



Employment Tribunals (England and Wales)

Presidential Guidance on remote and in-person hearings

Background

1. Rule 7 of the Employment Tribunals Rules of Procedure (“the Rules”), as set out in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, allows the President to publish guidance as to matters of practice and as to how the powers conferred by the Rules may be exercised. This guidance concerns the fixing and conduct of remote and in-person hearings in the Employment Tribunals in England and Wales. Employment Tribunals must have regard to this guidance, but they are not bound by it.
2. The Covid-19 pandemic has seriously disrupted the operational capabilities of the Employment Tribunals. It has increased the backlog of cases awaiting a decision, while the need for distancing, to minimise infection risk, has reduced the physical estate available for in-person hearings. Moreover, the winding down of the Coronavirus Job Retention Scheme is expected to lead to an increase in the number of claims that are presented.
3. Remote participation in a hearing may, in some cases, enhance access to justice. As a matter of principle, however, where a case before the Employment Tribunals involves disputed evidence and there is a need for parties and their witnesses to be asked questions, a hearing held in person is usually the best way to experience the delivery of justice.
4. The consequence of the challenges presented by the Covid-19 pandemic is that many cases will experience significant delay in being heard. To minimise that delay, and where it is consistent with fairness and justice to do so, there is a temporary need for the Employment Tribunals to conduct remote hearings in greater numbers, and to do so in respect of cases that, in ordinary circumstances, would have been conducted on a face-to-face basis.
5. The Presidential Practice Direction on remote hearings and open justice dated 14 September 2020 and this accompanying guidance, which should be read together, are a response to the challenges presented by the Covid-19 pandemic. They will be reviewed periodically and, if appropriate, updated.

6. In this guidance, “participant”, “wholly remote”, “partly remote”, “in person” and “tribunal” have the same meaning as given to them in the Practice Direction on remote hearings and open justice.

The Rules

7. Rule 3 provides that a tribunal shall seek to give effect to the overriding objective in interpreting or exercising its powers. The overriding objective is to deal with cases fairly and justly. This 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.
8. By rule 41, the tribunal may regulate its own procedure and it shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective.
9. By rule 46, 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.
10. In addition, rules 53 and 57 respectively set out the scope of preliminary hearings and final hearings. The Rules also contemplate other forms of hearing, such as in relation to the determination of remedy, applications for costs and applications for reconsideration.

Format of hearing – options

11. There are three options for the format of an Employment Tribunal hearing: a wholly remote hearing; a partly remote hearing; or an in-person hearing¹. Attached to this guidance is a table that visualises some of the permutations that operate in respect of partly remote hearings, including in respect of public access.
12. Furthermore, the options for a remote hearing include holding it by telephone or on an audio or audio-visual platform that participants join using a personal computer, laptop, tablet or smartphone. The preferred audio platform is BT MeetMe. The preferred audio-visual platform is the HMCTS Cloud Video Platform (“CVP”)².
13. Many preliminary hearings arranged under rule 53(1)(a) to deal with case management already take place by telephone or other audio platform; indeed, several Employment Tribunal regions in England and Wales list such hearings by default in that format. However, before the Covid-19 pandemic, it was rare for other sorts of hearing to be conducted in that manner; preliminary hearings of the type described at rules 53(1)(b) to 53(1)(e), final hearings of the type described at

¹ An explanation of the people who may be present at an Employment Tribunal hearing is available here: <https://www.gov.uk/guidance/hmcts-whos-who-employment-tribunal>. Guidance on hearings for parties is available here: <https://www.gov.uk/government/publications/employment-tribunals-hearing-types-t425>.

² Guidance on these platforms is available here (<https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>) and here (<https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>).

rule 57 and other hearings contemplated by the Rules all tended to be held in person. As noted at paragraph 4 above, there is currently an increased need to conduct all types of hearing on a wholly or partly remote basis, where consistent with fairness and justice to do so.

