

Employment Tribunal Rules: review by Mr Justice Underhill - response form

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The closing date for this consultation is **23 November 2012**

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Organisation (if applicable):

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The Law Society

The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Employment Law Committee ('the Committee'). The Committee is made up of senior and specialist employment lawyers from across England and Wales. Committee members provide advice and representation to employers and employees through practice in City and regional firms, local government, industry, trade unions and law centres. Some Committee members are fee-paid Employment Judges.

Our interest in employment law and practice is to influence policy changes to secure 'good law making', to provide clarity for employers and employees, and to avoid possible unintended consequences. We welcome this opportunity to provide comments on the Employment Tribunal Rules as reviewed by Mr Justice Underhill. Our comments reflect the concerns of solicitors with daily experience of putting employment law procedures into practice.

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?

☒ Yes

☐ No

☐ Not sure

The draft rules of procedure are a considerable improvement on the current rules and strike a good balance between the need for the rules to be clear and intelligible to tribunal participants (particularly lay parties) and providing an appropriate degree of rigour in terms of procedural clarity that enable Employment Judges to manage cases efficiently and robustly in accordance with the overriding objective of a fair hearing.

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?

A concern often expressed about the operation of employment tribunals nationally is a perceived lack of consistency. Opinions can be sharply divided as to whether this inconsistency is real or apparent, and indeed the extent of any such inconsistency. Presidential Guidance should to some extent alleviate these concerns by setting out the expectations that all participants should have. This should ensure that a common approach is adopted to the issues in respect of which concerns about inconsistency most often arise i.e. postponements, unavailability of witnesses or representatives, late disclosure etc.

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

☐ Yes

☒ No

☐ Not sure

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?

☒ Yes

☐ No

☐ Not sure

It is in the interests of justice, the parties and the efficient administration of justice that all relevant issues in a set of proceedings be addressed and disposed of as speedily as is consistent with the fair conduct of the proceedings. The proposed power for an employment judge to dismiss claims and/or responses or parts thereof following notification to the parties will facilitate the efficient disposal of weak claims, given the obligation to set out reasons for the judge's view and the ability of the relevant party to seek a

hearing. This process will hopefully weed out those claims which are weak or spurious or which have been commenced for tactical reasons.

The one concern that arises from this proposal is its potential to deter good claims brought by litigants in person who may not have articulated their claims effectively or eloquently, such that on paper they look weaker than they might actually be. These individuals may be deterred from seeking a hearing by receipt of a letter informing them that a judge considers their claim on paper to have no reasonable prospect of success.

The obligation to provide reasons for a decision, as well as the professionalism and expertise of Employment Judges, should address this concern. That said, Presidential Guidance could usefully expand on the requirements for Employment Judges in relation to this new sift and strike out power by:

- a. Requiring the judge to set out their view of the merits of the claim and/or response in sufficient detail to be intelligible.
- b. Making clear that the judge's view has only been reached on the available paperwork.
- c. Requiring the judge to inform litigants in person of the available sources of advice, to limit the risk of their being deterred from pursuing otherwise good claims or responses simply because the tribunal claim or response form has been completed poorly.
- d. Clarifying the right of any party to have a hearing save where struck out pursuant to the rules of procedure.

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

☒ Yes

☐ No

☐ Not sure

It is often only at a case management discussion that it becomes clear that there are preliminary issues which should be resolved ahead of a full hearing in the interests of justice and consistent with the overriding objective. This is especially the case where one or more of the parties is unrepresented. Combining pre-hearing reviews and case management discussions into a single preliminary hearing will not eradicate this risk.

That said, where preliminary issues are clear from the pleadings, to combine pre-hearing reviews and case management discussions into a single preliminary hearing makes considerable sense provided that:

- a. The preliminary issues to be addressed are identified and notified to the parties, or indeed raised by them, sufficiently far in advance of the hearing to enable adequate preparation.
- b. Adequate directions are given to the parties to enable them to prepare properly for the hearing and to ensure that the tribunal has the requisite evidence before it to consider and determine issues to be considered at the 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?

☒ Yes

☐ No

☐ Not sure

The draft rule will be of considerable assistance not only in reminding tribunals of the appropriateness and obligation to encourage and facilitate settlement but also to legitimise it in the eyes of the parties as a mandatory function of the tribunal. The only concern that more overt encouragement of settlement might risk increased perceptions in the eyes of the parties of bias or pre-judgment on the part of the tribunal, a concern which Employment Judges are well placed (and trained) to avoid.

