Courts and Tribunals Judiciary

Judge Barry Clarke
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(England and Wales)

Presidential Guidance

Alternative Dispute Resolution

1. Rule 7 of the Employment Tribunals Rules of Procedure (the "ET Rules"), as set out at Schedule 1 to 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 ET Rules may be exercised. Such guidance must be published in an appropriate manner to bring it to the attention of claimants, respondents and their advisers.

2. This guidance concerns the way in which the Employment Tribunals in England and Wales give effect to their duty under rule 3 of the ET Rules in respect of alternative dispute resolution ("ADR"). It supersedes the Presidential Guidance on ADR that was issued on 22 January 2018. It has been influenced by the experience of mediation on telephone and video during the Covid-19 pandemic.

3. Employment Tribunals must have regard to this guidance, but they are not bound by it.

Introduction

4. Employment Tribunals are the judicial bodies with responsibility for workplace justice, being the main forum for deciding disputes between workers and employers. They support the operation of the rule of law in the workplace.

5. However, Employment Tribunal proceedings carry a cost. That cost might be a financial one, like legal fees. In the Employment Tribunals, each side generally bears their own costs; orders to pay the other side's costs are rare. Even if the parties do not engage a professional representative (and the Employment Tribunals are well used to dealing with parties who are not professionally represented), there may be a cost resulting from the time that they and their witnesses spend away from work in preparing for and attending a hearing.

6. There is also a cost borne by the public purse, as there is in any system of justice. Each Employment Tribunal hearing needs a judge (and sometimes non-legal members as well), a hearing room (physical or virtual), and a clerk, and it requires a range of associated administrative and technical functions performed by HM Courts and Tribunals Service.

7. Like much litigation, Employment Tribunal hearings carry an emotional cost: preparing for and attending a hearing, and dealing with the aftermath, can be stressful. The more complex the case, the more disruptive it may be to the lives of those involved in it or affected by its outcome. It may be especially disruptive where the parties are in an ongoing employment relationship, or where the employment relationship involves familial connections.

8. In reaching its judgment, a tribunal must identify the issues, decide the relevant facts, apply the law to those facts, and then tell the parties who has won or lost in respect of each part of a claim. Even if the issues the tribunal must consider are agreed, and the law the tribunal must apply is clear, the evidence must still be heard and tested so that the relevant facts can be decided. In nearly all cases, the outcome cannot be predicted with certainty before the tribunal has evaluated the evidence. It follows that nearly all cases heard by the Employment Tribunals involve risk for the parties. That risk can be financial, emotional and reputational.

9. Even when the outcome is known, the tribunal's approach to remedy (usually in the form of compensation) also cannot be predicted with certainty before the tribunal has evaluated the evidence. Sooner rather than later, opposing parties to a dispute must address their minds to the value of a case. The question "will this claim succeed?" must be accompanied by "what is this claim worth?"

10. Each Employment Tribunal case resolved through agreement allows parties to minimise these different types of cost and risk. Some cases may ultimately need to be fought all the way to a hearing, but many cases can and should be resolved quickly and allow the parties and their witnesses to move on with their lives. The resolution of a case also frees resources to be used on other cases, whether in the Employment Tribunals or the wider justice system. Indeed, more cases are listed by the Employment Tribunals for hearing than there are resources available to hear them, because of an assumption that a high proportion will be resolved, whether through a private settlement, a compromise agreement or conciliation by ACAS.

11. The Employment Tribunals must of course decide a case where the parties cannot reach agreement. But they can and should encourage them to resolve their cases by agreement. The focus of this guidance is on how that is done.

The ET Rules

12. By rule 2, the overriding objective of the ET 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.

13. By rule 3, Employment Tribunals shall, wherever practicable and appropriate, encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement.

14. By rule 53(1)(e), a tribunal may arrange a preliminary hearing at which, among other matters, it may explore the possibility of settlement or ADR, including judicial mediation. Further, by rule 54, a hearing arranged for ADR purposes may be directed by the tribunal on its own initiative at any time, and the tribunal must give the parties reasonable notice of such a hearing; and, by rule 56, a hearing arranged for ADR purposes is held in private.

