

November 2024

Tribunal Procedure Committee

Reply to Consultation on remaking and possible changes to the
Employment Tribunal Rules

Introduction

1. The Tribunal Procedure Committee (“the TPC”) is the body that makes Rules that govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. The TPC is established under section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007 (“the TCEA”).
2. Further information on the TPC can be found at:
<https://www.gov.uk/government/organisations/tribunal-procedure-committee>
3. Responsibility for making procedural rules in the Employment Tribunals was transferred to the TPC from 25th April 2024 by the Judicial Review and Courts Act 2022 and the Judicial Review and Courts Act 2022 (Commencement No. 6) Regulations 2024¹. Responsibility for making regulations in respect of certain procedural matters in proceedings with national security implications was transferred to the Lord Chancellor by the same legislation. Prior to this, responsibility for procedural rules, including in relation to national security matters, was held by the Secretary of State for Business and Trade. The most recent rules are found in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the 2013 Regulations”)².
4. The Employment Tribunals are the main judicial forum for deciding disputes between workers and employers, including claims for unauthorised deductions from wages, unfair dismissal, discrimination, whistleblowing, redundancy and equal pay. Employment Tribunals also have jurisdiction over certain types of statutory appeal, such as appeals against health and safety improvement and prohibition notices. There are two different territorial jurisdictions: England & Wales, and Scotland.
5. In anticipation of the transfer of rules-making responsibility, the TPC launched a consultation on 3rd April 2024, which ran to 26th June 2024. That consultation is available at: <https://www.gov.uk/government/consultations/possible-changes-to-the-employment-tribunal-rules>

¹ S.I. 2024/568.

² S.I. 2013/1237.

6. The consultation dealt with the changes that the TPC intended to give effect to the transfer of responsibility, by making new rules produced by the TPC, together with a small number of other changes that the TPC believed were desirable. In accordance with section 37QA(1) of the Employment Tribunals Act 1996,³ rules made by the TPC are to be called the “Employment Tribunal Procedure Rules”. Following the consultation, the TPC intend to make the Employment Tribunal Procedure Rules (“the Procedure Rules”). It is the TPC’s intention that the Procedure Rules are to be in place for January 2025. The Procedure Rules are to be made together with the Lord Chancellor, who will make provision in respect of national security proceedings. It was agreed between the TPC and the Lord Chancellor that it was desirable for their respective rule- and regulation-making powers in respect of procedure to be exercised in one instrument, as this would be more accessible for users of the Employment Tribunals and the Tribunals themselves.
7. Amendments to the 2013 Regulations to omit the procedural rules contained in the Schedules to those Regulations, and to make other consequential amendments, are to be made by the Lord Chancellor via a separate statutory instrument. Other consequential amendments are to include the insertion of new regulations 14A and 14B to the 2013 Regulations, which relate to the time limits for appealing improvement and prohibition notices under the Health and Safety at Work etc. Act 1974 and Energy Act 2013 respectively. The time limits for such appeals are a matter for the Secretary of State, and will therefore be resituated from the procedural rules (previously rules 105(1) and 105A(1) in Schedule 1 to the 2013 Regulations) into the body of the 2013 Regulations, rather than replicated in the Procedure Rules.

Responses to the consultation and conclusions

8. There were nine respondents to the consultation, set out in annex A. The TPC wishes to thank all those who contributed to the consultation process.
9. The questions raised in the consultation are listed below, with a summary of the responses, followed by the TPC’s conclusions.

Question 1: Do you agree with the TPC’s proposed approach to the remaking of the Rules? If not, why not?

³ Section 37QA of the Employment Tribunals Act 1996, was inserted by section 34(4) of the Judicial Review and Courts Act 2022.

