EMPLOYMENT TRIBUNALS
(ENGLAND & WALES)

Presidential Guidance
Rule 3 – Alternative Dispute Resolution

1. This Presidential Guidance is issued on 22 January 2018 under the provisions of Rule 7 of the First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Employment Tribunals Rules of Procedure").

2. It replaces Presidential Guidance on Judicial Assessments first issued on 3 October 2016 and it incorporates an up-dated Guidance Note on Judicial Mediation that was first issued on 13 March 2014 as part of Presidential Guidance on General Case Management.

3. The Employment Tribunals in England and Wales must have regard to such Presidential Guidance, but they shall not be bound by it.

4. Rule 2 of the Employment Tribunals Rules of Procedure provides that the overriding objective of the Rules is to enable Employment Tribunals to deal with cases fairly and justly.

5. Dealing with a case fairly and justly includes, so far as practicable —
   - ensuring that the parties are on an equal footing;
   - dealing with cases in ways which are proportionate to the complexity and importance of the issues;
   - avoiding unnecessary formality and seeking flexibility in the proceedings;
   - avoiding delay, so far as compatible with proper consideration of the issues; and
   - saving expense.

6. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, the Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

7. Rule 3 of the Employment Tribunals Rules of Procedure provides that a Tribunal 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***.

8. Having regard to Rule 2 and Rule 3, this Presidential Guidance reproduces a Protocol for an Employment Judge conducting a Judicial Assessment of a claim and a response as part of a preliminary hearing (case management) held under Rule 53(1)(a) of the Employment Tribunals Rules of Procedure. The Protocol on Judicial Assessments is appended to this Presidential Guidance (together with some Questions and Answers for the parties). It provides a formal framework for the preliminary consideration of the claim and response with the parties that is already often an important part of a preliminary hearing (case management) in defining the issues to be determined at a final hearing. It is not anticipated that it will lead to longer preliminary hearings or to an increase in the number of preliminary hearings conducted by electronic communications under Rule 46. It will be particularly helpful, but not exclusively so, where a party to a claim is not professionally represented at the preliminary hearing (case management).

9. Having regard to Rule 2 and Rule 3, this Presidential Guidance also reproduces the Explanatory Note to the parties in respect of Judicial Mediation.

Judge Brian Doyle
President
Employment Tribunals (England & Wales)
22 January 2018

APPENDIX 1:
PROTOCOL FOR JUDICIAL ASSESSMENT

Introduction

1. This protocol sets out the basis on which the Employment Tribunals will offer to parties the facility of Judicial Assessment of their cases.

The aims and purpose of Judicial Assessment

2. Judicial Assessment is an impartial and confidential assessment by an Employment Judge, at an early stage in the proceedings, of the strengths, weaknesses and risks of the parties' respective claims, allegations and contentions.

3. The statutory basis for the offer is Rule 3 of the Employment Tribunals Rules of Procedure 2013, which provides that "A Tribunal 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."

4. Although the purpose of Judicial Assessment is to encourage parties to resolve their dispute by agreement, it is not envisaged that settlement discussions will necessarily occur during the Judicial Assessment itself.

5. Employment Tribunal proceedings are costly of parties' time and resources. They are stressful for parties and witnesses. Almost every case entails risks for both parties.

6. An early assessment of the case by an Employment Judge may assist the parties in identifying what the case is really about, what is at stake, and may clarify and narrow the issues and encourage settlement. This may lead to resolution of the case by agreement between the parties before positions become entrenched and costs excessive, or may shorten and simplify the scope of hearings.

7. This reflects the overriding objective of the Employment Tribunals to deal with cases justly, speedily and cost-effectively (Rule 2). Judicial Assessment is particularly valuable in view of the lack of information and advice available to parties in Employment Tribunal cases, many of whom are unrepresented.

Identification of suitable cases

8. Judicial Assessment will generally be offered at the first case management hearing in the proceedings. It will take place after the issues have been clarified and formal case management orders have been made in the first part of the case management hearing.

9. Most cases of any complexity which are listed for a case management hearing on service of proceedings 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 not all of whom request Judicial Assessment
- a party is insolvent
- High Court or other proceedings exist or are intimated.