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?

☒ Yes

☐ No

☐ Not sure

We do not anticipate there being any disadvantages to claims being automatically dismissed on withdrawal. If claimants wish in some way to preserve some aspect of their claim or the surrounding factual matrix for

adjudication in different proceedings, that is a matter which they can address in settlement discussions with the respondent.

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

☒ Yes

☐ No

☐ Not sure

The introduction of a specific rule confirming the existing power of Employment Judges to limit oral evidence and questioning of witnesses and submissions in the interests of better case management will be of considerable value, not so much to achieve consistency but rather clearly to establish this power to the parties beyond challenge. As is already the case, this is a power which will need to be exercised judicially. Again, this is an area where Presidential Guidance may be of assistance in setting out suitable issues for consideration in the interests of ensuring consistency.

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

☒ Yes

☐ No

☐ Not sure

We have some concerns about the operation of rule 55(4) and the position of 'persons with a legitimate interest' (i.e. the press).

The present rule makes no explicit provision for the press to make representations before a privacy or restricted reporting order is made. Given that such an order may be made of the tribunal's own motion it would not be right for the press to have an entitlement to make representations before an order is made, but it would seem sensible to have something similar to the current rule 50(7), permitting applications from the press to be made before an order is made. This is probably implicit in the current rule 55(4) but there is no explicit procedure for this.

Also, there is no mechanism in the current rule 55(4) for someone who has had the opportunity to make representations prior to the order being made to later make an application to revoke the order. Whilst repeated applications from the same person should not be allowed, there may need to be flexibility to hear applications to revoke an order if, for instance, the circumstances leading to the making of the original order have changed or no longer apply.

Applications for revocation of an order need to be made in writing under rule 55(4), but in practice this issue is most likely to arise when there are members of the press actually present at the tribunal hearing, so it may be more efficient and appropriate, at the tribunal's discretion, to permit oral applications to be made so that they can be dealt with immediately and in public (subject, of course, to the terms of any privacy or restricted reporting order).

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

☒ Yes

☐ No

☐ Not sure

As noted in the consultation, in practice lead claims are often used as a matter of case management. Providing a formal endorsement of this practice and mechanism for it in the new rules seems sensible.

The principal impact, and difficulty, we can see with such an approach is how it is to operate when multiple claimants have different representatives. In the multiple claims envisaged by this rule it is not unusual for there to be sets of claimants represented by firms instructed by trade unions, and other claimants represented by no-win-no-fee or other independent legal firms. There may be difficult questions to be dealt with as to whether one single lead claimant, represented by one firm, should proceed, and, if so, how the other firm can look after the interests of its clients.

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?

☒ Yes

☐ No

☐ Not sure

We have some other general observations on this suggested rule:

- a. In rule 58(2) the reasons are required to be signed by the employment judge. It may give more flexibility for the future if this requirement for authentication were more general, so as to allow for electronic signature or other means of authentication (and similarly in rule 57).
- b. In rule 58(3), on the current wording it is not clear what is to happen if the Employment Judge does not make this announcement. The most likely interpretation seems to be that if the announcement is not made then a party can ask for written reasons at any time thereafter without any time limit, which seems undesirable. On a practical level, if the parties are asked there and then if they want written reasons it seems to increase the likelihood that they will request written reasons, which might add substantially to the tribunals' administrative and judicial work.
- c. In rule 58(4), if the value of the claim is intended to be something that is taken into account in proportionality, it would be useful to add this so that we have 'significance of the issue and compensation or other remedy claimed and in appropriate cases.'

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)?

☒ Yes

☐ No

☐ Not sure

We have concerns about the removal of the £20,000 cap on awards of costs:

- a. The proposed rule envisages that an Employment Judge would assess costs using the principles set out in the Civil Procedure Rules, but Employment Judges would not necessarily have experience of operating those rules. In addition, the Civil Procedure Rules have a sophisticated procedure dealing with the form of a bill of costs, service of points of dispute and the issuing of default costs certificates, which have no equivalent under the employment tribunal rules. A lot of this could no doubt be covered by an experienced judge issuing directions, but it is difficult to see such significant matters as default judgments on the amount of costs being dealt with simply through directions rather than being formally built into the rules.
- b. In general it seems likely that Employment Judges will seldom carry out detailed assessments of costs, in contrast with specialist judges in the court, so they will not necessarily build up the degree of experience and knowledge on detailed assessment that is available in the ordinary courts.

