



TRIBUNALS
JUDICIARY



Employment Tribunals
(Scotland)

A road map for 2021-22

On 1 June 2020, we issued a joint “road map” for listing and hearing cases in the Employment Tribunals between June and December 2020. This was attached to an updated document answering frequently asked questions arising from the early months of the pandemic and our first foray into the world of video hearings.

A year after the commencement of the first lockdown, and with the prospect of a relaxation of Covid-19 restrictions over the spring and summer of 2021, we thought that our users would welcome a new “road map” from us. What follows is our shared vision for the 2021-22 financial year.

The pandemic has acted as both a disruptor and an accelerant. Each effect must be acknowledged. As we have surveyed its impact on our jurisdiction over the last year, we have seen a sharp increase in our outstanding caseload and lengthening waiting times for hearings (especially in London and the South East). Some of the new cases have inevitably arisen from the way that the pandemic has impacted working life since March 2020. But it is also right to acknowledge the distance we have travelled, with new ways of working bringing unexpected efficiencies and, in some cases, enhancing access to justice.

The challenge, as we speak of a “return to normal”, is to reflect on whether “normal” is the right destination point. In some cases, it will be. It remains our view that, in general terms, justice is best experienced in a face-to-face environment. In other cases, it will not be. In respect of some of the innovations of the last year, we should not turn back. We must reflect on what we have learned and ensure that we keep hold of the good. The future will involve more, not less, use of technology. We wish technology to be the servant of justice, not its master.

A word of thanks

We offer our heartfelt thanks to those who have supported the ongoing administration of workplace justice during a year of unprecedented challenge.

We pay special tribute to our Employment Judges and non-legal members who have shown impressive resilience and flexibility in adapting to new ways of working; to HMCTS colleagues who have shown themselves to be “key” workers in every sense; to our professional users who have provided free public guidance on the impact of coronavirus on the workplace, reinforcing the rule of law; and to

our unrepresented users who have been patient with us as we have sought, not always successfully, to maintain our operational effectiveness.

Recovery

We can share with you some of the steps that have been taken, and plans that are underway, to rebuild our operational resilience.

As we write, a new case management software system for the Employment Tribunals is being rolled out. It is a large undertaking, which has taken longer than we had hoped, but we pay tribute to the HMCTS design and implementation teams for bringing it to its deployment stage. Employment Case Management (“ECM”) replaces “Ethos”, a system which regularly failed, impacting negatively on administrative efficiency. It has been deployed successfully this month in the regional ET office in Leeds, across Scotland and the London ET regions. We hope for complete migration to the new system by the end of May 2021.

ECM will facilitate more efficient case management, better and more reliable generation of data and, crucially, remote access by HMCTS staff working in the Employment Tribunals. It was the absence of remote working possibilities that most substantially impaired our performance in 2020; many offices were not large enough to have sufficient staff working at a safe distance. Remote working by HMCTS staff also means that the Employment Tribunals can remain resilient if social distancing is required or if similar restrictions return in future.

In mid-April 2021, 16 new Legal Officers start work in the Employment Tribunals across Britain. We have great ambitions for them, and we would like more of them recruited. We will authorise them from the outset to determine all matters that fall within their delegated powers, but this is subject to an extensive programme of training, mentoring and supervision that we have planned for their first six months in the role. As we recruit more of them, we hope that our efficiency will improve. This is because, in addition to their delegated powers, the Legal Officers will be heavily involved in what we call “case progression”. In the fullness of time, our Legal Officers will look to the cases in the list in the weeks ahead, to check that correspondence has been answered, that the tribunal’s orders have been sent to the parties, that the allocated time remains appropriate and a host of other issues that, hitherto, have tended to be considered at the last minute.

Later in April 2021, the President in England and Wales launches the “virtual region”. Populated by about 100 existing fee paid Employment Judges (and in due course by many of our non-legal members), the virtual region will operate alongside the ten existing regions in England and Wales. It will take advantage of the flexibility offered by video hearings to enable judges, members and staff who are geographically dispersed to come together on the Cloud Video Platform (“CVP”) to hear cases generated by any region. In its first year, it will redirect resources to London and the South East of England, which together hold well over half of the outstanding Employment Tribunal caseload in Britain.

Then, later in the spring, the President in England and Wales launches an expressions of interest exercise, by which salaried and fee paid judges working in courts and other tribunals with suitable employment law expertise may act as Employment Judges in England and Wales. They will attend appropriate induction training. This process will also facilitate for the first time the flexible

cross-deployment of the ET judiciary between the sister jurisdictions in Scotland and England and Wales, further strengthening the bonds between colleagues north and south of the border.