Four ADR approaches

15. There are four approaches by which, in exercising their duty under rule 3, the Employment Tribunals may encourage the parties to resolve their dispute by agreement: using the services of ACAS; judicial mediation; judicial assessment; and a dispute resolution appointment.

16. Judicial mediations, judicial assessments and dispute resolution appointments are all forms of preliminary hearings held under rule 53(1)(e). They are conducted by Employment Judges who have received appropriate training. They will only take place where a Regional Employment Judge (or any Employment Judge nominated by a Regional Employment Judge) considers that it would give effect to rules 2 and 3 to do so, having taken into account the views of the parties. This guidance serves to explain them and to distribute protocols (as appended) about their operation.

Services of ACAS

17. Parties are encouraged to use the conciliation services of ACAS. ACAS is independent of the judiciary.

18. Such encouragement is given in this guidance, and regularly repeated at preliminary hearings for case management purposes. It may be repeated at the end of a hearing, when the tribunal has decided the outcome of a claim but (if they arise for consideration) not dealt with matters of remedy. There are standard references to the conciliation services of ACAS on correspondence issued by HMCTS and on judicial case management orders. This approach will continue.

Judicial mediation

19. Judicial mediation is a **consensual**, **confidential** and **facilitative** process.

20. The focus is on cases listed for three days or more. These cases are usually claims of discrimination and whistleblowing detriment, as well as more complex claims of unfair dismissal.

21. “Consensual” means that both parties have agreed to the process, and that they may withdraw from it at any time without explanation or sanction.

22. “Confidential“ means that the parties can speak freely (on a “without prejudice” basis) during the mediation without worrying that any concessions made will be used against them at a final hearing if the mediation fails.

23. “Facilitative” is used in contrast to “evaluative”; it means that, unless the parties have agreed to such a course, the Employment Judge conducting the mediation will generally not give any party in the case an indication of their prospects of success. The aim often is to hold the mediation before the parties have incurred significant cost, to maximise the savings that an agreement can deliver.

24. A judicial mediation usually occupies a day of tribunal time. It usually takes place by video or telephone, but may be held in person.

25. A successful mediation usually results in a settlement that is formally conciliated by an officer of ACAS or, less often, by use of a compromise agreement. Even if the parties do not agree to resolve their dispute following judicial mediation, the process may still give effect to rule 2 because it can assist the parties in understanding what the case is really about and what is at stake; and it may clarify and narrow the issues requiring adjudication, resulting in a shorter and more focused final hearing.

26. An Employment Judge who has conducted an unsuccessful mediation will not decide the claim on its merits at a final hearing.

27. Judicial mediation began in 2009 and, between then and the date this guidance is published, Employment Judges in England and Wales have conducted about 8,000 mediations, with a “success rate” of about 65-70%, resulting in a net saving of nearly 22,000 sitting days[1].

28. Further details are in the protocol for use by parties at Appendix 1.

Judicial assessment

29. Judicial assessment is a **consensual**, **confidential** and **evaluative** process.

30. It can be used in any case, regardless of the type of claim and duration of the hearing.

31. An Employment Judge will use their skills and experience, based on the information available at the time, which may be limited, to give the parties an

[1] These figures are collected internally by the judiciary and are not subject to official HMCTS audit.

evaluation of their respective prospects of success and possible outcomes in terms of remedy, while remaining impartial.

32. A judicial assessment usually takes place by video or telephone, but may be held in person. A judicial assessment may also take place at the end of a preliminary hearing listed for the purposes of case management or at the end of a preliminary hearing where an Employment Judge has declined to strike out a claim or response or to order a party to pay a deposit (but, in either situation, where the parties agree that it would assist them to have an indication about the possible outcome, and where the issues in dispute have been clearly identified).

