writing of a different address.

(3) If a party has given both a postal address and one or more electronic addresses, any of them may be used unless the party has indicated in writing that a particular address should not be used.

82. *Delivery to non-parties.* Subject to the special cases which are the subject of rule 83, documents should be sent to non-parties at any address for service which they may have notified but otherwise at any known address or place of business in the United Kingdom or, if the party is a corporate body, at its registered or principal office in the United Kingdom (or, if permitted by either President, at an address outside the United Kingdom).

83. *Special cases.* Addresses for serving the Secretary of State, the Law Officers of the Crown, and the Counsel General to the Welsh Assembly Government, in cases where they are not parties, will be issued by Practice Direction from time to time.

84. *Substituted service.* In any case where no address for service in accordance with the above rules is known, or it appears that service at any such address is unlikely to come to the attention of the addressee, an Employment Judge may order that there shall be substituted service in such manner as appears appropriate.

85. *Date of delivery.* Where a document has been presented or sent or delivered in

accordance with rules 80 or 81, it shall, unless the contrary is proved, be taken to have been received by the addressee—

(a) if sent by post, on the day on which it would be delivered in the ordinary course of post;

(b) if sent by means of electronic communication, on the day of transmission;

(c) if delivered in person, on the day of delivery.

86. *Irregular service.* A Tribunal may treat any document as regularly delivered to a person, notwithstanding any non-compliance with the above rules, if satisfied that the document in question, or its substance, has in fact come to the attention of that person.

MISCELLANEOUS

87. *National security proceedings*
[TO FOLLOW]

88. *Interim relief proceedings.* When a Tribunal hears an application for interim relief (or for its variation or revocation) under section 161 or section 165 of Trade Union and Labour Relations (Consolidation) Act 1992 or under section 128 or section 131 of the Employment Rights Act 1996 it will not hear oral evidence unless it directs otherwise.

89. *Proceedings involving the National Insurance Fund.* The Secretary of State shall be entitled to appear and be heard at any hearing in relation to proceedings which may involve a payment out of the National Insurance Fund and shall be treated as a party for the purposes of these Rules.

90. *Collective agreements.* Where a claim includes a complaint under section 146 (1) of the Equality Act 2010 so far as relating to sex, gender reassignment, marriage and civil partnership or pregnancy and maternity relating to a term of a collective agreement, the following persons, whether or not identified in the claim, shall be regarded as the persons against whom a remedy is claimed and shall be treated as respondents for the purposes of these Rules—

(a) the claimant's employer (or prospective employer); and

(b) every organisation of employers and organisation of workers, and every association of or representative of such organisations, which, if the terms were to be varied voluntarily, would be likely, in the opinion of an Employment Judge, to negotiate the variation;

provided that such an organisation or association shall not be treated as a respondent if the Judge, having made such enquiries of the claimant and such other enquiries as he or she thinks fit, is of the opinion that it is not reasonably practicable to identify the organisation or association.

91. *Devolution issues*

(1) In any proceedings in which a devolution issue within the definition of the term in paragraph 1 of Schedule 6 to the Scotland Act 1998 arises, notice shall as soon as reasonably practicable be given by the Tribunal to the Advocate General for Scotland and the Lord Advocate (unless they are a party to the proceedings), with a copy of the claim and the response and shall at the same time send a copy of the notice to the parties.

(2) In any proceedings in which a devolution issue within the definition of the term in paragraph 1 of Schedule 9 to the Government of Wales Act 2006 arises, notice shall as soon as reasonably practicable be given by the Tribunal to the Attorney General and the Counsel General to the Welsh Assembly Government (unless they are a party to the proceedings), with a copy of the claim and the response and shall at the same time send a copy of the notice to the parties.

(3) A person to whom notice is given in pursuance of paragraph (1) or (2) may within 14 days of receiving it, by notice to the tribunal, take part as a party in the proceedings, so far as they relate to the devolution issue. The Tribunal shall send a copy of the notice to the other parties.