We remain at the mercy of long timescales for judicial recruitment, but we continue to push for recruitment of judiciary in numbers large enough to help us bring down the caseload. There are pilots underway in other respects and we will share information with our respective user groups when we are able to do so.

Reform

It has long been planned that the HMCTS reform programme would reach the Employment Tribunals in the 2021-22 financial year. We look forward to sharing with you the further innovations this process will bring, in terms of judicial and user access to ECM, document management, the scheduling and listing of cases and a move away from paper files to electronic working.

The future of video hearings in the Employment Tribunals

The steps summarised above will not by themselves bring down the outstanding caseload. Our best ally in that endeavour, for the moment, is CVP and whatever platform may, in due course, replace it (and such a platform is being piloted in the South West England region). For simplicity, we will talk here simply of video hearings.

The adoption by the Employment Tribunals of video hearings, and our plan for their deployment, was summarised in our last road map. We have both issued Practice Directions and/or Presidential Guidance on the fixing and conduct of fully remote and partly remote (i.e. hybrid) video hearings (found [here](#) and [here](#)). Without the embracing of video hearings by the Employment Tribunals – and we pay tribute to our judiciary and users for embracing them – the outstanding caseload would be very much higher than it is. Indeed, it has remained static in the first three months of 2021 and there are encouraging signs that it is slowly reducing.

Video technology allowed us to move at pace to retain listed cases in response to the restrictions announced in January 2021, and it will do so again if coronavirus restrictions return on a seasonal or regional basis. It allows for flexible use of judiciary, as the virtual region will demonstrate. It has facilitated a steady increase in the rate at which we can adjudicate upon the claims that have been presented to the Employment Tribunals – what we call our “disposal rate”. The disposal rate had returned to its pre-pandemic rate by the Autumn of 2020, and it continues to improve. It does so because, freed of the constraints of the physical estate, more hearings can be listed and remain effective. No hearings were lost in recent months for want of a hearing room. That is because CVP has effectively tripled the size of our estate.

Unlike many other jurisdictions, the pandemic has inflated our caseload (which had been rising for some time anyway since the Supreme Court’s judgment in the *Unison* case in 2017). It follows that a return to pre-pandemic ways of working as restrictions relax is not an option for the Employment Tribunals. We cannot simply revert to holding final hearings exclusively on a face-to-face basis; that approach would be insufficient when it comes to tackling the outstanding

caseload. For us, video hearings are not simply a response to the pandemic itself. They provide a mechanism which assists in reducing the outstanding caseload. They must remain an essential part of our toolkit while that challenge persists. This is likely to be so for at least two years.

This part of our toolkit will not need to be deployed in the same way across all parts of Britain. As we have explained to our users at various stages over the last year, the impact of the pandemic on the operational resilience of the Employment Tribunals has varied considerably between parts of Britain. This has been seen in such matters as the delay in responding to telephone calls and correspondence or the waiting time for a final hearing, where some parts recovered faster than others. That remains the case today.

By way of example, the regional office of London (Central) Employment Tribunal, Victory House, has remained closed since the middle of December 2020 to enable the landlord to complete mechanical air ventilation works that will again make it safe to use (soon, we hope). Other regional offices have limited space for hearings, because HMCTS staff (in order to observe distancing) are working in hearing rooms; and some hearing rooms are too small to accommodate all those who need to be present on a socially distanced basis. The result is that some parts of Britain will remain more heavily reliant on video hearings while others may return more swiftly to face-to-face hearings. For the moment, there is no “one size fits all” approach. What works in Leeds, Glasgow or Cardiff may not work in London.

A further positive feature of video hearings is that they enable us to respond more nimbly to unexpected developments, such as flooding or power failure.

We recognise that there is no obvious consensus as to the future of video hearings in the Employment Tribunals once the outstanding caseload has abated significantly. We both regularly receive correspondence from our professional users offering diametrically opposed viewpoints on their utility. It is clear that some professional users are eager for their Employment Tribunal hearings, regardless of their duration, to return to a physical building with its waiting rooms and clerks, working alongside colleagues, opponents and clients. Others, by contrast, have found much to value in a working life that involves reduced travel. Both viewpoints involve subjective preferences. Both have much to commend them.