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

☒ Yes

☐ No

☐ Not sure

The Society would like to see the rules extended to allow costs to be awarded on the basis of 'oppressive' conduct of the litigation by either party.

There are two scenarios which this extension would address. First, the litigant in person who constantly bombards their opponent with unnecessary correspondence and applications, thus increasing costs. Second, the heavily represented client who attempts to intimidate an unrepresented opponent with complicated and unnecessary demands or threats. Both might arguably be characterised as unreasonable conduct under the current rules, but they could be dealt with as 'oppressive conduct' under the new costs rules.

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

In the same manner as preparation time orders.

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)?

☐ Yes

☒ No

☐ Not sure

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?

☒ Yes

☐ No

☐ Not sure

The use of deposit orders is an effective means of discouraging and halting the more speculative elements of claims. They should be used more often and there should be an ability to make such an order in relation to particular allegations within a claim.

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

The Society has the following comments on the ET1:

- a) Question 6.3 in relation to working out or being paid for a period of notice should include '...did you work (or were you paid for) a period of notice or part of period of notice?'
- b) What is the reason for the gap under question 6.4. Was it to provide details of the pension scheme and level of contributions? If so, that should be stated.
- c) The heading of question 7 should include 'the' before 'respondent'.
- d) Question 7.3 should not be limited to asking for details of what is being 'earned' in new employment but should specifically ask for details of any benefits being received including pension contributions.
- e) Question 8.1 has a generic question asking the claimant if they are seeking 'any other remedy or relief' and question 10 also encourages claimants to state if they are seeking any other remedy and then cross refers to the Guidance? Whilst there is a reference to the Guidance it is noted that the current Employment Tribunal Service Guidance (form T420) does not include guidance as to what a Tribunal can order by way of a remedy and with such a generic question it is anticipated that claimants may misunderstand what a Tribunal is able to order by way of a 'remedy'. The remedy sought should be listed to enable the claimant to tick the relevant box.

- f) Question 9 of the ET1 omits any reference to the race or religion or belief.
- g) The boxes for 'ticking' are drafted differently for each of the protected characteristics at question 9.1 and there should be continuity of approach.
- h) There is a box under the list of protected characteristics which states 'I am claiming' but it is not clear what it is intended the claimant should include here.
- i) Under the section in 9.1 which states 'I am owed' the column to the left should make it clear if it is asking for the amount being claimed under each heading or the number of days holiday etc.
- j) In relation to question 11 we repeat our comments made at 21 (c) below. We have a very real concern that injustice may be caused if the intention is to send information to a relevant regulator before the matter has been determined by a Tribunal and the nature of any wrongful act etc is identified having heard the evidence and the relevant regulator is agreed by the parties. We note on the form that the claimant is not being asked who the relevant regulator is: in the circumstances, is this a decision that would be made by the Tribunal? It is also not clear when the form or the information on it will be sent to the regulator, and this should be clear to both parties.

We make the following comments on the ET3:

- k) Again, section 4 in relation to notice should include the possibility that the claimant worked or was paid for part of their notice.
- l) The respondent should have an opportunity to object to any reference being made to a relevant regulator and it should be given the opportunity to state why and to confirm who or what is the relevant regulator in any particular circumstances.

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 Court and Enforcement Act?

☐ Yes

☐ No

☒ Not sure

We understand that BIS are currently consulting stakeholders on the use of legal officers in employment tribunals. We will comment on this when the formal consultation is published.

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

The EAT rules on privacy and restricted reporting orders are currently quite different from the tribunal rules, and that difference will only be magnified when the new tribunal rules come in.

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?

☐ Yes

☐ No

☐ Not sure

Currently awards are payable from day one, so the reason for changing this to a later date is not clear. If it is driven by the fact that payment is not received promptly by the claimant, delaying the date of payment is unlikely to make a difference. It is unlikely that the reason for late payment is that respondents were unclear when the judgment sum had to be paid. It is more likely that the main reasons for non payment are:

- a. intentional disobedience of the Tribunal's order to put the claimant to the bother and expense of enforcement;
- b. that the respondent is reviewing whether or not it will lodge an appeal and would therefore prefer to retain funds if the appeal is successful rather than having to recover monies already paid to a claimant in those circumstances;
- c. the respondent is waiting to see if the claimant will lodge an appeal on any element of the claim that has been lost, in which event, the respondent may cross appeal and therefore decides to withhold payment until the question of any appeal has been resolved;
- d. to simply keep the claimant out of funds for as long as possible and before interest starts to run.