92. *Transfer of proceedings between Scotland and England & Wales*

(1) The President (England and Wales) or a Regional Employment Judge may at any time, on their own initiative or on the application of a party, with the consent of the President (Scotland) or the Vice-President, transfer to a tribunal office in Scotland any proceedings started in England and Wales which could (in accordance with rule 8 (3))

have been started in Scotland and which in their opinion would more conveniently be determined there.

(2) The President (Scotland) or the Vice-President may at any time, on their own initiative or on the application of a party, with the consent of the President (England and Wales), transfer to an tribunal office in England or Wales any proceedings started in Scotland which could (in accordance with rule 8 (2)) have been started in England or Wales and in their opinion would more conveniently be determined there.

93. *References to the European Court of Justice.* Where a Tribunal decides to refer a question to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union, a copy of that decision must be sent to the Registrar of that Court.

94. *Transfer of proceedings from a court.* Where proceedings are referred to a Tribunal by a court, these Rules shall apply to them as if the proceedings had been presented by the claimant.

95. *Vexatious litigants.* The Tribunal may provide any information or documents requested by the Attorney General, the Solicitor General or the Lord Advocate for the purpose of preparing an application or considering whether to make an application under section 42 of the Supreme Court Act 1981, section 1 of the Vexatious Actions (Scotland) Act 1898 or section 33 of the Employment Tribunals Act 1996.

96. *Information to Equality and Human Rights Commission.* The Tribunal shall send to the Equality and Human Rights Commission copies of all judgments and written reasons relating to complaints under section 120, 127 or 146 of the Equality Act 2010. That obligation shall not apply in any proceedings where a Minister of the Crown has given a direction, or a Tribunal has made an order, under rule 87 in those proceedings; and either the Security Service, the Secret Intelligence Service or the Government Communications Headquarters is a party to the proceedings.

97. *Application of this Schedule to levy appeals.* For the purposes of a levy appeal, this Schedule shall be treated as modified in the following ways—

(a) References in this Schedule to a claim or claimant shall be read as references to a levy appeal or to an appellant in a levy appeal respectively and as the content may require.

(b) The following rules shall not apply in relation to levy appeals; 20, 36, 63.

98. *Application of this Schedule to appeals against improvement and prohibition notices under the Health and Safety Act*

(1) A notice of appeal must be presented to a tribunal office—

(a) within 21 days from the date of the service on the appellant of the notice which is the subject of the appeal, or

(b) within such further period as the Tribunal considers reasonable where it is satisfied that it was not reasonably practicable for an appeal to be presented within that time.

(2) For the purposes of an appeal against an improvement notice or a prohibition notice, this Schedule shall be treated as modified in the following ways—

(a) References to a claim or claimant shall be read as references to an appeal or to an appellant in an appeal respectively and as the content may require.

(b) References to a respondent shall be read as references to the inspector who issued the notice which is the subject of the appeal.

(c) A notice of appeal must include the date of the improvement notice or prohibition notice which is the subject of the appeal, the address of the premises or the place concerned and details of the requirements or directions which are being appealed.

(d) The following rules shall not apply in relation to appeals against an improvement notice or a prohibition notice; 20, 36.

99. *Application of this Schedule to appeals against unlawful act notices*. For the purposes of an appeal against an unlawful act notice, this schedule shall be treated as modified in the following ways:

(a) References in this Schedule to a claim or claimant shall be read as references to a levy appeal or to an appellant in a levy appeal respectively and as the content may require.

(b) References to a respondent shall be read as references to the Commission for Equality and Human Rights established under section 1 of the Equality Act 2006.

(c) A notice of appeal must include the date of the unlawful act notice which is the subject of the appeal and details of the requirements which are being appealed.

(d) The following rules shall not apply in relation to appeals against an unlawful act notice; 20, 36.

Annex 1

Selected provisions of the Employment Tribunals Act 1996

4.— Composition of a tribunal.