33. Even if the parties do not agree with the judicial assessment, the process may still give effect to rule 2 because it can assist them in understanding what the case is really about and what is at stake; and it may clarify and narrow the issues requiring adjudication, resulting in a shorter and more focused final hearing.

34. An Employment Judge who has conducted a judicial assessment will not decide the claim on its merits at a final hearing.

35. Further details are in the protocol for use by parties at Appendix 2.

Dispute resolution appointment

36. A dispute resolution appointment is a **non-consensual**, **confidential** and **evaluative** process.

37. The focus is on cases listed for six days or more (but this may vary according to Employment Tribunal region). These are generally the most complex claims of discrimination and whistleblowing detriment.

38. Dispute resolution appointments have been piloted in the Midlands West region since July 2020. The outcome of that pilot has influenced the content of this guidance and its desired adoption in other regions. Between then and the date this guidance is published, Employment Judges in the Midlands West region have conducted about 200 such appointments, resulting in a net saving of over 1,000 sitting days[2]. This guidance allows for this approach to be extended nationally.

39. The need for such appointments arises because of the high number of discrimination and whistleblowing detriment that populate the outstanding stock of cases to be heard by the Employment Tribunals, where many parties do not wish to engage in either judicial mediation or judicial assessment. Their reluctance to do so may be because one of the parties is not professionally represented. Because of the legal and factual complexity of such cases, and most especially the large number of issues identified for judicial determination, they may require multiple case management hearings and time consuming correspondence with the tribunal. They also require longer hearings (into a

[2] See footnote 1.

second week or longer), and so they contribute significantly to extended waiting times in England and Wales. Longer hearings may not be proportionate where the parties are still in an employment relationship, and where the parties may not appreciate that any award made by a tribunal may be limited to a sum in respect of injury to feelings.

40. Those long waiting times have a detrimental impact on the other cases awaiting adjudication by the Employment Tribunals. It means that other cases, often involving simpler issues or with more modest sums at stake, must wait longer for a hearing. Even if cases with long hearings do settle “at the last minute”, there is still a detrimental impact on the efficient administration of justice because it is rarely possible to fill all the judicial time that has become available by “backfilling” the list with cases brought forward; this is because, by operation of rules 54 and 58, many preliminary hearings, and all final hearings, require at least 14 days’ notice.

41. Consequently, dispute resolution appointments are non-consensual. This means that the tribunal may arrange such an appointment even if the parties do not desire one. It is only the appointment that is non-consensual; there is no mandatory outcome from the appointment. The tribunal may arrange such an appointment if a judicial mediation has previously been held without success; equally, the tribunal may (if the judge thinks it appropriate and the parties agree) arrange a judicial mediation after a dispute resolution appointment. As with any hearing, the parties are required to attend a dispute resolution appointment, so a failure to attend such a hearing without good reason may amount to unreasonable behaviour for the purposes of considering costs under rule 76(1)(a) of the ET Rules (although not for the purposes of rule 37(1)(b)).

42. A dispute resolution appointment usually takes place by video or telephone, but may be held in person. It will usually be listed for 2 or 3 hours.

43. An Employment Judge will use their skills and experience, based on the information available at the time, to give the parties an evaluation of their respective prospects of success and possible outcomes in terms of remedy, while remaining impartial. To ensure that the evaluation is as helpful to the parties as possible, the dispute resolution appointment will be held after witness statements have been exchanged. These statements will be available for the Employment Judge to read (along with key documents of relevance).

44. Even if the parties do not agree to resolve their dispute following a dispute resolution appointment, the process may still give effect to rule 2 because it can assist the parties in understanding what the case is really about and what is at stake; and it may clarify and narrow the issues requiring adjudication, resulting in a shorter and more focused final hearing.

45. An Employment Judge who has conducted a dispute resolution appointment will not decide the claim on its merits at a final hearing.

46. Further details are in the protocol for use by parties at Appendix 3.

Miscellaneous

47. To encourage a free and frank exchange of views by the parties, hearings held under rule 3 (whether judicial mediations, judicial assessments or dispute resolution appointments) will not be recorded, and therefore will not be available for transcription.