Delaying the payment date by 14 days is not going to change the behaviours listed at 19 (a) to 19 (c) above.

Changing the date on which interest should run would change the behaviours identified at 19 (d) above, but it is anticipated that it would have little impact on the main reasons for late payment as detailed at 19 (a) to 19 (c).

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?

See Question 19.

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

Comments:

- a) There is no provision within the rules that provides for the mechanism by which matters will be dealt with and the discretions that will be exercised where a claimant is unwell and/or lacks mental capacity under the Mental Capacity Act 2005 to the extent that a stay of proceedings/time limits or the appointment of litigation friend is required. It is submitted that some guidance should be given as to how a Tribunal might proceed in those circumstances as it is under the Civil Procedure Rules, Rule 21.
- b) Rule 4(2) referring to Bank Holidays under the Banking and Financial Dealings Act 1971 should be clarified to include common law holidays of New Years Day, Good Friday and Christmas Day;
- c) We note the provisions of Rule 13 which provides that 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. There is scope for abuse by claimants who may lodge claims asserting protected disclosures which are not on final analysis made out. The respondent should have an opportunity to make representations as to such a referral to a regulator and as to the identify of the relevant regulator which may not be obvious in all cases. The Tribunal should exercise its judicial discretion and should not refer automatically upon receipt of the claim and not without representations by respondents.
- d) Rule 20 deals with default judgments where no response has been received or the response received has been rejected and there has not been an application for an extension of time. Rule 20(b) provides that after any default judgment the respondent cannot participate in any Hearing. It seems to us that there may be circumstances in which a respondent may not be able to apply to set aside a default judgment on liability because the merits would not warrant it but it may have substantive submissions to make in relation to remedy which it should be entitled to make. For example, it may be that a loss relating to a final salary pension scheme is being claimed but there is clear evidence from the respondent that such a scheme was to be closed to all existing members across the business in any event. The respondent should not be barred from taking part in a remedy hearing in such circumstances. It is appreciated that there is a provision which states save 'to the extent permitted by the Employment Judge', but it seems inequitable that the respondent should not have a right to make submissions and take part in a remedies hearing alone.
- e) Rule 33 provides that when a party writes to the Tribunal, they send a copy of that communication to all other parties. The reason for the

carve out for communication in respect of rule 28 however is not clear. Rule 28 relates to the ability of the Tribunal to order any person to attend to give evidence and produce documents at a Hearing. To carve out such a provision means that any application by a claimant for example that any one or more of the respondent's officers or employees should attend the hearing could not be challenged by the respondent. This is inequitable and is open to abuse by claimants.

- f) Rule 35 provides that unless orders are limited to a claim or response being dismissed. In our view, there should be a wider ability to give Unless Orders for example, where a claimant is refusing to provide certain information about loss, for example, details of pension arrangements with a new employer. In those circumstances, rather than striking out the whole claim, it would be prudent for the Tribunal to be able to make an unless order that unless such information is provided, they be debarred from claiming any compensation arising as a result of the loss of the pension with the respondent. This would ensure compliance with rules and procedures but would not be so draconian as to strike out claims altogether.
- g) Rule 42 deals with when preliminary hearings will be in public but the reason for the carve out of issues identified under 39(d) (the making of a deposit order) is unclear.
- h) We presume that the rules concerning the reconsideration of decisions, rules 63 - 65, include Tribunal Judgments and Orders etc and applies across the Board but this should be stated expressly.
- i) Under rule 70(2) the Tribunal is obliged to make a Costs Order or preparation time Order against a respondent in the circumstances listed. It is presumed that this is meant simply to apply to the costs or preparation time in respect of that adjournment, not in respect of costs or preparation time in relation to the whole of the claim to that date and this should be expressly stated.
- j) Under rule 71 a party can apply for a Costs Order or preparation time Order but it does not seem clear that the other side to that application can request a hearing. This should be expressly stated.
- k) The definition of representative under rule 76(2) should clarify that it includes a representative acting under a contingency as well as a conditional fee arrangement.

Do you have any other comments that might aid the consultation process as a whole? Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☐

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒ Yes

☐ No

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