10. The TPC proposed to largely re-make the rules of procedure contained in the 2013 Regulations in their existing form, in order to move them from the Schedules to the 2013 Regulations to become TPC Rules. The TPC's view was that it would be inappropriate to embark on a fundamental rewriting of the rules, which would be time-consuming and disrupting for Employment Tribunal users and the Tribunals themselves. It would also delay making more urgent changes.
11. Seven respondents agreed with the proposed approach. Two respondents did not express a view on this question. Some respondents also made observations about the 2013 Regulations and about other potential changes, which the TPC has noted to inform its future work.
12. In light of the support for the proposed approach, the TPC concluded that it should proceed.
13. The process of re-making the rules has resulted in a large number of minor drafting changes, in order to bring the rules into line with contemporary drafting practice, update references and clarify potential ambiguities identified during the drafting process. The TPC does not believe that this will result in any substantive change to the substance of the rules. Some of these changes had been referred to in the consultation as matters that the TPC intended to consider as part of its future work: clarifying when the Tribunal will consider written representations (to be rule 42 of the Procedure Rules); confirming that the Tribunal may order addresses and other personal details to be redacted from the claim form (to be rule 49 of the Procedure Rules) and clarifying that where a decision is made by a member of staff without a hearing, the decision should identify the member of staff who made the decision (to be rule 58 of the Procedure Rules). On further consideration, the TPC concluded that these were matters of clarification of the existing rules that did not require further consultation and could be most efficiently dealt with at this stage.
14. The TPC concluded that it was appropriate to omit the rules relating to Employment Tribunal fees. These had remained within the rules in the 2013 Regulations after the previous Employment Tribunal fees regime was found to be unlawful by the Supreme Court in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51. At the time of the TPC's consultation in April 2024, the government had launched a consultation on Introducing Fees in the Employment Tribunals and the Employment Appeal Tribunal. At this stage there are no fees in the Employment Tribunals and it is understood that there is no current plan for them to be introduced. In those circumstances, it would be wrong for the Procedure Rules to make reference to fees, since this would be confusing and misleading for the Tribunals' users.

15. The TPC has also determined it is appropriate to replace the requirement for the written record of Tribunal decisions to be signed by the Employment Judge, as a presiding member, with a requirement that they be approved by the presiding member. These changes will be reflected in rules 60 and 61 of the Procedure Rules. Views on this change in relation to signing written reasons were obtained in response to a separate TPC consultation on written reasons in all chambers of the First-tier Tribunal and the Employment Tribunals, which ran from 30 July to 22 October 2024⁴, at question 12. A full response to that consultation will be published in due course. In respect to question 12, nine respondents were in favour of the change while three respondents opposed the change.
16. Of the three respondents not in favour, one respondent argued that the change was unnecessary because there were no practical difficulties to appending an electronic signature. Another considered that it was not an onerous requirement, which had some potential benefits in providing reassurance that the Judge had personally confirmed the decision and adding gravitas to the decision. One respondent asserted that the requirement for a signature was an important provision that should be extended to all Tribunals.
17. The TPC is grateful for the respondents' views on this matter but remain of the view (as supported by the majority of respondents) that this rule imposes an unnecessary administrative burden on the Tribunal and is out of step with the increased digitisation of the Tribunal system. Additionally, this change will bring the Employment Tribunals into line with other tribunal jurisdictions.

Question 2: Do you agree with the TPC's proposed approach to Schedules 2 & 3? If not, why not?

18. The 2013 Regulations contain provisions for National Security cases and Equal Pay (Equal Value) cases in Schedules 2 and 3, which are to be read with the procedural rules as set out in Schedule 1. The TPC propose to maintain this structure in the Procedure Rules, rather than seek to incorporate those aspects into the main body of the rules. The TPC expressed the preliminary view that this would avoid disruption when the existing rules were broadly working well.
19. Eight respondents agreed with this proposed approach.
20. One respondent did not express a view, but raised two other points in relation to the rules relating to Equal Pay (Equal Value) claims. First, they suggested that it

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https://assets.publishing.service.gov.uk/media/66a35cd6a3c2a28abb50d79b/TPC_written_reasons_consultation_document.pdf

would be beneficial to have a wider pool of qualified independent experts appointed by the Tribunal under Schedule 3 rule 3(1)(b) and 5 to the 2013 regulations. The TPC concluded that this was matter outside its rules-making powers. Decisions about who should be appointed as an independent expert are a matter for Tribunals dealing with individual cases. Second, the respondent suggested that there should be additional flexibility in the rules, which they described as 'very prescriptive' in light of the practical and commercial reality of compliance and the increasing complexity of such claims. The TPC concluded that any attempt to make these rules more flexible would go beyond the scope of the present exercise, but noted these comments to inform its future work.

21. In light of respondents' support for the proposed plan, the TPC concluded that it should maintain the same structure of procedure rules in the Procedure Rules. Rules relating to proceedings generally are to be set out in the body of the Procedure Rules. Provisions adapting those rules for National Security cases are to be made by the Lord Chancellor; however, it has been agreed with the Lord Chancellor that these will be made in the same instrument to maintain a comparable structure to the 2013 Regulations and to ensure procedural rules are as accessible as possible for Tribunal users. The rules relating to National Security cases are therefore to be found in Schedule 1 to the Procedure Rules. Rules relating to Equal Pay (Equal Value) claims are to be made by the TPC, and are to be found in Schedule 2.
22. The TPC concluded that it is appropriate to omit the indicative timetable that was annexed to Schedule 3 to the 2013 Regulations from the Procedure Rules. In practice, equal value cases do not follow the timeframe that is laid down. It is unhelpful to provide information within the rules that has become inaccurate and therefore misleading to the Tribunal's users.