Format of hearing – a judicial decision

14. The decision on the format of a hearing (that is, whether to hold it on a wholly remote basis, a partly remote basis or in person, or a combination of these) is a judicial decision. The tribunal shall seek to give effect to the overriding objective when making this decision. The decision may be taken by the tribunal when first listing the case for a hearing upon receipt of the claim, or following an initial consideration under rule 26 upon receipt of the response, or during a preliminary hearing arranged for case management purposes under rule 53(1)(a), or at any stage in response to correspondence received from the parties, or when acting on its own initiative.
15. The parties may express their views on the appropriate format for the hearing and, as with any case management decision, they may apply to the tribunal under rule 29 for any judicial decision about the format of the hearing to be varied or set aside. They can express their views or make such applications in correspondence with the tribunal, or at a preliminary hearing arranged under rule 53(1)(a), or in a renewed application at the outset of a final hearing that is using a format to which they object. In addition, in parallel with this guidance, the prescribed ET1 claim form and ET3 response form will be amended so that they provide an early opportunity for the parties to indicate whether they have the capability to participate in a hearing using an audio-visual platform.

Format of hearing – relevant factors

16. Certain general factors influence the judicial decision on the format of the hearing because they relate to the *feasibility* of holding a remote hearing. Such factors will vary between Employment Tribunal regions in England and Wales, depending on their location and resources. They include:
 - 16.1 The availability of enough space in safe, clean and risk-assessed venues, having regard to distancing measures required to ensure public safety;
 - 16.2 Whether safe travel to the Employment Tribunal venue is possible, especially for those using public transport;
 - 16.3 The availability of suitable hardware and software for use by the tribunal in the conduct of remote hearings; and
 - 16.4 The availability of HMCTS staff to support remote hearings.
17. Other, more specific, factors will vary from case to case. They need not lead to an inevitable conclusion one way or the other, but they are for the tribunal to weigh in the balance when deciding the format of the hearing. They include:
 - 17.1 The length of the delay that will likely result if the hearing of the case is to be held in person rather than remotely;

- 17.2 The personal circumstances, disability or vulnerability of any participant, including whether a litigation friend or interpreter is required. In some cases, they will mean that an in-person hearing (or a partly remote hearing with this participant in attendance at the venue) may be fairer because it allows for more effective participation. In other cases, for example because of clinical vulnerability or shielding, or because of the risk associated with using public transport to travel to the venue, remote participation may be fairer;
 - 17.3 Whether the parties are legally represented, which may favour holding the hearing remotely;
 - 17.4 The ability of any participant to engage meaningfully with a remote hearing, which includes access to and familiarity with the necessary technology; and
 - 17.5 Whether the nature of the disputed evidence is such that fairness and justice require it to be evaluated by the tribunal in a face-to-face environment.
18. Further guidance and assistance can be found in the document “Good practice for remote hearings”, produced by the editors of the Equal Treatment Bench Book³.

Orders and directions for a remote hearing using an audio-visual platform

19. The responsibilities of the parties ahead of a remote hearing, when using an audio-visual platform, are set out below. These may be incorporated by reference into any case management orders and directions produced by the tribunal (but the tribunal may vary or supplement them as it sees fit). This is not an exhaustive list:
- 19.1 Parties should communicate with any witnesses they intend calling to give evidence remotely, to ensure that they can participate effectively in a remote hearing (and, if a party is not satisfied that a witness will be able to participate effectively in a remote hearing, they may make the appropriate application to the tribunal);
 - 19.2 Parties should ensure that any of their witnesses giving evidence remotely are aware of the following:
 - (a) The instructions for logging on to the chosen platform, as provided by HMCTS, including any access code or PIN;
 - (b) The need to use a suitable device (with camera, speaker and microphone) and a stable internet connection when giving their evidence remotely;
 - (c) The need to use this device at the allotted time and without interruption in an environment that is suitable for the provision of remote evidence;

³ <https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf>.