Those divergent viewpoints feature in correspondence received by ET offices from litigants. Some parties object to a video hearing because they do not consider it to be a just way to proceed where evidence is disputed; others object to an in-person hearing because it is not a proportionate way to proceed where it causes disruption and possibly unsafe travel. Unsurprisingly, such divergent views are also found among judges and members, although there appears to be consensus that video hearings are more tiring and take longer.

As the senior leadership judges for Employment Tribunals in Britain, we do not think the solution is found in exclusively adopting one method over another. If we are to build on what we have learned over the last year, the better approach is to recognise that a mixture of platforms (remote, hybrid and in-person) will subsist. In the meantime, we will seek to use our influence to improve the experience of system users and the ET judiciary on all platforms. For example, we wish to see safe physical venues, more physical hearing rooms, better IT equipment, more

stable video platforms and better means for the secure transmission and navigation of electronic bundles.

We will pay close attention to any research findings that emerge about the circumstances which militate for and against delivery of workplace justice through the mechanism of video hearings. We will also wish to consult the judiciary and service users of Employment Tribunals about the development of judicial policy in this area for the longer term.

In the meantime, we set out below our shared vision for how hearings will proceed in the coming financial year, between **April 2021** and **March 2022**.

2021-22

We reiterate that different Employment Tribunal regions, and different parts of Britain, may need to move at different speeds, just as was the case with our previous road map in June 2020. We also emphasise that: (1) in every case it will be open to an Employment Judge to decide that the default position below should not apply; and (2) it will always be possible for a party to write to the Employment Tribunal office handling their case to explain why they would like the hearing to be held using a different format.

The appropriate format for a hearing remains a judicial decision, taken in the light of the tribunal's overriding objective. Our respective guidance documents remain valid in identifying the relevant considerations that apply¹. Furthermore, we now ask parties in the prescribed ET1 and ET3 forms whether they have access to the internet and the equipment necessary to take part in a video hearing. The replies to these questions will be taken into account in assessing whether the default position below should apply.

The default position for 2021-22, subject to what is said above and periodic review, is as follows:

- Preliminary hearings listed in private for case management purposes will default to **telephone or video**.
- Preliminary hearings in public to determine a preliminary issue (e.g. time limits, employment status) will default to **video**.
- Preliminary hearings to consider an application to strike out or for a deposit order will default to **video**.
- Applications for interim relief will default to **video**.
- Judicial mediations will default to **telephone or video**.
- Final hearings of short track claims (unpaid wages, notice, holiday pay, redundancy pay etc) will default to **video**.

¹ See paragraphs 16 and 17 of the Presidential Guidance applicable in England and Wales [here](#) and paragraphs 8 and 9 of the Practice Direction applicable in Scotland [here](#).

- Final hearings of standard track claims (unfair dismissal) will vary. In most parts of Britain, as the physical estate recovers and requirements for social distancing are removed, they will return in greater numbers to **in-person**. This will take time, as recovery will not be uniform. In London and the South East, however, where the backlog is most severe and to maximise use of the virtual region, they will default to **video**.
- Final hearings of open track claims (discrimination and whistleblowing) will also vary. In most parts of Britain, they will default to **in-person**. The parties will be able to express a contrary view at the earlier preliminary hearing held for case management purposes having regard to our respective guidance documents. In contrast, in London and the South East, where the backlog is most severe and to maximise use of the virtual region, parties should expect to see greater reliance on **video**, including hybrid formats. This will also facilitate remote participation by non-legal members drawn from the virtual region.
- Other hearings listed specifically to deal with applications for reconsideration or costs/expenses will default to **video**.

It would be too complex to apply this approach to cases already listed in 2021-22, although it is open to a tribunal to revisit its approach on its own initiative or upon application by a party. Instead, it is intended to apply to cases yet to be listed.

We consider this approach will allow us to make maximum use of our physical and virtual estate, which will help to reduce the outstanding caseload and waiting times for hearings. These defaults operate for listing purposes only. We again emphasise that parties can apply to the tribunal for a different approach; this may result in a change of format or, indeed, a hybrid approach in which one or more of the participants (including members of the panel) joins remotely.

Our shared vision is that the Employment Tribunals north and south of the border rise to the challenge of delivering workplace justice to both claimants and respondents in a fair and efficient manner during a time of enormous challenge to our jurisdictions. The tone we hope to set, as we face that challenge, is one of realistic optimism.



Judge Barry Clarke
President of Employment Tribunals
(England and Wales)



Judge Shona Simon
President of Employment Tribunals
(Scotland)

31 March 2021