Question 3: Do you agree that the rules should give the Senior President power to delegate any judicial function under to the rules to staff, subject to a fresh consideration by a Judge? If not, why not?

23. Regulation 10A of the 2013 Regulations allows for the appointment of legal officers by the Lord Chancellor. Their responsibilities are then dealt with in regulation 10B.
24. Broadly, these regulations allow legal officers to carry out certain judicial functions, subject to authorisation by the Senior Presidents of Tribunals through a practice direction. The functions that can be exercised are, however, significantly restricted by the terms of regulation 10B, which allows the Senior President to authorise only limited types of decisions.

25. This has meant that there is a significant disparity between the Employment Tribunals and the First-tier Tribunal. In the First-tier Tribunal, the Senior President is able to authorise staff to carry out any function of a judicial nature, although any party may apply for that decision to be considered afresh by a judge.
26. The TPC reached the preliminary view that these greater restrictions in relation to the Employment Tribunal were not justified and, in practice, created obstacles to the appropriate deployment of legal officers within the Employment Tribunals. It therefore proposed bringing the rule in the Procedure Rules in line with that in the First-tier Tribunal.
27. Eight respondents supported this proposal.
28. One respondent opposed the proposal. It argued that the use of legal officers should be 'constrained to largely non-judicial functions' which do not allow for judicial discretion or have significant implications. The main reasons advanced for this position were that legal officers might not have the appropriate legal qualifications, training or experience to exercise most judicial functions and they would not be governed by the judicial principles of independence, impartiality and integrity, including the Bangalore Principles and the Guide to Judicial Conduct. This respondent also argued that it would not be appropriate for legal officers to make some of the decisions that the TPC's consultation had given as examples of the types of decision that they might be authorised to make.
29. Two of the respondents qualified their support for the proposal, expressing concern that the use of legal officers should not be extended too far. They suggested that, in substantive or contested issues, decisions benefited from the expertise and experience of an Employment Judge – especially where they involved complex issues or ones that might determine the ultimate outcome of a claim. They also expressed concern that, if the decisions made by legal officers were routinely challenged and therefore had to be referred to Employment Judges, this would produce delay rather than greater efficiency.
30. The TPC has concluded that it is appropriate to proceed with its intention to harmonise the approach to legal officers in the Employment Tribunal with that in the First-tier Tribunal.
31. The TPC recognise that there are legitimate concerns that legal officers should not be overused or allowed to carry out functions that should be performed by judges. But the TPC concluded that these are issues that can properly be dealt with by the Senior President of Tribunals and the Presidents of the Employment Tribunals, rather than being prescribed in rules. The majority of the respondents to the consultation supported this view and were content with legal officers taking

the types of decisions that the TPC expects the Senior President to authorise. The TPC considers that the absolute right to have any decision made by a legal officer considered afresh by a judge was a significant check on the possibility of legal officers being deployed inappropriately.

32. The TPC also recognises that there would need to be consideration of how legal officers are deployed if their use was to make the Employment Tribunals more efficient. If a significant proportion of decisions taken by a legal officer were challenged, there would be a risk that this would, overall, lead to delay. The TPC considers, however, that it is the Senior President and the Presidents of Employment Tribunals who are best placed to make such decisions. To a significant extent, any issue is likely to be self-correcting. Once it became apparent that a particular type of decision was being challenged frequently enough to lead to delay, it is likely that the use of legal officers in relation to such decisions would be reviewed.
33. The TPC also notes the concerns raised that some decisions of the type that might be delegated to legal officers could be extremely significant and complex. It is important, however, to recognise that, in practice, legal officers do not take all decisions of the type that they are authorised to make. Nothing in the proposal or the new rules is intended to limit the power of judges to make decisions without a legal officer being involved. In practice, many decisions of the type that legal officers are authorised to take are made by judges. Decisions that are particularly complex, difficult or have significant implications in a particular case are more likely to be made by judges, rather than legal officers. There are, and will always be, processes within the tribunal system that seek to assess the various decisions and applications that arise and ensure that they are made within an appropriate timescale and by an appropriate person.

Question 4: Should the rules require that the Senior President of Tribunals' power of delegation be exercised through a Practice Direction? If so, why?

