

Employment Tribunals in the pandemic: The Presidential Guidance, the reality, and the future

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3PB

The Guidance

1. The Presidential Guidance issued in connection with the conduct of Employment Tribunal proceedings during the COVID-19 pandemic was effective from 18th March 2020¹.
2. At the outset of the Guidance it is stated that Employment Tribunals must have regard to it, but they are not bound by it.
3. It goes on to state that the parties are required to assist Tribunals to further the overriding objective set out in rule 2 of the Tribunal Rules ('the Rules')². Rule 2 states that:

"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 cases 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..."*

4. The Guidance strongly encourages Tribunals and parties to use electronic communication methods, including Skype for business and video conferencing

¹ <https://www.judiciary.uk/wp-content/uploads/2015/03/Presidential-Guidance-ET-Covid19.pdf>

² Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Rule 2.

technology where available to conduct hearings of all kinds, where doing so is compatible with the overriding objective and the requirements of the Tribunal Rules.

5. The above is said in the context of Rule 41 of the Rules allowing Tribunals to regulate their own procedure and Rule 46 allowing a hearing of any kind to be conducted, in whole or in part, by use of electronic communication (including by telephone) provided the Tribunal considers it just and equitable to do so and, where a hearing is to be in public, members of the public can hear what the Tribunal can hear and see any witnesses as seen by the Tribunal.
6. A Presidential Direction was then issued on 19th March directing that from Monday 23rd March all in-person hearings would be converted to case management hearings by telephone or other electronic means which will take place (unless parties are advised otherwise) on the first day allocated for the hearing.
7. There was then an amended Presidential Direction stating that from 23rd March all in-person hearings listed to commence on or before **Friday 26th June 2020**, would be converted to case management hearings by telephone or other electronic means which will take place on the first day allocated for the hearing. If the case is set down for more than 1 day then parties should proceed on the basis that the remainder of the days fixed have been cancelled.
8. This has led to a lot of uncertainty and confusion as to whether or not the hearings in this interim period will be straight forward administrative hearings or will actually deal with some substantive issues, for instance strike out applications or jurisdictional points.
9. A further a document entitled 'FAQs arising from the Covid-19 pandemic' was issued by the Presidents on 3rd April 2020, which included (non-exhaustively):
 - Suspending case management orders and directions made before 23rd March for hearings due to take place between 23rd March and 26th June and being able to 'stand down' witnesses for those hearings³;
 - The following 3 types of case will be prioritised:
 - Statutory appeals against prohibition notices;
 - Applications for interim relief; and

³ Question and Answer (3).

- Dismissals where an individual has lost accommodation 'tied' to their employment⁴.
 - Advising that there are a range of available video platforms and that the Judiciary and HMCTS have experience in using Skype for Business to conduct hearings and KINLY Cloud is also being introduced by the HMCTS reform programme⁵.
 - Whilst recognising that the pandemic may impact on compliance with time limits for presenting ET1s / ET3s, nonetheless time limits remain as normal (as they do for instituting appeals) with the caveat that Judges have discretion to allow matters to be presented out of time and still allow them to proceed⁶.
10. In terms of EAT hearings, having postponed all hearings up to and including 15th April (albeit the time limits for instituting appeals remain as usual), as of 16th April onwards it is holding hearings via telephone, Skype or other internet-based platforms (remote hearings) in a limited number of appeals⁷.
11. There has also been recent 'Help for Users' documents issued by the ET and EAT, by which it is variously stated that⁸:
- Most but not all ET offices in England and Wales are open to the public and judicial office holders. The remainder (including Scotland) are partially staffed but closed to the public. The majority of salaried EJs are continuing to work from home with support provided by staff in ET offices or working remotely. Leadership Judges and salaried EJs are covering the main ET centres on a rota basis.
 - All substantive i.e. contested full hearings up to 26th June 2020 have been postponed and have been converted to telephone case management hearings. PHs and some final hearings are being conducted remotely.
 - Final hearings are usually being re-listed at parties' requests
 - There is growing confidence (and access to training) for the use of teleconferencing (using, for example, BTMeetMe) and Skype, Teams or Zoom.
 - Glasgow and Cardiff are piloting KINLY (CVP) which is a virtual hearing room solution
 - A new recording mechanism is expected to be available soon

⁴ Question and Answer (10).

⁵ Question and Answer (15).

⁶ Questions and Answers (18) and (19).