(1) Subject to the following provisions of this section and to section 7(3A), proceedings before an employment tribunal shall be heard by—
(a) the person who in accordance with regulations made under section 1(1), is the chairman, and
(b) two other members, or (with the consent of the parties) one other member, selected as the other members (or member) in accordance with regulations so made.

(2) Subject to subsection (5), the proceedings specified in subsection (3) shall be heard by the person mentioned in subsection (1)(a) alone or alone by any Employment Judge who, in accordance with regulations made under section 1(1), is a member of the tribunal.

(3) The proceedings referred to in subsection (2) are—
(a) proceedings on a complaint under section 68A, 87 or 192 of the Trade Union and Labour Relations (Consolidation) Act 1992 or on an application under section 161, 165 or 166 of that Act.

(b) proceedings on a complaint under section 126 of the Pension Schemes Act 1993.

(c) proceedings on a reference under section 11, 163 or 170 of the Employment Rights Act 1996, on a complaint under section 23, 34, 111 or 188 of that Act, on a complaint under section 70(1) of that Act relating to section 64 of that Act, on an application under section 128, 131 or 132 of that Act or for an appointment under section 206(4) of that Act,

(ca) proceedings on a complaint under regulation 15(10) of the Transfer of Undertakings (Protection of Employment) Regulations 2006,

(cc) proceedings on a complaint under section 11 of the National Minimum Wage Act 1998;

(cd) proceedings on an appeal under section 19C of the National Minimum Wage Act 1998;

(ce) proceedings on a complaint under regulation 30 of the Working Time Regulations 1998 relating to an amount due under regulation 14(2) or 16(1) of those Regulations,

(cf) proceedings on a complaint under regulation 18 of the Merchant Shipping (Working Time: Inland Waterways) Regulations 2003 relating to an amount due under regulation 11 of those Regulations,

(cg) proceedings on a complaint under regulation 18 of the Civil Aviation (Working Time) Regulations 2004 relating to an amount due under regulation 4 of those Regulations,

(ch) proceedings on a complaint under regulation 19 of the Fishing Vessels (Working Time: Sea-fishermen) Regulations 2004 relating to an amount due under regulation 11 of those Regulations,

(d) proceedings in respect of which an employment tribunal has jurisdiction by virtue of section 3 of this Act,

(e) proceedings in which the parties have given their written consent to the proceedings being heard in accordance with subsection (2) (whether or not they have subsequently withdrawn it), and

(g) proceedings in which the person (or, where more than one, each of the persons) against whom the proceedings are brought does not, or has ceased to, contest the case.

(4) The Secretary of State and the Lord Chancellor, acting jointly, may by order amend the provisions of subsection (3).

(5) Proceedings specified in subsection (3) shall be heard in accordance with subsection (1) if a person who, in accordance with regulations made under section 1(1) , may be the chairman of an employment tribunal, having regard to—

(a) whether there is a likelihood of a dispute arising on the facts which makes it desirable for the proceedings to be heard in accordance with subsection (1),

(b) whether there is a likelihood of an issue of law arising which would make it desirable for the proceedings to be heard in accordance with subsection (2),

(c) any views of any of the parties as to whether or not the proceedings ought to be heard in accordance with either of those subsections, and

(d) whether there are other proceedings which might be heard concurrently but which are not proceedings specified in subsection (3),

decides at any stage of the proceedings that the proceedings are to be heard in accordance with subsection (1),

(6) Where (in accordance with the following provisions of this Part) the Secretary of State makes employment tribunal procedure regulations, the regulations may provide that any act which is required or authorised by the regulations to be done by an employment tribunal and is of a description specified by the regulations for the purposes of this subsection may be done by the person mentioned in subsection (1)(a) alone or alone by any Employment Judge who, in accordance with regulations made under section 1(1), is a member of the tribunal.