48. Parties and their representatives are reminded that they are required to assist the tribunal to further the overriding objective and in particular to co-operate generally with each other and with the tribunal.

Summary

Judicial mediation	Consensual	Confidential	Facilitative *
Judicial assessment	Consensual	Confidential	Evaluative
Dispute resolution appointment	Non-consensual	Confidential	Evaluative

* unless parties agree it can be evaluative

Judge Barry Clarke
President

7 July 2023

Appendix 1: Protocol – Judicial Mediation

Introduction

1. It is often better for everyone involved in an Employment Tribunal case to settle their legal dispute by agreement rather than by going through a stressful, risky, expensive and time-consuming hearing. The process of judicial mediation is one method for achieving settlement. It is entirely voluntary and private.

2. Judicial mediation has several potential advantages over a hearing. The parties remain in control of their own agreement, rather than having a tribunal impose outcomes.

3. The parties may include practical solutions which would not be open to the tribunal at a hearing (for example, an agreed reference, an apology and/or confidentiality). The parties might agree to consider and settle other litigation or disputes between them, even if not within the tribunal's jurisdiction. It provides a certain, speedier outcome which cannot be appealed.

Which cases?

4. Cases with complaints under any jurisdiction are potentially suitable for mediation, although it is not likely to be cost-effective – and therefore usually will not be available - in short cases. A working guide is that the hearing has been listed for at least three days. Discrimination complaints and those where a claimant is still employed by the respondent may be particularly suitable.

5. If there is more than one claimant or respondent the case may be less suitable, and the practical arrangements will have to be considered. Features in an individual case may make mediation desirable. Mediation will not be offered unless both parties actively want it. Even if both are willing, mediation may not be offered. The decision whether to offer judicial mediation is made by the Regional Employment Judge (or any judge that the Regional Employment Judge has nominated).

Identification of suitable cases

6. Arrangements in different Employment Tribunal regions may vary, but the first time the parties are asked whether they are interested in judicial mediation is likely to be before a preliminary hearing that has been arranged for the purposes of "case management". They receive a case management agenda which asks them if they are interested in judicial mediation, so that the Employment Judge dealing with the hearing is made aware of this.

7. Depending on regional arrangements, if both parties wish to mediate, the judge at the preliminary hearing will either decide that the case is suitable for judicial mediation and go on to give directions for the mediation to take place, or will refer the file to the Regional Employment Judge (or a judge nominated by the Regional Employment Judge) to decide whether a mediation should be held.

8. The main criteria for suitability are that:

- The parties understand what mediation involves and are willing to participate;
- The parties agree that they will keep the discussions that take place at the judicial mediation confidential, and will not refer to anything said at that hearing afterwards, whether they reach agreement or not;
- The parties are willing to negotiate (that is, to move away from their ideal outcome and to consider other options); and
- Each party will be able to decide whether to accept or reject whatever solution is offered on the day of the mediation (which means, in the case of a respondent, that the relevant "key decision maker" attends or is available).

9. The judge may also take account of whether each party has acted reasonably in the litigation to date. This is because they will want to be assured that the parties are willing to compromise.

10. If the judge at the case management hearing refers the case to the Regional Employment Judge (or another nominated judge) to decide on whether the case is suitable for mediation, there is likely to be another short hearing (usually by telephone) to consider this, and to provide a date for the mediation and to make other orders so that it is ready to proceed.

11. It is always helpful for the parties to provide each other (and to provide to the judge who is deciding whether to list a mediation hearing) with their explanation of what they think the claim is worth. In the case of a claimant, this usually means preparing a schedule of loss; in the case of a respondent, it means preparing a counter schedule, setting out how the respondent thinks a tribunal would compensate the claimant if the claimant were successful at a final hearing (it is not an offer of payment).

12. Judges often direct that, if a party wishes to use a particular form of compromise agreement, a copy is sent to the other party/parties in advance of the mediation so that they have a chance to consider its terms.