Initial formalities

10. Written information about Judicial Assessment will be available to parties in all cases listed for an initial case management hearing.

11. The parties are encouraged to inform the Tribunal in advance of the case management hearing that they wish to have Judicial Assessment in their case. This will enable the Employment Judge to prepare for the process and to make sure that sufficient time is available on the day. However, even if the parties have made no request in advance, the Employment Judge, in suitable cases, may offer Judicial Assessment during the case management hearing.

12. Judicial Assessment will almost invariably take place at the initial case management hearing. This reflects the need for it to happen at an early stage in the proceedings. It will not generally be offered later in the proceedings.

13. If Judicial Assessment is expected to take place, the case management hearing may be listed in person rather than by telephone conference call if it is envisaged that the necessary in-depth discussion could not take place in a telephone conference call. However, the Employment Judge will have the discretion to conduct a Judicial Assessment by telephone or other electronic communication means in appropriate cases. Sufficient time will be allocated to the case management hearing (generally up to two hours, depending always on the nature of the case).

14. It is a requirement for Judicial Assessment that the parties freely consent to it. Whilst the Employment Judge will explain the advantages of Judicial Assessment, no pressure should ever be placed on any party to agree to it.

15. The information provided to the parties in advance will make clear that Judicial Assessment is strictly confidential. This will be repeated by the Employment Judge before the Judicial Assessment takes place.

16. Although anything said in the Judicial Assessment might be used in subsequent “without prejudice” discussions between the parties, or in a Judicial Mediation, the views expressed by the Employment Judge are non-attributable and must be kept strictly 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.

The conduct of the Judicial Assessment

17. Judicial Assessment involves evaluating the strength of the parties' cases. Employment Judges will use their skill and experience in doing this, whilst remaining wholly impartial. Whilst recognising that evidence will not have been heard, Employment Judges may, when appropriate, give indications about the possible outcome of the case.

18. Judicial Assessment is not the same as Judicial Mediation. An outcome of Judicial Assessment may be that a case is listed for Judicial Mediation. Judicial Assessment is indicative in nature and will involve a practical assessment of the case by the Employment Judge. Judicial Mediation is usually facilitative, but can be indicative or evaluative; has the aim of assisting the parties to achieve a resolution of the issues between them without giving any indication of prospects of success; and is usually allocated a full day of the Employment Tribunal's time.

19. It is possible that the Judicial Assessment process will lead to immediate settlement negotiations between the parties. This is not the primary purpose of Judicial Assessment, but will be encouraged if it occurs, and time will be made available for it.

20. The Judicial Assessment must only be conducted after the issues between the parties have been fully clarified and case management orders made in the usual way at the case management hearing. The Judicial Assessment is not a way of avoiding the discipline of a properly conducted case management hearing and indeed is dependent upon the process.

21. If the parties consent, the Employment Judge may then give an assessment of the liability and/or remedy aspects of the case. It will be made clear that the assessment is provisional and that the Employment Tribunal hearing the case may come to a different view. In conducting the assessment the Employment Judge must make it clear that they are assessing the case on the state of the allegations and not evaluating the evidence, which has not been heard or seen, and assessing provisionally the risks as to liability and, typically, brackets of likely compensation on remedy. The Employment Judge will encourage parties to approach the process with an open mind and to be prepared to enter into the assessment pragmatically and to be receptive and to listen to the Employment Judge's views.

22. The Judicial Assessment will be conducted with a view to assisting eventual 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 advised that if an offer is made, they should take time to reflect upon it.

23. Judicial Assessment of parties' cases must be provisionally and guardedly expressed because no evidence will have been heard. Employment Judges must recognise that parties may not fully understand the distinction between a provisional indication and the eventual result of the case.

24. The Employment Judge may make their own notes of the Judicial Assessment. These will not be placed on the case file and the parties will be informed that such notes are kept only as the Employment Judge's record and will not be distributed to them or to any third parties.

25. The Employment Judge who conducted the Judicial Assessment will normally not then be involved in any part of the proceedings which may entail final determination of the parties' rights (except that 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. This does not preclude involvement in day to day case management of the proceedings, including, in particular, case management hearings.