(6A) Subsection (6) in particular enables employment tribunal procedure regulations to provide that—

(a) the determination of proceedings in accordance with regulations under section 7(3A), (3B) or (3C)(a),

(b) the carrying-out of pre-hearing reviews in accordance with regulations under

subsection (1) of section 9 (including the exercise of powers in connection with such reviews in accordance with regulations under paragraph (b) of that subsection), or

(c) the hearing and determination of a preliminary issue in accordance with regulations under section 9(4) (where it involves hearing witnesses other than the parties or their representatives as well as where, in accordance with regulations under section 7(3C)(b), it does not),

may be done by the person mentioned in subsection (1)(a) alone or alone by any Employment Judge who, in accordance with regulations made under section 1(1), is a member of the tribunal.

(6B) Employment tribunal procedure regulations may (subject to subsection (6C) also provide that any act which—

(a) by virtue of subsection (6) may be done by the person mentioned in subsection (1)(a) alone or alone by any Employment Judge who, in accordance with regulations made under section 1(1), is a member of the tribunal , and

(b) is of a description specified by the regulations for the purposes of this subsection,

may be done by a person appointed as a legal officer in accordance with regulations under section 1(1); and any act so done shall be treated as done by an employment tribunal.

(6C) But regulations under subsection (6B) may not specify—

(a) the determination of any proceedings, other than proceedings in which the parties have agreed the terms of the determination or in which the person bringing the proceedings has given notice of the withdrawal of the case, or

(b) the carrying-out of pre-hearing reviews in accordance with regulations under section 9(1).

10A.— Confidential information.

(1) Employment tribunal procedure regulations may enable an employment tribunal to sit in private for the purpose of hearing evidence from any person which in the opinion of the tribunal is likely to consist of—

(a) information which he could not disclose without contravening a prohibition imposed by or by virtue of any enactment,

(b) information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person, or

(c) information the disclosure of which would, for reasons other than its effect on negotiations with respect to any of the matters mentioned in section 178(2) of the Trade Union and Labour Relations (Consolidation) Act 1992, cause substantial injury

to any undertaking of his or in which he works.

(2) The reference in subsection (1)(c) to any undertaking of a person or in which he works shall be construed—

(a) in relation to a person in Crown employment, as a reference to the national interest,

(b) in relation to a person who is a relevant member of the House of Lords staff, as a reference to the national interest or (if the case so requires) the interests of the House of Lords, and

(c) in relation to a person who is a relevant member of the House of Commons staff, as a reference to the national interest or (if the case so requires) the interests of the House of Commons.

11.— Restriction of publicity in cases involving sexual misconduct.

(1) Employment tribunal procedure regulations may include provision—

(a) for cases involving allegations of the commission of sexual offences, for securing that the registration or other making available of documents or decisions shall be so effected as to prevent the identification of any person affected by or making the allegation, and

(b) for cases involving allegations of sexual misconduct, enabling an employment tribunal , on the application of any party to proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal.

(2) If any identifying matter is published or included in a relevant programme in contravention of a restricted reporting order—

(a) in the case of publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical,

(b) in the case of publication in any other form, the person publishing the matter, and

(c) in the case of matter included in a relevant programme—

(i) any body corporate engaged in providing the service in which the programme is included, and

(ii) any person having functions in relation to the programme corresponding to those of an editor of a newspaper,

shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(3) Where a person is charged with an offence under subsection (2) it is a defence to prove that at the time of the alleged offence he was not aware, and neither suspected nor had reason to suspect, that the publication or programme in question was of or

included the matter in question.

(4) Where an offence under subsection (2) committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—
(a) a director, manager, secretary or other similar officer of the body corporate, or

(b) a person purporting to act in any such capacity,

he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

(5) In relation to a body corporate whose affairs are managed by its members "director", in subsection (4), means a member of the body corporate.