13. It is also possible for the parties to write to the tribunal to request a judicial mediation if the case falls within the general criteria set out above and all parties agree that it is a suitable case. If the parties do write to request mediation, a short telephone hearing may still be arranged so that a judge can decide if the case is suitable and, if so, make some orders to ensure that the case is ready for mediation. In other cases (for example where both parties are represented), it may be possible for the judge to make the decision without a hearing. It will help if parties making a joint application provide a schedule of loss and counter-schedule with their written request.

What happens at a judicial mediation?

14. A judicial mediation is a type of hearing, which usually takes place by telephone or video but may involve attendance at a tribunal hearing centre.

15. The parties receive the assistance of a judge trained in mediation for up to a day. In exceptional circumstances, the judge may decide that the mediation can continue for a second day.

16. The judge who conducts the mediation will not hear the case if the mediation fails. The judge will not make decisions for the parties, impose solutions, give advice, or hear evidence.

17. The judge will help the parties to reach their own solution by managing the process in a fair and constructive manner, making sure that they understand what is going on and helping them to focus on areas of agreement and common interest.

18. The mediation day starts relatively early, usually at 9.30am. If the mediation is by telephone or video, a member of HMCTS staff will provide the parties with the information they need to join the call. Otherwise, there will be a notice of hearing setting out the date, time and location of the mediation.

19. If the mediation takes place at a tribunal building, the parties are provided with separate rooms which they may occupy during the mediation.

20. Parties may bring a supportive companion to the mediation if that person agrees to keep the discussions confidential.

21. In most cases, the judge will commence the mediation session by holding a meeting with all parties together, either around a table in a private room or on the same telephone line/video room. The judge will outline what the parties should expect to happen and remind them of the vital confidentiality of the mediation process. The judge will emphasise that if the mediation fails, no mention may be made of it at all in the further stages of the case or at any hearing.

22. The parties need not contribute anything at this initial meeting: but they do have an opportunity to ask questions if they are at all unclear about what is to happen. The judge will not expect the parties to make an “opening statement” at this meeting.

23. Occasionally one party may not wish to meet the other in this way. Although the initial meeting is intended as a helpful part of the process, it is not compulsory. If a party has concerns about the meeting, they should tell the tribunal clerk at the start of the day.

24. If the judge meets all parties together at the start of the mediation hearing, the judge will then wish to speak to the parties separately. If the mediation is being held in person at a tribunal venue, the parties go to their own rooms. The judge then visits the parties in their separate rooms. If the hearing is by telephone or video, the parties will either be able to use separate video “rooms” (or separate telephone lines) as provided by the tribunal’s clerk. These arrangements ensure that the judge can talk freely to the parties without risk of being overheard.

25. The judge will seek to understand what each side wishes to achieve and, sometimes, to manage their expectations by pointing out any that are unrealistic. The judge will use that understanding to help the parties move to a position where they have reached a solution which they both agree.

26. If lawyers or other professional representatives are involved, they will often be able to record the agreement in writing. So, it is likely to be useful if they bring with them laptops or other devices and, where appropriate, template compromise agreements. It is always useful to share any standard terms of compromise (about tax/national insurance/confidentiality and so on) with the other party before the mediation. Directions for the mediation hearing may provide for this. It is the responsibility of the parties and their representatives to ensure that they have secure and private means of communicating with each other if the mediation is held remotely.

27. After the initial meeting, the parties need not meet up or speak directly to each other again, but often do if they (or their representatives) wish to discuss matters directly. They also often agree to meet at the end of the process when agreement is reached.

Reaching an agreement

28. When agreement is reached, the judge and/or the parties will usually contact ACAS so that it can be formalised. To this end, the parties are requested to obtain the name and contact details of the ACAS conciliation officer who will be available to take any necessary action on the mediation day.

29. The ACAS officer may be sent any written agreement and/or a telephone or video call may be set up to speak to the officer to establish that there is a binding legal agreement. It is important to note that, once the parties confirm to an ACAS officer that they have reached agreement, the proceedings are at an end – there is no need for written confirmation.