- (d) That, just as when evidence is given during an in-person hearing, they must not have any person guiding or influencing their answers to questions;
 - (e) That they remain under oath during any adjournment and therefore unable to discuss their evidence with any other person (unless the tribunal permits them to do so); and
 - (f) That it is a criminal offence to record or broadcast a hearing without the permission of the tribunal;
- 19.3 Parties should direct their witnesses towards guidance on how to join an Employment Tribunal hearing held via an audio-visual platform⁴;
- 19.4 Parties should ensure that witnesses have available to them, at the time of giving their evidence, the form of oath or affirmation that each witness wishes to take and, if they wish to take an oath on a Holy Book, to advise them that they must provide their own copy. (It is not necessary for witnesses to have a Holy Book in order to take a religious oath, provided they regard themselves as bound by the oath. If they do not wish to take a religious oath without a Holy Book or other sacred object and have none in their possession, they may instead affirm);
- 19.5 Parties should ensure that each witness has available to them a copy of their witness statement as exchanged and submitted to the tribunal, a copy of all other witness statements as exchanged and submitted to the tribunal and a copy of the hearing bundle (if not in PDF form, in a version that precisely reflects that provided to the tribunal);
- 19.6 If witness statements and the bundle are going to be sent to witnesses in electronic form, parties should ensure that they will be able to view them simultaneously and conveniently and that they have the ability to read them and turn to specific pages when directed to do so;
- 19.7 If witness statements and the bundle are going to be sent to witnesses in paper or printed form, parties should ensure that enough time passes between receipt of the documents and the need for them to be physically handled (see paragraphs 22.1 and 29 below); and
- 19.8 Parties should maintain a means of immediate contact with their witnesses (such as email address, telephone number or instant messaging) on the days and times when they are to give their evidence.
20. The responsibilities at paragraph 19 above apply equally to any representative instructed in the case, both in respect of the party instructing them and any witnesses that may be called.

⁴ <https://www.gov.uk/government/publications/how-to-join-a-cloud-video-platform-cvp-hearing/how-to-join-cloud-video-platform-cvp-for-a-video-hearing>. Scroll down for a short video tutorial on how to join a civil, family or tribunal hearing using CVP.

21. Any representative instructed in the case should set up a mechanism for immediate contact with the party instructing them, so that instructions can be given swiftly and conveniently.

Electronic documents or paper/printed documents

22. Electronic documents are preferred to paper or printed documents for two reasons:
 - 22.1 They make Employment Tribunal hearings safer. This is because electronic documents do not carry infection risk. In contrast, paper or printed documents must be physically handled by different people; the measures to reduce risk include building in time for the documents to be safely handled between being touched, handling with single-use gloves and/or washing hands after contact. As for the time that is needed between touches for safe handling, current advice is that, where cardboard or paper has been handled by a person with Covid-19, the risk of infection is negligible after 24 hours.
 - 22.2 They support the operation of remote hearings. This is because HMCTS can quickly and easily forward electronic documents to members of the tribunal participating remotely. Such flexibility assists the Employment Tribunals because the judges and members assigned to cases are subject to last-minute changes as cases are withdrawn or settle late in the day. In contrast, HMCTS does not have the ability to produce multiple copies of bundles for use by the tribunal or the participants in the hearing.
23. However, many of the system's unrepresented users are unfamiliar with electronic documents. Some users, judges and members lack the software and hardware equipment to read them effectively on screen. Until such time as electronic documents become the norm, the guidance below will support the Employment Tribunals in conducting hearings safely, efficiently and flexibly.