(6) In this section—

"identifying matter", in relation to a person, means any matter likely to lead members of the public to identify him as a person affected by, or as the person making, the allegation,

"relevant programme" has the same meaning as in the Sexual Offences (Amendment) Act 1992,

"restricted reporting order" means an order—
(a) made in exercise of a power conferred by regulations made by virtue of this section, and
(b) prohibiting the publication in Great Britain of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain,

"sexual misconduct" means the commission of a sexual offence, sexual harassment or other adverse conduct (of whatever nature) related to sex, and conduct is related to sex whether the relationship with sex lies in the character of the conduct or in its having reference to the sex or sexual orientation of the person at whom the conduct is directed,

"sexual offence" means any offence to which section 4 of the Sexual Offences (Amendment) Act 1976, the Sexual Offences (Amendment) Act 1992 or section 274(2) of the Criminal Procedure (Scotland) Act 1995 applies (offences under the Sexual Offences Act 1956, Part I of the Criminal Law (Consolidation) (Scotland) Act 1995 and certain other enactments), and

"written publication" has the same meaning as in the Sexual Offences (Amendment) Act 1992.

12.— Restriction of publicity in disability cases.

(1) This section applies to proceedings on a complaint under section 120 of the Equality

Act 2010, where the complaint relates to disability in which evidence of a personal nature is likely to be heard by the employment tribunal hearing the complaint.

(2) Employment tribunal procedure regulations may include provision in relation to proceedings to which this section applies for—

(a) enabling an employment tribunal , on the application of the complainant or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal, and

(b) where a restricted reporting order is made in relation to a complaint which is being dealt with by the tribunal together with any other proceedings, enabling the tribunal to direct that the order is to apply also in relation to those other proceedings or such part of them as the tribunal may direct.

(3) If any identifying matter is published or included in a relevant programme in contravention of a restricted reporting order—

(a) in the case of publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical,

(b) in the case of publication in any other form, the person publishing the matter, and

(c) in the case of matter included in a relevant programme—

(i) any body corporate engaged in providing the service in which the programme is included, and

(ii) any person having functions in relation to the programme corresponding to those of an editor of a newspaper,

shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Where a person is charged with an offence under subsection (3), it is a defence to prove that at the time of the alleged offence he was not aware, and neither suspected nor had reason to suspect, that the publication or programme in question was of, or included, the matter in question.

(5) Where an offence under subsection (3) committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—

(a) a director, manager, secretary or other similar officer of the body corporate, or

(b) a person purporting to act in any such capacity,

he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

(6) In relation to a body corporate whose affairs are managed by its members “director”, in subsection (5) means a member of the body corporate.

(7) In this section—

“evidence of a personal nature” means any evidence of a medical, or other intimate,

nature which might reasonably be assumed to be likely to cause significant embarrassment to the complainant if reported.

“identifying matter” means any matter likely to lead members of the public to identify the complainant or such other persons (if any) as may be named in the order.

“promulgation” has such meaning as may be prescribed by regulations made by virtue of this section.

“relevant programme” means a programme included in a programme service, within the meaning of the Broadcasting Act 1990,

“restricted reporting order” means an order—
(a) made in exercise of a power conferred by regulations made by virtue of this section, and
(b) prohibiting the publication in Great Britain of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great Britain, and

“written publication” includes a film, a sound track and any other record in permanent form but does not include an indictment or other document prepared for use in particular legal proceedings.

Annex B: Example draft Presidential Guidance

Draft Presidential Guidance on seeking the postponement of a hearing

This Guidance is issued in accordance with the [Rule 7 of the Employment Tribunals Rules of Procedure 2013]. An Employment Judge or Tribunal will be expected to have regard to such Guidance but is not bound by it.

Power to grant a postponement

Rule [27] of the Employment Tribunal Rules of Procedure allows an Employment Judge to give case management directions. That includes the power to order that a hearing should be postponed.

Purpose of Guidance and the relevance of the overriding objective

The purpose of this Guidance is to provide parties with information about the practice of Employment Tribunals in connection with requests for postponement of a hearing and what Employment Judges will normally expect of parties who make such an application. Parties can proceed on the basis that the information set out below is sought because it will normally be relevant and taken into account in the decision making process although a range of other factors, which will vary depending on the circumstances of the case, are also likely to be relevant.

The **overriding objective** of the tribunal is to deal with cases fairly and justly. If you wish a hearing to be postponed for any reason the Employment Judge who considers the request will have to be satisfied that it is in accordance with the overriding objective to order that the hearing be postponed.