30. A successful mediation is one which concludes with a concluded agreement. Any future hearings will then be vacated, and the dispute will be over.

31. If agreement is not reached, any previous case management orders will continue to apply, and the case will proceed to a final hearing. The judge who conducted the mediation would not sit on any hearing which finally determines a claim or part of a claim. However, this does not preclude the judge from involvement in day-to-day case management of the proceedings, including case management hearings, or conducting a judicial assessment or a dispute resolution appointment.

Appendix 2: Protocol – Judicial Assessment

Introduction

1. This protocol sets out the basis on which the Employment Tribunals will offer parties judicial assessment of their cases.

2. Judicial assessment is an impartial and confidential process by an Employment Judge, of the strengths, weaknesses and risks of the parties' respective claims, allegations and contentions.

3. Although the purpose of judicial assessment is to encourage parties to resolve their dispute by agreement, it is not envisaged that settlement discussions will occur during the assessment itself (although that may happen with the parties' agreement). The parties may wish to involve ACAS in any discussions which take place, and to alert ACAS that a judicial assessment is taking place.

4. Judicial assessment is confidential. While anything said in a judicial assessment can be used in subsequent "without prejudice" discussions between the parties, including those involving ACAS, it cannot be referred to in correspondence with the tribunal or at a final hearing. Furthermore, the views expressed by the Employment Judge are non-attributable and must be kept confidential; they must not be disclosed to third parties, other than advisers, as having been expressed by the Employment Judge, or attributed or identified as the views of the Employment Judge in subsequent proceedings, including the final hearing. Unless the parties agree to these conditions, judicial assessment will not take place.

Which cases?

5. Judicial assessment will generally be offered in cases listed for a case management hearing. Most cases of any complexity which are listed for a case management hearing will be suitable for judicial assessment. However, the following (non-exclusive) factors may render the case unsuitable for an offer of judicial assessment:

    - There are multiple claimants (or respondents), not all of whom have requested a judicial assessment;
    - A party is bankrupt or insolvent;
    - There are other proceedings underway or intimated in the civil or criminal courts.

Identification of suitable cases

6. If both parties indicate that they are interested in having a judicial assessment prior to a case management hearing, the question of whether to offer it will be discussed at the case management hearing after the issues have been clarified and formal case management orders have been made.

7. The judge will explain what is involved in a judicial assessment and what the essential ground rules are.

8. If, having received that information, both parties are still interested in having a judicial assessment and the judge considers that it is appropriate, the judge will list a separate hearing for a judicial assessment and give directions to ensure that the judge conducting it has sufficient information to make an assessment. This may mean that a judicial assessment hearing does not take place until after there has been disclosure, or witness statements have been exchanged. However, a judicial assessment may also take place at the end of a preliminary hearing listed for the purposes of case management or at the end of a preliminary hearing where a judge has declined to strike out a claim or response or to order a party to pay a deposit (but, in either situation, where the parties agree that it would assist them to have an indication about the possible outcome, and where the issues in dispute have been clearly identified).

9. The time estimate for a judicial assessment hearing will vary depending on the case; given the nature of such a hearing, however, it is not envisaged that it will last for more than half a day (including reading time for the judge). A typical judicial assessment hearing may be listed at 10.30am (with a time estimate of 2 hours) to allow the judge time for pre-reading.

10. The parties may jointly request a judicial assessment hearing. It will assist the judge if the parties, when making a joint request, explain why they consider it appropriate. They should attach an agreed list of disputed matters of fact and law, if this is not apparent from a previous case management order. The Regional Employment Judge (or any judge that the Regional Employment Judge has nominated) will consider whether a judicial assessment is appropriate having regard to rules 2 and 3 of the ET Rules. If they do direct that a judicial assessment is held, directions will be issued to ensure that the judge conducting it has sufficient information to give an assessment.