34. Under the 2013 Regulations, the Senior President of Tribunals' power of delegation must be exercised through a practice direction. This is in contrast with the delegation power in respect of the First-tier Tribunal, which does not have such a requirement. In relation to the First-tier Tribunal, the power is exercised through practice statements. The TPC proposed removing the requirement that the delegation occur through practice direction.
35. Seven respondents supported the proposal. Two opposed the proposal.
36. One respondent argued that the requirement for a practice direction should be retained, because it was important that it was clear what powers were being

delegated and on what terms. While the TPC agreed that clarity is important, it did not agree that this required a practice direction. The distinction, in this context, between a practice direction and practice statement is in the mechanism through which a practice direction must be made, rather than how it is phrased. There is no reason to expect that a practice statement would be drafted in a vague or unclear manner as compared with a practice direction.

37. One respondent argued that it was desirable to retain the current system, which provided a degree of transparency and consistency. The TPC concluded that there was not a significant loss of either transparency or consistency as a result of removing the requirement that delegation occur through a practice direction.

38. The TPC therefore concluded that the Procedure Rules should not require that the power of delegation be exercised through a practice direction.

Question 5: Do you have any other comment on this draft Rule?

39. One respondent suggested that the deadline to apply for a decision by a legal officer to be considered afresh by a judge should be extended to 28 days. They argued that this period was a more reasonable one and minimised the risk that a party might lose the opportunity to make such an application.

40. The TPC decided that it would not be appropriate to extend this time-limit. It would introduce inconsistency between the Employment Tribunals and other Tribunals. It would also create the potential for delay. Where there were good reasons that an application had been made outside the time-limit the Employment Tribunals have discretion to extend time.

41. Delegation to staff is to be dealt with at rule 7 of the Procedure Rules.

Question 6: Do you agree with the TPC's proposal to remake regulation 12, while moving the power to prescribe the claim and response forms from the Secretary of State to the Presidents of Employment Tribunals in each jurisdiction? If not, why not?

42. In contrast to the First-tier Tribunal, the Employment Tribunals have prescribed forms that both claimants and respondents in the Tribunals are required to use. These are provided for in regulation 12 of the 2013 Regulations, which allow the Secretary of State to prescribe such forms. In practice, this has been dealt with by the Secretary of State for Business and Trade.

43. The TPC proposed that the power to prescribe forms should be transferred to the Presidents of the Employment Tribunals, as they would be the most appropriate

persons to deal with these matters once responsibility for procedural matters was moved away from the Secretary of State.

44. All nine respondents supported this proposal. Given this support, the TPC concluded it should proceed. Prescribed forms are to be dealt with by rule 9 of the Procedure Rules.

Question 7: Do you agree with the proposed changes to Rule 99? If not, why not?

45. Rule 99 in Schedule 1 to the 2013 Regulations dealt with the transfer of cases between the jurisdictions of England & Wales and Scotland. It required that a transfer to a jurisdiction be authorised by the receiving jurisdiction's President. The TPC proposed expanding the power to allow a transfer to be authorised by the Vice-President, on the basis that it was unnecessary to have it restricted to the two Presidents.

46. All nine respondents supported this proposal. Given this support, the TPC concluded that it should proceed. The rule relating to such transfers is to be rule 98 of the Procedure Rules, and will permit authorisation to be given by the Vice President (in Scotland) or a Regional Employment Judge (in England and Wales) as well as the respective Presidents. The TPC concluded that it was appropriate to extend the power to allow a transfer to the Regional Employment Judges. These are the nearest equivalent posts in England and Wales, which does not have a Vice-President.

Keeping the Rules under review

47. The remit of the TPC is to keep the Rules under review.

48. Please send any suggestions for further amendment to the Rules to:

Email: tpcsecretariat@justice.gov.uk

Post: Tribunal Procedure Committee
Access to Justice Directorate
Policy, Communications and Analysis Group
Ministry of Justice
Post Point: Area 5.20
102 Petty France
London
SW1H 9AJ

Extra copies of this consultation response document can be obtained using the above contact details or online at:

<https://www.gov.uk/government/organisations/tribunal-procedure-committee>

Annex A

Annex A - List of Respondents to the Consultation (published on 3rd April 2024)	
1.	Birmingham Law Society
2.	Cora Employment Law
3.	Council of Employment Judges
4.	Employment Lawyers Association
5.	Eversheds Sutherland
6.	Faculty of Advocates
7.	Law Society of Scotland
8.	Prospect
9.	WorkNest Limited