How a request should be made and the information it should contain

Any request for a postponement should be made in writing to the Employment Tribunal Office dealing with the case and should state:

(i) the reason why it is made; and
(ii) why it is considered that it would be in accordance with the overriding objective to grant the postponement

In what follows any reference to the "other party" is to be taken as referring to all other parties, where there is more than one other party in the case.

If possible supporting documents (see below for examples) should be provided at the time the request is made. The request (with supporting documents) should also be copied to the other party (or representative if there is one) and should state that this has been done. If the request has not been copied to the other party, **it will not be considered, except in exceptional circumstances**. If a request is made which has not been copied to the other party then an explanation should be provided as to why that has not happened.

If the party seeking the postponement is legally represented then, unless it is not possible to do so, the request should be discussed with the other party/representative before it is made with a view to finding out:

- Whether the other party objects to the hearing being postponed;
- The earliest date(s) possible at which the hearing could proceed if the postponement was granted.

If this information is provided at the time the request is made it will mean that the request can be dealt with more quickly by the Employment Judge than might otherwise be the case.

Specific situations which may arise

The following Guidance deals with common situations that arise where a party may seek a postponement. It is not an exhaustive list.

Ill health

If the request is made because of the ill health of a party or a witness, the request should be accompanied by medical evidence (normally a medical certificate and a letter/document from the treating G.P. or hospital doctor) that confirms:

- The nature of the health condition concerned and
- **Importantly, that the doctor considers in his or her professional opinion that s/he is unfit to attend the hearing and the basis of this conclusion**. This is important as the fact that a person has a medical condition does not necessarily mean s/he cannot attend a hearing.

If possible, the medical evidence should also indicate **when it is expected that the person *will* be fit to attend**.

An Employment Judge must be satisfied on the evidence that it is just to grant a postponement: s/he may ask for additional evidence in a particular case. Parties may wish to note that a medical certificate to the effect that a person is not fit to attend a hearing is not conclusive evidence of that fact.

The request for a postponement should be made as soon as it becomes apparent that the person will be unfit to attend. If the illness develops suddenly and so close to the start of the hearing that it is not possible to obtain the medical evidence before requesting a postponement, the request should be made at once with an undertaking to provide the necessary medical information within 7 days.

If the person who has become ill is a witness (rather than a party) the request should explain why the evidence of this witness is relevant and important in the context of the issues which will require to be decided by the Employment Tribunal.

A party or witness is not available

The request should be made as soon as it becomes clear that there is a difficulty and should:

- state why the person is not available;
- state when the difficulty first came to light;
- state, in the case of a witness, why his/her evidence is considered to be relevant and important to the case;
- if the hearing is scheduled to last for more than one day, state whether a change in the normal order in which evidence is heard might deal with the problem and

- include any supporting evidence available. For example, if a person is not available because s/he will be on holiday or abroad for some other reason then written confirmation of the travel booking should be provided. If the person is not available because s/he is required to attend a hospital appointment then written evidence of that appointment should be provided.

It should be noted that one of the factors which an Employment Judge will take into account is whether parties were consulted about the dates of the hearing in advance of it being fixed and, if so, whether the alternative commitment (e.g. the holiday) was known about at the time the date consultation took place or was booked after parties were informed of the date of the hearing. Generally parties are expected to give a tribunal hearing priority over most other matters.

A representative is not available

The request should be made as soon as possible and should:

- state when the difficulty first came to light;
- explain why it is considered that any alternative commitment should take precedence over the Employment Tribunal hearing;
- if there was consultation on the date to be fixed for any alternative commitment, when that took place relative to parties being informed of the date of the Employment Tribunal hearing and
- if there is more than one qualified representative in the firm, explain why it is not possible for someone else in the firm to appear at the hearing.

It should be noted that one of the factors which an Employment Judge will take into account is whether parties were consulted about the dates of the hearing in advance of it being fixed and, if so, whether any alternative commitment was known about at that time.