11. A judicial assessment will only be conducted where the issues between the parties are clear from the ET1 and ET3, have been clarified at a case management hearing, or are otherwise clearly understood by the parties. Crucially, a judicial assessment is not a means of avoiding the discipline of a properly conducted case management hearing. Case management orders will be made in the usual manner; judicial assessments should not lead to delays in deciding the claim.

What happens at a judicial assessment?

12. A judicial assessment may take place by telephone or video or may take place by attendance at a tribunal venue. The judge who deals with the judicial assessment will not make decisions for the parties, give advice or hear evidence.

13. Judicial assessment is evaluative in nature. It will involve a practical assessment of the case by an Employment Judge. The judge will encourage parties to approach the process with an open mind, to be prepared to enter the assessment pragmatically and to listen to the judge’s views.

14. At the hearing, the judge will consider how to assist the parties to reach an agreement. To do so, the judge may provide a view as to whether either party is being unrealistic, either in respect of the issues they are raising or the amounts in dispute. The judge may express an opinion as to the strength or weakness of the claim or response (or parts of them). The judge may ask the parties to comment on particular issues or evidence before giving an assessment.

15. The judge may give an assessment of any aspect of the case, including remedy. It will be made clear that the assessment is provisional and that a tribunal considering the case at a final hearing may come to a different view. The judge will make it clear that they are assessing the case on the basis of the information available to them at the time, rather than on a detailed evaluation of the evidence, some or all of which will not be available. The judge may decline to give any indication at all.

16. Employment Judges recognise that parties may not fully understand the distinction between a provisional indication and the eventual result of the case; they will take care to ensure that this is made clear, particularly if one or both parties are unrepresented. The judge must seek to further the overriding objective at rule 2 of the ET Rules, including the need to ensure that the parties are on an equal footing. The judge will bear in mind the importance of the dispute to the parties and, while encouraging them to reach agreement, will not pressurise them to do so.

17. If the judge expresses a view about the strength or weakness of the claim or response, or about the amount being claimed or disputed, that is not binding on the parties; nonetheless, it is hoped that it will help them to reach their own agreement. In other words, judicial assessment involves evaluating the strength of the parties' cases. Employment Judges will use their skill and experience in doing this, while remaining impartial.

18. Judicial assessment will be conducted with a view to encouraging a settlement of all or part of the claim. If the parties express the wish to enter into immediate settlement negotiations, this may be encouraged, but care must be taken to make sure that unrepresented parties have time to think and to consider any offer, and are informed that, if an offer is made, they may take time to reflect upon it.

19. The Employment Judge who conducted the judicial assessment will not be involved in any part of the proceedings which may entail final determination of the parties' rights (although they may conduct any subsequent judicial mediation). This is to encourage full and frank assessment of the claim and ensure public trust in the confidentiality and impartiality of the evaluation.

Reaching an agreement

20. Where a settlement is reached at or following a judicial assessment, it will be recorded by one of the following means:

- An ACAS conciliated settlement (COT3);
- A compromise agreement between the parties; or
- A consent judgment issued under rule 64.

21. Alternatively, if the parties agree and the judge considers that it would give effect to rules 2 and 3 of the ET Rules to do so, a judicial mediation may be listed. The judge will also remind the parties of the availability of the conciliation services of ACAS.

Appendix 3: Protocol – Dispute resolution appointment

Introduction

1. This protocol sets out the basis on which the Employment Tribunals will require the parties to attend a dispute resolution appointment.

2. A dispute resolution appointment is an impartial and confidential process by an Employment Judge, of the strengths, weaknesses and risks of the parties' respective claims, allegations and contentions.

3. A dispute resolution appointment is confidential. While anything said in the appointment can be used in subsequent "without prejudice" discussions between the parties, including those involving ACAS, it cannot be referred to in correspondence with the tribunal or at a final hearing. Furthermore, the views expressed by the Employment Judge are non-attributable and must be kept confidential.

Which cases?