⁷ https://www.judiciary.uk/wp-content/uploads/2020/04/09-Apr-20-SPT_EAT-Covid-19-announcement.pdf

⁸ <https://www.judiciary.uk/wp-content/uploads/2020/04/14-Apr-20-Employment-Tribunals-England-Wales-and-Scotland-.pdf>

<https://www.judiciary.uk/wp-content/uploads/2020/04/14-Apr-20-Employment-Appeal-Tribunals-Help-for-Users.pdf>

Judges and users are able to consider greater reliance on alternative dispute resolution and active case management.

The Reality

12. The reality is that at present there does not appear to be any consistent approach as between either Tribunal regions or individual judges, and so practitioners are advised to approach each case listing very carefully and not just assume that it is going to be a straightforward case management discussion with no jurisdictional or strike out issues being dealt with.
13. Practitioners would also be well advised to chase the relevant Tribunals by email for updates as to how the hearing is going to be dealt with, not least so that you can say to the Judge hearing the case that you asked for clarity but did not receive it.
14. In accordance with the Guidance, you / your client / your opponent may wish to adhere to the fact that all case management directions / orders issued before 23rd March were suspended. However, whilst in principle there might seem to be nothing wrong with adopting that approach, it seems now that you do so at the risk of you or your Counsel incurring Judicial disapproval and possible sanction.
15. It is suggested that the better approach would be to agree with your opponent (particularly if the other side are legally represented, but even if not) to comply with the directions so that you are likely to get an earlier full merits listing when cases are re-listed. This accords entirely with the overriding objective.
16. Even before the pandemic Tribunals in various parts (if not all parts) of the country were faced with a huge volume of cases and limited resources to deal with them. As was to be expected, that situation has only been exacerbated by the pandemic and the consequent lockdown. Illustrative of those pressures and the ever-increasing backlog of cases which need to be listed and allocated Tribunal time, here are a few experiences from 3PB's Employment & Discrimination Law Group Members from around the country over the last few weeks:

Bristol ET: An expectation that parties will have complied with case management orders, Counsel will be entirely familiar with all

aspects of the case, and a general readiness to move things forward through the use of all forms of technology

Cambridge ET: Listing 5 day trials in September 2021

Central London ET: Judicial Mediations by telephone working well

Now listing new hearings from December 2020. No immediate plans to list remote open hearings, but apparently they are working on it

Croydon ET: Asking parties in short cases (1 day or less) whether they'd be willing to have a remote hearing once the ability is up and running.

Judicial willingness to list a straightforward unlawful deduction from wages claim by telephone

East London ET: An offer of a 3 day video trial in July 2020

Southampton ET: Listing of open telephone preliminary hearing in June 2020 with cross-examination to take place.

Successful conduct of an open telephone preliminary hearing in which 4 witnesses gave evidence and were cross-examined

Watford ET: 1 day listings are from 5th January 2021

2 day listings are from 18th February 2021

3 day listings are from 16th August 2021

EAT: A couple of hearings conducted through Skype for Business have worked well

17. In addition, as well as appearing as advocates using virtual technologies in the Employment Tribunals, 3PB's EDG team has also been busy conducting virtual hearings and disciplinary matters as decision makers. For example, Joseph England has presided over a disciplinary matter in respect of a police officer and Gareth Graham has recently sat on a number of rugby disciplinary panels, including that which involved Sale Sharks and Rohan Janse Van Rensburg. Both agree that their experiences were very useful in seeing a virtual hearing from the other side of the

bench/screen rather than their more common roles as advocates and offer the following as observations.

18. As virtual hearings become more common, there are obvious but important steps to take. For example, simple measures such as having test-runs of the video facilities reduce the possibility of last minute snags. It is also important to ensure there are mechanisms to conduct discussions in private (such as private 'rooms' within the technology, WhatsApp groups or a traditional phone call) and that distractions for all are removed. It is equally important to ensure that bundles are agreed, complete and ordered and that they can be accessed by everyone involved in the hearing, including witnesses. A recent study has suggested that virtual hearings can feel more tiring than hearings in person, in part because it can be more difficult to pick up on visual or aural cues (such as facial expressions or intonation), which perhaps reinforces the need for clarity and brevity from advocates.
19. The work on such matters builds on the EDG's extensive experience of employment and disciplinary work, both within and outside of the tribunal system. Outside of formal legal proceedings, members have been instructed to determine and investigate matters such as disciplinaries, grievances, whistleblowing concerns and capability concerns.

The Future

20. Following the 1st review of the Joint ET Presidents' Direction (amended on 24th March 2020) on 29th April 2020, the FAQs have now been updated as follows:

(22) I know that the ET Presidents said they were going to review the direction they issued about what was to happen, in light of the Covid-19 pandemic, to ET cases already listed for hearing. Have they done that?