While the tribunal will normally seek to accommodate the availability of a representative within reason, there may come a point where the overriding objective requires that the hearing go ahead even if this means that the party has to find another representative.

A representative has withdrawn

If a representative has withdrawn from acting, the request should state:

- when that happened and
- whether the party affected intends to seek alternative representation and, if so, what steps have been taken to obtain such representation and when it is anticipated that a new representative will be appointed.

Outstanding appeals to the EAT

If a party seeks a postponement of a hearing because there is an outstanding appeal from an earlier decision, the party seeking the postponement should give the date the appeal is to be heard, if known, and also say why it is considered that the hearing cannot take place until the appeal is heard.

Related criminal proceedings

If there is a risk that evidence will be heard in the Employment Tribunal that overlaps with related criminal proceedings, the tribunal case will be delayed until the criminal proceedings have been concluded to avoid prejudice to the person involved in the criminal proceedings. This may be a party or another witness.

An application to postpone a hearing for this reason should include:

- the nature of the criminal proceedings and the connection between those proceedings and the issues which will be considered by the Employment Tribunal;
- the date of any hearing fixed in the criminal proceedings;
- the name and address of the police officer or procurator fiscal dealing with the case and
- a crime reference number if available.

Related civil court proceedings

An application to postpone a hearing on the basis that there are related civil proceedings ongoing should include:

- the nature of the proceedings which are said to be related to the Employment Tribunal proceedings and the basis upon which it is said that the proceedings are related;
- when the court proceedings were commenced and when they are expected to be concluded and
- an explanation as to why it is said that the court proceedings should be progressed ahead of the Employment Tribunal proceedings.

Late disclosure of documents or information

If this is the reason for seeking a postponement, the request should set out:

- the nature of the evidence that has been disclosed;
- when it was disclosed and
- why it is said that the hearing cannot proceed as a result.

If the evidence has been disclosed as a result of a request from the party seeking the postponement then the date when the information was first sought should also be stated.

Failure to disclose documents or information

If this is the reason for seeking a postponement, the request should set out:

- what documents or other information have been sought but not provided;
- when the request for the documents or other information was first made and the dates of any subsequent requests;
- the relevance of the documents or information sought to the issues before the tribunal and
- the dates of any tribunal orders which are believed to have been breached by the failure to disclose

What the Employment Judge will do

Compliance with this Guidance does not guarantee that a request for a postponement will be granted. The information referred to above will be taken into account by an Employment Judge when making a decision about whether to grant or refuse the postponement but the decision remains a matter of discretion for the judge concerned. S/he will take account of all relevant circumstances in the individual case (including the timing of the request) and may ask for more information than is set out above.

The President has no statutory power to overturn or interfere with the decision of an Employment Judge.

Draft Presidential Guidance – Default Judgments

This Guidance is issued on the _____ day of _____ 2013 under the provisions of [Rule ___] of _____ ["The Rules"].

Note:

Whilst the Tribunals in England and Wales must have regard to such Guidance they will not be bound by it.

Background:

1. Rule [20] provides that where the time limit provided for under Rule [15] has expired and there has been no response presented, or any response received has been rejected, and no application for a reconsideration is outstanding or where the Respondent has stated that no part of the claim is contested then an Employment Judge will consider whether a determination can properly be made (a default judgment) and make detailed provisions to that effect.

2. In applying the provisions of that Rule the procedure that will normally apply is as set out below.

Action by Parties:

1. Unless there are exceptional circumstances no action is required nor provided for by the Rules.

2. If there are exceptional circumstances then the party who believes such to exist must notify the Tribunal in writing immediately.

3. It is of benefit for all concerned for documentation to be sent to the Tribunal that will be considered by the Employment Judge, and in particular the claim form and any response form submitted, to provide sufficient detail for appropriate consideration to be made by an Employment Judge in accordance with this Rule.

Action by the Employment Judge:

1. The Employment Judge will review all the material that is then available. This will normally consist of the claim form and any response form that has been validly submitted and any other supplementary documents.