Electronic documents

24. Where at least one of the parties in a remote hearing is professionally represented, and unless the tribunal orders otherwise, the witness statements and the bundle must be supplied to the tribunal in PDF form. The following principles apply:
 - 24.1 Pages containing images of text should have been subjected to optical character recognition (this is the process by which images of text are turned into text that can be searched and highlighted);
 - 24.2 An index or table of contents should be prepared (ideally with entries hyperlinked to the indexed document);
 - 24.3 Pages should appear the right way up in portrait mode. If an original document is in landscape, it should be inserted so that it can be read with a 90-degree rotation clockwise;
 - 24.4 Pages must be numbered so that, including the index, they correspond to the automated PDF numbering system;

- 24.5 All significant documents (such as any letter of dismissal) and all sections of the electronic bundle should be bookmarked for ease of navigation, with an appropriate description as the bookmark;
 - 24.6 If documents are to be added to an electronic bundle after it has been delivered to the tribunal or after the hearing has started, the tribunal should be consulted on how it should be incorporated. This is because the members of the tribunal may already have started to mark up the electronic bundle provided;
 - 24.7 If a PDF bundle is around 20MB, it will probably be too large to send to the tribunal as a single email attachment. If so, parties should contact the relevant regional office of the Employment Tribunals to ask what alternative method of delivery (such as a cloud-based file-storing or file-sharing service) is available⁵. It is not helpful for the tribunal to receive a series of separate emails each attaching different portions of the bundle; and
 - 24.8 Where a PDF bundle (or a link to a PDF bundle) is transmitted by email, the subject line should include the case number, the shortest comprehensible version of the case name and the hearing date. If it is for use in a remote hearing, the phrase “remote hearing” should be included in the subject line.
25. HMCTS will forward electronic documents to any member of the tribunal who is participating remotely and who has the software and hardware equipment needed to read them effectively on screen; the numbers with that equipment will increase over time. Where any member of the tribunal participating remotely currently lacks that equipment, HMCTS will instead forward paper or printed copies to them. To facilitate this, and unless the tribunal orders otherwise, represented parties should do the following:
- 25.1 They should ensure that PDF versions of the witness statements and the bundle are accompanied by three identical printed copies for a case before a full panel and one identical printed copy for a case before an Employment Judge sitting alone; and
 - 25.2 The electronic documents and the printed copies should be sent so that they are received by the tribunal one week before the start of the hearing.
26. It is recognised that many unrepresented parties do not have the capacity to create electronic bundles or to subject such bundles to optical character recognition or bookmarking. That is why the responsibilities at paragraphs 24 and 25 above are for represented parties (and, where both parties are represented, they should co-operate to ensure compliance). However, even where all parties are unrepresented, the tribunal will be better able to conduct the hearing safely, efficiently and flexibly if the parties can at least try to provide scans of their documents.
27. A professional representative should liaise with an unrepresented opponent to ensure that the witness statements and the bundle are provided to them in an accessible form. If the unrepresented party does not have the facility to read them

⁵ It may be possible to share files using links to a Dropbox, One Drive or Google Drive account. A secure document upload centre is being developed for use by the Employment Tribunals (it is already in use in some regions) and further information will be provided in due course.

effectively on screen during a hearing, this may mean providing them with paper or printed copies that precisely reflect those provided to the tribunal, and subject to the need for safe handling.

28. The next section applies where it is not practicable to use electronic documents or because the tribunal has ordered that paper or printed documents are to be used.

Paper and printed documents

29. To reduce the risk of infection during the pandemic, there is a need to avoid the double-handling of paper or printed documents during a partly remote or in-person hearing. Where double-handling is necessary outside a hearing, enough time should pass between contact for safe handling; 24 hours is recommended.
30. As a result, the following principles apply:
 - 30.1 Unless arrangements have been made for each participant to be separately gloved, the parties should co-operate to ensure that a separate set of documents is available for each party or witness in attendance;
 - 30.2 Oaths or affirmation cards, whether laminated or not, should not be shared. The oath or affirmation will instead be read out and then repeated;
 - 30.3 Any person who wishes to take a religious oath on the Holy Book provided for using in the hearing room by HMCTS will be asked respectfully not to touch it. If they wish to take a religious oath by touching a Holy Book, they may bring their own to the hearing. If they do not wish to take a religious oath without touching a Holy Book and they have not brought their own, they may instead affirm;
 - 30.4 The tribunal will only accept paper or printed documents handed up during a partly remote or in-person hearing where arrangements can reasonably be made for safe handling, such as wearing single-use gloves;
 - 30.5 Where such arrangements cannot reasonably be made, it will be open to the tribunal to refuse to accept the paper or printed documents that the party wishes to hand up;
 - 30.6 Where paper or printed documents are to be provided to any other party or witness for use in a hearing, they should be sent to them so that a full 24 hours can pass to allow for safe handling; and
 - 30.7 Where paper or printed documents are to be provided to the tribunal for use in a hearing, they should be sent to the tribunal so that they are received one week before the start of the hearing.

