



TRIBUNALS
JUDICIARY

JUDGE SIMON
PRESIDENT
EMPLOYMENT TRIBUNALS (SCOTLAND)

Practice Direction

Fixing and Conduct of Remote Hearings

Introduction

1. This Practice Direction is made under Regulation 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (hereafter “the Regulations”) which allows each President to make Practice Directions about the procedure of Employment Tribunals in the area for which the President is responsible.
2. This Practice Direction is concerned with the fixing and conduct of remote hearings in Employment Tribunals (Scotland). It applies to all types of Employment Tribunal hearings contemplated by the Regulations, including hearings in public or in private, and hearings that are preliminary hearings (whether for case management purposes or otherwise), final hearings, remedy hearings, expenses hearings, and reconsideration hearings.
3. If the remote hearing is taking place during the course of the Covid-19 pandemic the Tribunal and the participants, in any proposed or actual remote hearing, shall also have regard to the “Presidential Guidance In Connection With The Conduct of Employment Tribunal Proceedings During the Covid-19 Pandemic”. In particular paragraphs 4-14 of the Presidential Guidance consider the fixing and conduct of remote hearings.
4. Practical guidance and information about taking part in remote hearings is contained in the document entitled “Guidance on Remote Hearings in the Employment Tribunals” which should be read alongside this Direction. The guidance document will be subject to change so it is important that those consulting it ensure that reference is being made to the latest edition.

Decisions about whether to hold a remote hearing

5. Schedule 1 of the Regulations sets out the Employment Tribunals Rules of Procedure (hereafter “the Rules”). Rule 46 provides that “A hearing may be conducted, in whole or in part, by use of electronic communication (including by telephone) provided that the Tribunal considers that it would be just and equitable to do so and provided that the parties and members of the public attending the hearing are able to hear what the Tribunal hears and see any witness as seen by the Tribunal”.

6. For the purposes of this Direction an Employment Tribunal hearing conducted wholly or partly by use of electronic communication (whether by use of telephone and/or video technology of any kind) is a “remote hearing”.
7. The “Tribunal” for these purposes means an Employment Judge sitting alone or an Employment Judge sitting with one or two members in accordance with section 4 of the Employment Tribunals Act 1996 (“the Act”) and regulations 8-9 of the Regulations.
8. In deciding whether to hold (or to continue to hold) a remote hearing, and in conducting such a remote hearing, the Tribunal shall have regard to the overriding objective in rule 2 of the Rules; its powers to make case management Orders and other powers (rules 29-39); and the rules that are common to all kinds of hearings (rules 41-50). This Practice Direction does not bind any judicial discretion afforded by the Rules.
9. In deciding whether a remote hearing is appropriate, an Employment Tribunal shall take account of all relevant circumstances including, but not limited to whether:
 - any party is a party litigant;
 - any party, witness or representative is a vulnerable person;
 - parties, witnesses and representatives have access to, and are able to use confidently, available telephony, IT and internet services (including possession of or access to hardware and software, and access to a reliable telephone signal and/or adequate broadband or WiFi coverage);
 - the arrangements in place are such that represented parties are able to converse appropriately with their representatives and representatives are able to take instructions in an appropriate manner;
 - the parties and witnesses will be able to participate fully in the remote hearing in a manner which is conducive to the achievement of a fair and just hearing and
 - the Tribunal, by means of a remote hearing, will be able to fairly assess any evidence it hears in order to allow it to come to a determination (that is a final decision about one or more of the legal issues in the case) if that is what is required.

Preparation for a remote hearing (other than a case management preliminary hearing or a judicial mediation hearing)

10. Tribunals shall issue Orders in relation to every hearing which is to be conducted remotely (other than a case management hearing or a judicial mediation hearing) which will normally include (but are not limited to):
 - (i) Orders about the format in which documents, witness statements, written submissions and legal authorities are to be provided to the Tribunal (hereafter “the overall bundle”);
 - (ii) Orders about the indexing and pagination scheme to be followed in respect of the overall bundle(s);
 - (iii) Orders specifying whether a joint overall bundle is to be prepared and submitted, and if so, by whom, and if not, whether each party is to prepare and submit their own overall bundle;
 - (iv) Orders setting out a timetable for preparation of the overall bundle(s) and exchange of any component parts of the overall bundle(s)
 - (v) Orders setting out any particular steps to be taken to ensure that the overall bundle(s) can be effectively utilised in the context of a remote hearing;

- (vi) Orders setting out what arrangements are to be made to ensure that witnesses are provided with the overall bundle(s) or relevant parts thereof;
- (vii) Subject to paragraph 12 below, Orders relating to recording and broadcasting of the hearing (including taking screenshots or photographs of the hearing or overall bundle(s));
- (viii) Orders setting out any steps that parties are to take to test their equipment and ability to participate in a remote hearing, in advance of the hearing taking place, including participating in any trial run/test organised by or on behalf of the Tribunal.

11. Where any of the particular matters set out in paragraph 10 (i) – (vii) are not the subject of Orders in advance of the hearing the Tribunal will set out in its Reasons pertaining to the determination in question the arrangements which were in place which meant that it was not necessary to make such Orders.