2. They will consider whether the matter requires more information. If so, they will cause a letter to be written to the party/ies specifying the further information that is required.

3. If no such information is required, or once it has been received then the Employment Judge will consider whether it is appropriate to:-

    a. issue a Judgment in full for all claims and remedy; or

    b. issue a Judgment in full for all liability issues and hold a hearing for remedy or request further details of remedy matters; or

    c. issue a Judgment in part for one or more of the items claimed, together with any remedy issues arising; or

    d. issue a Judgment in part for one or more of the items claimed but no remedy issues and hold a hearing for remedy or request further details of remedy matters; and

    e. consider any of the combinations of Judgment for liability matters or remedy matters which they consider appropriate on the facts available to them at the time of consideration; and

    f. hold a hearing for any part of the claim that has not had a judgment issued or any remedy matters remaining outstanding as a result of such judgment having been issued and make appropriate case management orders; and

    g. if such a hearing is to be held then the Respondent will be entitled to receive notice of any hearings and decisions but entitlement to participate in the hearing will be limited as provided for by Rule [20(b)]; and

    h. the hearing that will be held ordinarily will be a hearing as provided for under Rule [43].

4. If a judgment is issued it will be copied to all parties as soon as possible thereafter and notice sent of any hearing if an Employment Judge has considered it appropriate for such a hearing to take place.

5. Judgment will be issued as provided for under paragraph 3 above where an Employment Judge is satisfied that they have sufficient information properly so to do. For example, the Employment Judge will examine whether the claim is clearly stated and whether the Tribunal has jurisdiction to hear the claim. The Employment Judge will consider all the detail contained in the written matters before them; consider any obligation or burden on either of the parties in relation to proving such matters; the calculations that have been provided (if any) by the claimant; any case management orders that have previously been made; and any response. If the Employment Judge has any reasonable doubt as to the whole or any part of such matters contained in the claim then the claim will be heard. The provisions of Rule [56] will apply.

6. Any party who wishes to ask for reconsideration of such decisions must make such application in accordance with the provision of Rules [XX – XX].

7. Any party who considers lodging an appeal against such a judgment must comply with the Rules of the Employment Appeal Tribunal.

Annex C: The Consultation Code of Practice Criteria

The Civil Service Reform Plan commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.

For details of the revised principles of engagement, please see
http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf

The policy issues addressed in this consultation document have been the subject of ongoing discussion with an Expert User Group of stakeholders who supported the Underhill review. The review's recommendations were also made publicly available on 11th July 2012. For these reasons, we consider that a ten-week consultation period is appropriate.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

John Conway,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone John Conway on 020 7215 6402
or e-mail to: john.conway@bis.gsi.gov.uk

Annex D: List of Individuals/Organisations Consulted

Keith Ashcroft (EHRC - Equality and Human Rights Commission)

Damian Brown (ELBA - Employment Law Bar Association)

Neil Carberry (CBI - Confederation of British Industry)

Nick Carey (ACEVO – Association of Chief executives of Voluntary Organisations)

Richard Dunstan (Citizens Advice Bureau)

Helen Giles (ACEVO – Association of Chief executives of Voluntary Organisations)

Angharad Harris (Chair of the Law Society Employment Law Committee Law Society)

Tony McGrade McGrade & Co – (Scottish User Group)

Bronwyn McKenna (AJTC - Administrative Justice & Tribunals Council)

Michael Mealing (FSB - Federation of Small Businesses)

Stephen Millar (Scottish Law Society)

Abigail Morris (BCC - British Chambers of Commerce)

John Morris (Employment Law committee of the Law Society of England and Wales)

Brian Napier QC

Joanne Owers (ELA - Employment Lawyers Association)

Matthew Percival (CBI - Confederation of British Industry)

President of the Employment Tribunals (England & Wales)

President of the Employment Tribunals (Scotland)

Hannah Reed (TUC - Trades Union Congress)

Linda Wong (Law Centres Confederation)

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