Action following the Judicial Assessment

26. In some cases, a settlement may be reached at the Judicial Assessment. Any settlement will be recorded by one of the following means:

- ACAS COT3;
- Formal settlement agreement between the parties;
- Consent judgment by the Tribunal;
- Conditional withdrawal and dismissal of the claim upon payment within an agreed period.

27. More usually, the parties will wish to consider their positions following the Judicial Assessment. If the parties agree, a Judicial Mediation may be listed. Otherwise the Employment Judge will remind the parties of the availability of the conciliation services of ACAS.

APPENDIX 2:
JUDICIAL ASSESSMENT
Questions and Answers for the parties

Not every case is suitable for Judicial Assessment. It is in the discretion of the Employment Judge whether to offer Judicial Assessment.

What is Judicial Assessment?
Judicial Assessment is a service offered by the Employment Tribunals to assess the strengths, weaknesses and risks of the parties' respective claims, allegations and contentions on liability and remedy, at an early stage on an impartial and confidential basis. If all parties and the Employment Judge agree, the Judicial Assessment will take place at the end of the private case management hearing. The service is optional and the Employment Judge cannot decide anything about your case at a Judicial Assessment.

Why might I want to consider taking part in a Judicial Assessment?
Judicial Assessment may save time and expense if it leads to a settlement. The first part of your case management hearing will clarify the issues between the parties and set a timetable to ensure that the case is ready for a full hearing. This involves a great deal of work over the coming weeks and months (organising documents and witness statements and having other evidence ready such as medical reports). Preparation for a hearing is expensive and time consuming for all parties. The Employment Judge will normally arrange a full hearing, which may be in several months' time. It may involve several days or weeks in Tribunal depending on the complexity of the case. Judicial Assessment may lead to an early settlement of the proceedings.

How is the Judicial Assessment different from the first part of the private preliminary hearing?
Judicial Assessment is strictly confidential and will involve the Judge giving a provisional assessment of the case**.**

What does "Confidential" mean?
The parties cannot give details of the assessment to anyone other than their advisers. Although anything said in the Judicial Assessment might be used in subsequent "without prejudice" discussions between the parties or in a Judicial Mediation, the views expressed by the Employment Judge are non-attributable and must be kept strictly 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 full merits hearing. Unless the parties agree to these conditions, Judicial Assessment will not take place. The Judge's notes will be kept separate from the case file and if the case proceeds to a full hearing the Tribunal will not see those notes.

What does "without prejudice" mean?
Anything said during the Judicial Assessment may not be referred to in correspondence or at subsequent hearings. Such statements are inadmissible evidence. They include offers of settlement and what is said leading up to and to explain such offers. They are made with view to settling the case and are without prejudice to the parties' position at a full merits hearing. They include anything said by the Employment Judge during the Judicial Assessment.

What is an assessment?
The Employment Judge in the Judicial Assessment may express a provisional view on the strengths and weaknesses of parts of the case without having heard any evidence, but by considering the law and what parties say about their cases. The Employment Judge will use his or her skill and experience in the assessment, while remaining wholly impartial. The assessment may identify possible ranges of compensation for remedy if liability is established. The purpose of the provisional assessment is to help the parties to resolve their differences by way of settlement. The eventual outcome at the hearing may be different from the Employment Judge's assessment. An assessment is not legal advice nor does it relieve a party from the need to take legal advice.

Will the Judge always offer a Judicial Assessment?
There is no presumption that an Employment Judge will offer a Judicial Assessment. The Employment Judge will take into account the time available and matters that might mean settlement is difficult or impossible. These might include where a party is insolvent or bankrupt, other proceedings exist or the parties indicate an intention to commence other proceedings, or the parties express a view that the case cannot be settled.

Is there any fee payable for a Judicial Assessment?
No.

What do I have to do if I want a Judicial Assessment?
You should indicate your interest in the box on the case management agenda for the case management hearing and bring it to the case management hearing or send it in advance to the Tribunal. A Judicial Assessment will only take place if all parties agree.

How can a case settle at a Judicial Assessment?
There are four ways in which this can happen:

- ACAS may be contacted to produce a conciliated settlement (normally recorded by way of an ACAS COT3 agreement).
- There may be a formal settlement agreement between the parties (often called a compromise agreement).
- There may be a consent judgment by the Employment Judge.
- There may be conditional withdrawal and dismissal of the claim upon payment within an agreed period.