Other safety measures

31. Any participant should remain at home, rather than attend an Employment Tribunal venue, if they develop any Covid-19 symptoms: a high temperature, a new continuous cough or a loss of smell or taste. Continuing advice is available on the

website of Public Health England⁶ and Public Health Wales⁷. The same applies where the symptoms are developed by someone with whom they live, although it may still be possible for them to participate in the hearing remotely.

32. HMCTS advises that face coverings should be worn in the public areas of courts and tribunals⁸. It is a matter for the tribunal's discretion whether to request that a witness removes a face covering when giving oral evidence⁹.
33. During an in-person hearing, or a hearing where one or more of the parties is present in the Employment Tribunal venue, the tribunal will provide regular breaks for hand washing purposes.
34. Further safety measures will be set out in risk assessments for the venue where the hearing is taking place. HMCTS will provide a copy of the risk assessment to any participant who asks to see it.

Recording and broadcasting

35. No party or member of the press or public may record or broadcast a hearing, whether a remote hearing or an in-person hearing, without the permission of the tribunal. To do so without permission would be a criminal offence; see section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981.

Judicial mediations

36. This guidance applies equally to the conduct of judicial mediations, in that they may be done on a wholly remote, partly remote or in-person basis; where done on a partly remote or in-person basis, safe distancing will be required; parties should maintain a means of immediate contact with those participating remotely in the mediation; and position statements, supporting documents and draft settlement agreements should be provided in electronic form to minimise infection risk.



Judge Barry Clarke
President

Dated: 14 September 2020

⁶ <https://www.gov.uk/government/organisations/public-health-england>.

⁷ <https://phw.nhs.wales/topics/latest-information-on-novel-coronavirus-covid-19>.

⁸ Along with other guidance available here: <https://www.gov.uk/guidance/keeping-court-and-tribunal-buildings-safe-secure-and-clean>. Note that advice may differ as between England and Wales.

⁹ Some assistance may be derived from what the Equal Treatment Bench Book ([here](#)) says about those who wish to wear a veil when giving oral evidence: “*Science and a growing understanding indicates the difficulties with, and the possible fallibility of, evaluation of credibility from appearance and demeanour in the somewhat artificial and sometimes stressful circumstances of the courtroom. Scepticism about the supposed judicial capacity in deciding credibility from the appearance and demeanour of a witness is not new.*”

Remote and in-person hearings in the Employment Tribunals (England and Wales): a visualisation

Status of hearing ↓	Participants in the hearing: some permutations										How does a member of the press or public observe a hearing held in public?	
	Clerk	Judge	Non-legal member 1	Non-legal member 2	Rep 1	Rep 2	Party 1	Party 2	Witness 1	Witness 2		
Wholly remote	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	By observing remotely (details available on the cause lists)
Partly remote	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	
	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗	✗	
	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗	
	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗	✗	
	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	✗	
	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	✗	
	✓	✓	✓	✓	✓	✓	✓	✗	✗	✗	✗	
	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	
Wholly in-person	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	By attending the venue An option to join remotely may be available – an application must be made to the tribunal

✓ = physically present in an Employment Tribunal venue

✗ = joining remotely