Yes, they did this on 29 April 2020. Following this review that Direction remains in force in its current form. This means that Hearings listed on or after 29 June 2020 will remain in hearing lists. During the Covid-19 pandemic arrangements will be made to contact parties/representatives in these listed cases so that an assessment can be made by an Employment Judge of the most appropriate method of conducting the hearing (for example, that could be entirely in-person, entirely by remote means, or a

combination of such methods). At that time any special measures which require to be put in place in connection with the conduct of the hearing will also be considered. Parties remain at liberty to make any application to the Tribunal that they consider appropriate at any time⁹.

21. This is without doubt very welcome news for all employment lawyers and their clients who wish to progress their cases and return to at least some kind of a 'normal' working pattern.
22. The outcome of the review also chimes with the positive news and pro-active / progressive approach emerging from the South West ET region (covering Bristol, Southampton, Exeter, Plymouth, Bodmin and Havant), as follows (which is non-exhaustive and only provided to the reader as (hopefully) helpful information rather than any binding Tribunal guidance):
 - The ET is moving to the CCD (Court Case Data) system. This is a system whereby the ET and the parties will be able to electronically access the relevant case files and upload documents to the same.
 - Judges are likely to be working from 3 screens when conducting cases (bundle / witness statements / participants) and it is envisaged that representatives conducting hearings may well need the same to work efficiently.
 - All salaried Judges are working and some fee paid Judges are being utilised
 - There is a significantly reduced administrative function.
 - If lockdown is lifted but social distancing measures remain in place, whilst it is unlikely that places like Exeter ET would be able to hold in-person hearings, Bristol and Southampton ETs may be able to offer a reduced number of in-person hearings.
 - All trials listed to commence on or before Friday 26th June 2020 remain converted to case management hearings by telephone or other electronic means (a COVID TCMPh) which will take place (unless parties are advised otherwise) on the 1st day allocated for the hearing.
 - Telephone Case Management Preliminary Hearings ('TCMPh') are not just courtesy calls to re-list cases. Judges will expect representatives to be familiar with the case papers so that issues can be properly clarified and

⁹ <https://www.judiciary.uk/wp-content/uploads/2020/05/FAQ-edition-date-30-April-2020.pdf>

defined, discussions can take place as to whether any facts can be agreed, with the aim that full merits hearings will be more focussed both during the pandemic and in the future.

- An expectation from Judges that representatives will have spoken to or corresponded with one another prior to the hearing to see if anything constructive can be agreed. To that end parties are encouraged to get in touch with one another to see if anything can be usefully agreed prior to the TCMPH, and in particular whether they can agree that a case is suitable for some kind remote hearing to deal with a discrete issue or even a trial.
- Judicial Mediations are being considered for 2 day cases if there is a genuine prospect of settlement.
- COVID-19 TCMPHs will have the re-listed full hearings prioritised for listing between October to December 2020 where possible.
- Increased Judicial resources are likely to become available in order for cases to be heard sooner than you might think.
- There have already been remote hearings dealing with interim relief, the issue of disability, TUPE preliminary issues, time limit issues, strike out and deposit order applications, and Judicial Mediations, and this will continue to be the case.
- Just because one party does not wish to participate in a video hearing is not determinative that it will be kicked into the long grass for a future in-person listing, rather it will be one of the factors a Judge will take into account in deciding whether or not to list it as a video hearing.
- 6 – 7 day family law cases have been taking place remotely (through Zoom) through the pandemic at Bristol Civil Justice Centre – the inference being that if it can be done in family law cases, why not in ET cases?
- A Cloud Viewing Platform ('CVP') produced by KINLY is being rolled out by HMCTS (18 months earlier than was envisaged), which is apparently very easy to use on any device which has internet access. It has a chat and share document function. The Ministry of Justice is KINLY's client and so that allows tweaks to the software to be suggested as necessary as we all get to grips with the new technology – presently you cannot blur your background, but that will hopefully be addressed. We will all need to start getting used to this technology as soon as possible (Judicial training is taking place) and the downloading and use of both Google Chrome and Pexip Infinity Connect app is advised, as well as little tips like not placing your mobile phone close to

your internet device which you're running the CVP on and checking that you have sufficient bandwidth prior to commencing a remote hearing.