What if the case does not settle at a Judicial Assessment?

The case will proceed as ordered at the case management hearing. The Employment Judge will not normally be involved in any part of the proceedings which may entail a final determination of the parties' rights, but the Employment Judge may conduct any subsequent judicial mediation and is not precluded from day to day case management, including any further case management hearing. It is still open to the parties to agree to Judicial Mediation, if offered. The services of ACAS are available to the parties at any time.

APPENDIX 3:
JUDICIAL MEDIATION – AN EXPLANATION FOR THE PARTIES

Introduction to judicial mediation

1. It is often better for everyone involved to settle their legal dispute by agreement rather than by going through a possibly stressful, risky, expensive and time-consuming hearing. The process of judicial mediation is one method for achieving settlement. It is entirely voluntary and it is private. It no longer incurs a fee.

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

Is your case suitable for mediation?

3. Cases with complaints under any jurisdiction are potentially suitable for mediation, although it is not likely to be cost-effective – and therefore not 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. Multiple respondents may diminish suitability. Particular 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 or not to offer judicial mediation is made by the Regional Employment Judge (or his or her nominated judge).

How is your case identified as suitable?

4. At a preliminary hearing an Employment Judge may ask you if you consider your case suitable for mediation. If both parties are keen to enter mediation the judge will refer the file to the Regional Employment Judge, who will decide whether the case may qualify for an offer of judicial mediation. This may include consideration of how reasonably the litigation is being conducted. An up-to-date schedule of loss or statement of remedy will assist the Regional Employment Judge.

Telephone preliminary hearing

5. If satisfied, the Regional Employment Judge will hold a preliminary hearing with the parties (or their representatives) by telephone. It is likely that judicial mediation will be offered in this hearing if both parties persuade

the Regional Employment Judge that it has a high prospect of success. This means, in large part, that they must demonstrate a real willingness to compromise.

6. Where judicial mediation is offered and accepted by both parties, the Regional Employment Judge will list a date for the mediation, usually within the next three weeks, and make any necessary orders and directions. The Regional Employment Judge will need to know that decision-makers with authority to make decisions *on the day* will be at the mediation in person, so parties should be able to provide names and job titles during the telephone hearing.

What happens in judicial mediation?

7. The parties to a judicial mediation come to the Tribunal hearing centre for what is listed as a private preliminary hearing. They receive the assistance of a judge trained in mediation for a day, very occasionally two days. The judge will not make decisions for the parties, impose solutions, give advice or hear evidence. However, if requested and subject to mutual agreement, the judge may give an indication as to the strength of a particular point. 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.

8. The mediation day starts relatively early. On arrival, the parties are provided with separate consultation rooms which they may occupy for the duration of the mediation. At 9.30 a.m. the parties are invited to meet the judge and each other around a table in a private 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. The judge who conducts the mediation will not hear the case if the mediation fails. 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.

9. 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.

10. After the round-table meeting, the parties withdraw to their own rooms. The judge then visits the parties in their separate rooms. The judge will seek to understand what each side wishes to achieve and, sometimes, to manage their expectations. The judge will use that understanding to help the parties move to a position where they have reached a solution which they both agree.

11. If lawyers are involved, they will often be able to record the agreement in writing. So it is likely to be useful if they bring laptops with internet access, memory sticks and template compromise agreements.

12. After the initial meeting, the parties need not meet up again, but often do if they (perhaps more realistically, their lawyers) wish to discuss matters directly or at the end when agreement is reached.

13. When agreement is reached the judge and/or the parties will usually contact ACAS, which is independent of the judiciary. To this end, the parties are requested to bring the name and contact details of their ACAS conciliation officer, having notified the officer in advance of the mediation date. The ACAS officer may be sent any written agreement and/or a telephone conference call may be set up to speak to the officer to establish that there is a binding legal agreement. It is advisable for any draft settlement agreement to be copied to the other party in advance of the judicial mediation.

14. A successful mediation is one which concludes with a signed agreement. The hearing will then be vacated and the dispute will be over.