



EMPLOYMENT TRIBUNALS, OPEN JUSTICE AND COVID-19

At the time of writing the Covid-19 pandemic has effectively called a halt to the operation of Employment Tribunals throughout the UK. On 19 March 2020 the Presidents of the Employment Tribunals of England & Wales and Scotland issued a Direction providing that from Monday 23 March 2020 all in person hearings (hearings where the parties are expected to be in attendance at tribunal hearing centres) will be converted to case management hearings by telephone or other electronic means. The writer is aware from personal experience that in the week prior to the direction being issued courts and employment tribunals were taking matters into their own hands and adjourning hearings or converting them to telephone hearings on the grounds of the need to ensure social distancing or simply because of the pressures on judicial resources caused by the pandemic. On 24 March 2020 an updated Presidential Direction was issued providing that there will be no in person hearings before 26 June 2020, although the Direction states that the tribunals will continue to deal with applications. The updated Direction stated that the position will be reviewed on 29 April 2020 and 29 May 2020.

Furthermore Central London Employment Tribunal is not doing hearings of any kind at the time of writing, It is reported that telephone hearings might re-commence from 30 March 2020.

Finally HMCTS has just announced that some Employment Tribunals will remain open for “essential face to face hearings.” The announcement does not make clear when it will be “essential” that a hearing is conducted in person. It is clear that a very significant number of hearings will be conducted remotely whenever possible.

The Employment Tribunals Rules of Procedure 2013 under Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 already make provision for hearings to take place other than through attendance at a tribunal hearing centre. Rule 46 provides:

“46 Hearings by electronic communications

A hearing may be conducted in whole or in part, by use of electronic communication (including by telephone) provided that the Tribunal considers that it would be just and equitable to do so and provided that the parties and members of the public attending the hearing are able to hear what the Tribunal hears and see any witness as seen by the Tribunal.”

Presidential Guidance to Tribunals and Tribunal users issued on 18 March 2020 gave strong encouragement to the use of Rule 46, although in reality a number of the provisions of the Guidance appear to have been overtaken by events.

There appear to be two challenges to overcome if hearings are conducted by use of electronic communication. It is imperative that practitioners address their mind to these challenges. The first is the technical challenge of conducting a hearing using telephone or video technology. The second is the challenge of ensuring that such a hearing is “in public”, such that the provisions of Rule 46 are satisfied.

Prior to the current crisis the EAT and Court of Appeal have taken a fairly strict approach when determining whether an employment tribunal hearing was a public hearing. In **Storer v British Gas plc [2000] IRLR 495** the Court of Appeal held, in relation to the requirement that a hearing be held in public under the rules of procedure then in force, that the obligation to sit in public was fundamental to the function of an employment tribunal. In **Storer** a hearing to determine whether an unfair dismissal complaint had been presented in time was held, due to a lack of available hearing rooms, in the office of the regional chairman, which was behind a locked door and separate from the area of the tribunal office which the public had access to. The Court

of Appeal held that it was irrelevant that no member of the public had in fact sought to attend the hearing and had been prevented from doing this, or that there had in fact been no chance of a member of the public dropping in to see how the hearing was conducted. The fact that the hearing was conducted in private, behind a locked door, was sufficient to render the hearing unlawful.

The same principle was applied in **East of England Ambulance Service v Sanders [2015] IRLR 277**. The EAT held that the fact that an employment tribunal had carried out its own research on the internet when determining an issue meant that the hearing had not taken place in public, as the material researched had not been made available at the hearing.

In normal circumstances the requirement that the tribunal hearing conducted by telephone or other means of electronic communication be conducted in public would probably be satisfied if the case was included in the hearing list displayed at the tribunal office and a loudspeaker or video monitor was set up in a hearing room to broadcast the hearing, so that any member of the public could, if they wished, attend the tribunal office and, having been provided with copies of any written witness statements, sit and listen to or watch the hearing (although the Presidential Guidance referred to above noted that not all employment tribunal offices have ready access to video conferencing equipment). However, in the circumstances created by the Covid-19 pandemic and in particular the rules enforcing social distancing, it may be very difficult or even impossible to make such arrangements.

Practice Direction 51Y, which has just been issued, and which relates to hearings conducted under the Civil Procedure Rules, may provide some assistance. Practice Direction 51Y states that, during the period in which the Coronavirus Act 2020 has effect:

“2 During the period in which this Direction is in force, where the court directs that proceedings are to be conducted wholly as video or audio proceedings and it is not practicable for the hearings to be broadcast in court buildings, the court may direct that the hearing must take place in private where it is necessary to do so in order to secure the proper administration of justice.

“3 Where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings. In such circumstances it will not be necessary to make an order under paragraph 2 and such an order may not be made.

“4 Any hearing held in private under paragraph 2 must be recorded, where that is practicable, in a manner directed by the court. Where authorised under s.32 of the Crime and Courts Act 2013 or s.85A of the Courts Act 2003 (as inserted by the Coronavirus Act 2020), the court may direct the hearing to be video recorded, otherwise the hearing must be audio recorded. On the application of any person, any recording so made is to be accessed in a court building, with the consent of the court.”

As such it is clear that if contested hearings are going to take place at employment tribunals during the Covid-19 pandemic the Tribunal Service and litigants will need to give urgent consideration not only to the technical arrangements which will need to be made for conducting such hearings remotely, which in themselves may be challenging for Judges and panel members, parties, their representatives and witnesses, but also to the arrangements that will have to be made to ensure that such hearings are in public. Practice Direction 51Y points towards the ways this may be achieved.

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