- There are presently 150 licenses for CVP and so potentially there are a significant number of 'rooms' available for conducting hearings each day.
- Judges could conduct up to 4 case management hearings a day.
- In order to satisfy the 'in public' aspect of hearings, the details of cases will be published on Court Serve with a 'Guest' page link.
- In accordance with the recent review of the Guidance, the immediate future is likely to consist of a mixture of physical and remote hearings, potentially with Counsel and Judge / Members in a Tribunal room, but witnesses dialling in and giving evidence remotely. It should be remembered when listing remote trials at the TCMPH that they are likely to take longer than normal in-person trials, thought needs to be given to paper or electronic bundles, questions being more focussed, and witnesses needing to have the requisite technology.
- Representatives will need to establish a method of taking instructions remotely during the hearing.

23. In other unrelated news for the future, on 28th April 2020 the Law Commission¹⁰ published a 200 page report on Employment Law Hearing Structures in which it makes 23 specific recommendations as follows:

- (1) The time limit for bringing a claim should be 6 months for all employment tribunal claims¹¹.
- (2) In types of claim where the time limit for bringing the claim can at present be extended where it was "not reasonably practicable" to bring the complaint in time, employment tribunals should have discretion to extend the time limit where they consider it just and equitable to do so¹².
- (3) Employment Judges with experience of hearing discrimination claims should be deployed to sit in the county court to hear non-employment discrimination claims¹³.
- (4) Employment Tribunals should have jurisdiction to determine claims by an employee and counterclaims by an employer for damages for breach of, or a sum

¹⁰ The Law Commissioners are: The Right Honourable Lord Justice Green (Chairman), Professor Sarah Green, Professor Nick Hopkins, Professor Penney Lewis, and Nicholas Paines QC.

¹¹ Page 23, paragraph 2.58; page 190, paragraph 11.1.

¹² Page 33, paragraph 2.96; page 190, paragraph 11.2.

¹³ Page 58, paragraph 3.101; page 190, paragraph 11.3.

- due under, a contract of or connected with employment notwithstanding that the employee's employment has not terminated¹⁴.
- (5) Employment Tribunals should have jurisdiction to determine claims by an employee and counterclaims by an employer for damages for breach of, or a sum due under, a contract of or connected with employment notwithstanding that the alleged liability arises after employment has terminated¹⁵.
- (6) The current £25,000 limit on employment tribunals' contractual jurisdiction in respect of claims by employees be increased to £100,000 and thereafter maintained at parity with the financial limit upon bringing contractual claims in the county court¹⁶.
- (7) The same financial limit on employment tribunals' contractual jurisdiction should apply to claims by employees and counterclaims by employers¹⁷.
- (8)
- (i) The time limit for claims for breach of contract brought in an employment tribunal during the subsistence of an employee's employment should be 6 months from the date of the alleged breach of contract;
 - (ii) The time limit for claims for breach of contract brought in an employment tribunal after the termination of an employee's employment should be 6 months from the termination, but
 - (iii) Where the alleged liability arose after the termination of the employment the time limit should be 6 months from the date upon which the alleged liability arose¹⁸.
- (9) Employment tribunals should have jurisdiction to determine claims and counterclaims for damages or sums due in respect of the provision by an employer of living accommodation¹⁹.
- (10) It be made clear that employment tribunals have the same jurisdiction to determine breach of contract claims in relation to workers within the meaning of section 230(3)(b) of the Employment Rights Act 1996 as they have in relation to employees within the meaning of section 230(1) of the Act²⁰.
- (11) Extensions of the employment tribunals' jurisdiction as per the recommendations at (4), (5), (6), (7) and (8) above should apply equally to

¹⁴ Page 66, paragraph 4.18; page 190, paragraph 11.4.

¹⁵ Page 67, paragraph 4.27; page 191, paragraph 11.5.

¹⁶ Page 72, paragraph 4.42; page 191, paragraph 11.6.

¹⁷ Page 73, paragraph 4.48; page 191, paragraph 11.7.

¹⁸ Page 77, paragraph 4.66; page 191, paragraph 11.8.

¹⁹ Page 83, paragraph 4.90; page 192, paragraph 11.9.

²⁰ Page 89, paragraph 4.113; page 192, paragraph 11.10.

workers within the meaning of section 230(3)(b) of the Employment Rights Act 1996²¹.