Recording and broadcasting of remote hearings - WARNING

12. **A remote hearing, or part thereof, must not be recorded, broadcast or commented upon during its course using live text based communications (including by social media), without the permission of the Tribunal, by any participant in the hearing or by any member of the public or press who has “joined” the hearing to listen and/or observe. “Recording” means a visual or sound recording on any medium from which a single image, a moving image or any sound may be produced or reproduced, or the making of any such recording, and “record” and “recorded” shall be construed accordingly. “Broadcast” means the transmission to members of the public of a recording of a hearing.**
13. **Recording or broadcasting a hearing, or part thereof, without permission will be a breach of this Practice Direction. Similarly commenting upon a hearing during its course using live text based communications (including by social media), without permission, will be a breach of this Direction. Such a breach will be treated as a breach of a Tribunal Order and may result in the claim or response, or part thereof, being struck out within the meaning of Rule 37 and/or an expenses or preparation time order being made under the provisions of Rule 76. Furthermore, Section 9 of the Contempt of Court Act 1981 applies: a recording of a hearing, or part thereof, should not be made without the permission of the tribunal. Broadcasting a hearing, or part thereof, may similarly lead to further proceedings.**
14. **The Lord Chancellor retains the copyright of live recordings of Tribunal proceedings. The use, capture, re-editing or redistribution of the material in any form, without the permission of the Tribunal, could attract liability for breach of copyright and/or defamation, in addition to the possibility of contempt proceedings.**

Recording of remote hearings by the Tribunal

15. Where suitable arrangements can be made a remote hearing (other than a judicial mediation hearing) will normally be recorded by Her Majesty’s Court and Tribunals Service (HMCTS) on behalf of the Tribunal. Such a recording may be audio only or audio and video.

16. A copy of any such recording will not routinely be made available to parties or to the press but it may be made available in whole or part, on cause shown, by means of a written application to the Tribunal. The Tribunal may impose conditions in respect of access to any recording, including conditions in connection with any transcription of the recording that may be made available, in accordance with any policy in place at the date of any such application.
17. **The Lord Chancellor retains the copyright in respect of recordings of Tribunal proceedings. Although an arrangement may be made for a person to listen to a recording the use, capture, re-editing or redistribution of the material in any form, without the permission of the Tribunal, is not permitted. Any such use could attract liability for breach of copyright or defamation, in addition to the possibility of contempt proceedings.**

Conduct of a remote hearing in public or in private

18. Nothing in this Practice Direction is intended to displace any provisions of the Act, the Regulations or the Rules that require a hearing to be held in public or permit a hearing to be held in private. Regard shall also be had to the principle of open justice and the requirements of article 6 of the European Convention on Human Rights.
19. The principles of open justice remain paramount. If an open and public hearing, where required by the Act, the Regulations or the Rules is not possible the Tribunal will require to adjourn or postpone the hearing until a public hearing is possible (assuming that it is not practicable to conduct an in-person hearing in a Tribunal hearing room at that point in time).
20. Given the importance of the open justice principle, the following issues will need to be addressed before any remote hearing can begin:
- (i) whether the hearing is legally required to be in public or in private;
 - (ii) if in private, on what grounds;
 - (iii) if in public, can a public hearing be secured in circumstances where the hearing is being conducted remotely; and
 - (iv) where possible, have steps been taken to ensure that an audio recording (whether or not accompanied by visual images) will be made of the hearing by HMCTS (other than a judicial mediation hearing).

If these issues cannot be answered satisfactorily that will strongly suggest that a remote hearing is not possible in the particular case.

21. In respect of any remote hearing, which is required to be a public hearing, the Tribunal should check to ensure that the following steps have been taken:
- (i) a notice has been put on the Tribunal cause list, which has been or will be made available free of charge online, that explains to the press and members of the public what they should do if they wish to 'join' the remote hearing (whether that is being conducted using video or telephone)¹;

¹ Further information about how members of the public and press can join remote hearings is available in the guidance document entitled "Guidance on Remote Hearings in the Employment Tribunals". It should be noted that, as would be the case in an in-person hearing taking place in a publicly accessible hearing room, it may be necessary to restrict the number of participants (other than parties, representatives and witnesses) who are enabled to access a remote hearing conducted electronically.

- (ii) in the event that any member of the press or public does 'join' the hearing reference is made to the fact that if they wish sight of:
 - (a) any witness statement, taken as read during the hearing, which is not displayed on screen, they should inform the Tribunal of that fact and appropriate arrangements will be made;
 - (b) any document relied on by parties in the case, which is not displayed on screen during the hearing, they should make an application in writing to the Tribunal, explaining the reason they seek such access.
- (iii) Where it is possible to do so, HMCTS has made arrangements for an audio recording (whether or not accompanied by visual images) to be made of the hearing;
- (iv) In the event that it is possible to stream the hearing live over the internet, parties are given an opportunity to make representations about whether or not that is appropriate and any such representations will be taken into account by the Tribunal when it makes a decision as to whether arrangements should be made to live stream.

Effect and extent of the Practice Direction

22. This Practice Direction has been approved by the Senior President of Tribunals and the Lord Chancellor under section 7A(2C) of the Employment Tribunals Act 1996. It comes into force on the date it is signed below. It applies to Employment Tribunals (Scotland).

Judge S Simon

Date: 11/06/2020