4. Dispute resolution appointments may be listed at the discretion of a Regional Employment Judge (or an Employment Judge nominated by a Regional Employment Judge for this purpose) in respect of cases which are listed for a minimum duration which may vary as between different Employment Tribunal regions but is likely to be at least six days. Whether a region operates dispute resolution appointments will depend upon available resources and local requirements.

5. Dispute resolution appointments may be ordered whether or not the parties have already had a judicial mediation or judicial assessment hearing.

Identification of suitable cases

6. The Regional Employment Judge (or an Employment Judge nominated by a Regional Employment Judge for this purpose) may identify suitable cases.

7. The parties may make submissions in writing to the tribunal, as soon as possible before the dispute resolution appointment takes place, as to why it would not be in the interests of the overriding objective for it to take place in the case in question. The Regional Employment Judge (or an Employment Judge nominated by a Regional Employment Judge for this purpose) will then decide whether the dispute resolution appointment will proceed.

What happens at a dispute resolution appointment?

8. A dispute resolution appointment is generally listed 4-6 weeks after the date on which the parties have been directed to exchange their witness statements. It will have an estimated length of 2-3 hours. It may be that there is a delayed start to the appointment while the judge reads the papers; if this occurs, the

clerk will inform the parties. The parties are encouraged to use this time to discuss and narrow the issues.

9. The purpose of the dispute resolution appointment is to encourage parties to resolve their disputes by agreement. At the hearing the judge will consider how to assist the parties to reach an agreement. Directions will be given in advance of the appointment for the parties to provide documents and information to enable the judge to understand the issues and the evidence on which the parties propose to rely.

10. Usually, this will involve the claimant and respondent being directed to supply each other with an up-to-date schedule of loss and counter schedule in advance of the dispute resolution appointment. Schedules of loss and counter schedules are not offers of payment but an attempt by the parties to make a realistic assessment of the compensation that the tribunal is likely to award if the claimant is successful after a final hearing.

11. Directions will be given for one of the parties to provide an agreed file for the dispute resolution appointment; this will include the claim form (including any amendments approved by the tribunal), the response form, any case management orders, a list of issues (if not apparent from the case management orders), witness statements, relevant parts of any expert evidence and a limited number of other key documents.

12. The judge will endeavour to provide a view as to whether either party is being unrealistic, either in respect of the issues they are raising or the amounts they are claiming or disputing. It may be possible for the judge to express an opinion as to the strength or weakness of the claim or response (or parts of them).

13. A dispute resolution appointment is confidential. The judge who holds the appointment will not conduct the final hearing in the case in the event that the parties cannot reach an agreement. If the judge expresses a view about the strength or weakness of the claim or response, or about the amount being claimed or disputed, that is not binding on the parties, but it is hoped that it will help them to reach their own agreement. Anything said at the appointment must be kept confidential and not referred to after that hearing.

14. Although the purpose of the appointment is to encourage parties to resolve their dispute by agreement, it is not envisaged that settlement discussions will occur during the appointment itself (although that may happen with the parties' agreement). The parties may wish to involve ACAS in any discussions which take place, and to alert ACAS that an appointment is taking place.

15. If the parties express the wish to enter into immediate settlement negotiations, this may be encouraged, but care must be taken to make sure that unrepresented parties have time to think and to consider any offer, and are informed that, if an offer is made, they may take time to reflect upon it.

16. If a party fails to attend a dispute resolution hearing directed by the tribunal without proper cause being shown, failure to attend such a hearing may amount

to unreasonable behaviour in respect of the conduct of the proceedings if the tribunal is considering whether to make a costs award under rule 76.

Reaching an agreement

17. Where a settlement is reached at or following a dispute resolution appointment, it will be recorded by one of the following means:

    - An ACAS conciliated settlement (COT3);
    - A compromise agreement between the parties; or
    - A consent judgment issued under rule 64.

18. Alternatively, if the parties agree and the judge considers that it would give effect to rules 2 and 3 of the ET Rules to do so, a judicial mediation may be listed. The judge will also remind the parties of the availability of the conciliation services of ACAS.