- (12) Employment tribunals should have the power to interpret or construe terms in contracts of employment in order to exercise their jurisdiction under Part I of the Employment Rights Act 1996²².
- (13) Employment tribunals should have the power to hear claims of unlawful deductions from wages that relate to unquantified sums. This power is sufficiently conferred by (4) above²³.
- (14) Where an employment tribunal finds that one or more of the “excepted deductions” listed in section 14(1) to 14(6) of the Employment Rights Act 1996 applies, the tribunal should have the power to determine whether the employer deducted the correct amount of money from an employee’s or worker’s wages²⁴.
- (15) Employment tribunals should have jurisdiction to apply set-off principles in an unauthorised deduction from wages claim under Part II of the Employment Rights Act 1996, limited to established liabilities for quantified amounts and to extinguishing the Part II claim²⁵.
- (16) Section 128(2) of the Equality Act 2010 be amended to provide a power to transfer equal pay cases to employment tribunals, with a presumption in favour of transfer²⁶.
- (17) Employment tribunal judges be given a discretionary power to extend the limitation period for equal pay claims where it is just and equitable to do so²⁷.
- (18) Employment tribunals should have jurisdiction to hear complaints by workers that they are working hours in excess of the maximum working time limits contained in regulations 4(1), 5A(1), 6(1) and 6A of the Working Time Regulations 1998²⁸.
- (19) The maximum award applying to employment tribunal claims brought under the Employment Relations Act 1999 (Blacklists) Regulations 2010 is at least increased to, and maintained at, the level of the maximum award for unfair dismissal under section 124(1ZA) of the Employment Rights Act 1996²⁹.
- (20) Respondents to employment-related discrimination claims should be able to claim contribution from others who are jointly and severally liable with them for

²¹ Page 89, paragraph 4.118; page 192, paragraph 11.11.

²² Page 100, paragraph 5.11; page 192, paragraph 11.12.

²³ Page 103, paragraph 5.25; page 193, paragraph 11.13.

²⁴ Page 104, paragraph 5.32; page 193, paragraph 11.14.

²⁵ Page 108, paragraph 5.50; page 193, paragraph 11.15.

²⁶ Page 125, paragraph 6.56; page 193, paragraph 11.16.

²⁷ Page 126, paragraph 6.59; page 194, paragraph 11.17.

²⁸ Page 135, paragraph 7.33; page 194, paragraph 11.18.

²⁹ Page 145, paragraph 7.80; page 194, paragraph 11.19.

the discrimination. The test to be applied should mirror that in section 2(1) of the Civil Liability (Contribution) Act 1978³⁰.

- (21) The Government should investigate the possibility of:
- (a) Creating a fast track for enforcement which allows the claimant to remain within the employment tribunal structure when seeking enforcement; and
 - (b) Extending the BEIS employment tribunal penalty scheme so that it is triggered automatically by the issuing of a tribunal award.

Consideration be given to:

- (a) Sending a notice with the judgment to inform an employer that if it does not pay the award by a set date, it will be subject to a financial penalty;
 - (b) Sending a copy of the judgment to the BEIS enforcement team; and
 - (c) Improving the information sent to successful claimants on how to enforce awards³¹.
- (22) An informal specialist list should be established to deal with employment and discrimination-related claims and appeals within the Queen's Bench Division of the High Court³².
- (23) The subject matter within the remit of the new List (as above) should be:
- (a) Employees' claims for wrongful dismissal or other breach of contract where the sum claimed exceeds the limit on tribunals' jurisdiction under the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994;
 - (b) Employees' equal pay claims;
 - (c) Employer's claims to enforce restrictive covenants in restraint of trade;
 - (d) Employers' claims for breach of confidence or misuse of trade secrets;
 - (e) Employers' claims against trade unions for injunctions to prevent industrial action or for damages following what is alleged to be unlawful industrial action;
 - (f) Claims arising in "employee competition" cases such as team moves and garden leave;
 - (g) Appeals from the county court in claims for discrimination in goods and services; and
 - (h) Appeals from the county court in employment-related cases³³.

24. It is hoped that with the new President of the England and Wales ETs, Judge Barry Clarke, due to take office on 11th May 2020³⁴, the recent appointment of 4 new

³⁰ Page 162, paragraph 8.46; page 194, paragraph 11.20.

³¹ Page 169, paragraph 8.78 and 8.79; page 195, paragraph 11.21.

³² Page 187, paragraph 10.35; page 195, paragraph 11.22.

³³ Page 187, paragraph 10.36; page 196, paragraph 11.23.

³⁴ <https://www.judiciary.uk/announcements/appointment-of-the-president-of-the-employment-tribunals-england-and-wales/>

REJs³⁵, as well as the efforts of all the other hardworking EJs across the country, the ET system is in very good hands and that with the availability and use of new technology there will be an increased efficiency in furthering the overriding objective.

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³⁵ <https://www.judiciary.uk/announcement-type/appointments-and-retirements/page/2/>