



EMPLOYMENT TRIBUNALS (SCOTLAND)

PRACTICAL GUIDANCE ON REMOTE HEARINGS IN THE EMPLOYMENT TRIBUNALS (SCOTLAND)

NOTE: The President of Employment Tribunals (Scotland) has issued a Practice Direction concerning the Fixing and Conducting of Remote Hearings (the Practice Direction): available at <https://www.judiciary.uk/wp-content/uploads/2015/03/11-June-20-SPT-ETS-PD-Fixing-and-Conduct-of-Remote-Hearings.pdf>. That Direction includes an Order that a remote hearing must not be recorded (this includes taking screenshots or saving documents) or commented upon during its course using live text based communication by anyone, without the consent of the Tribunal. Similarly the Practice Direction includes an Order that no part of a hearing should be broadcast. This Guidance should be read together with the Practice Direction before participating in a remote hearing.

Introduction

1. The following practical guidance is for parties in relation to hearings that take place by telephone or video instead of face to face in a tribunal hearing room (A face to face hearing is sometimes referred to as an 'in-person hearing'. This is the term that will be used below). The phrase 'remote hearing' will be used to describe a hearing conducted partly or entirely by telephone or by video.
2. It is inevitable, particularly in the early stages of remote hearings, that there will be technical issues. Similarly, levels of knowledge and experience in dealing with technology of this kind will vary. Parties must be patient and flexible regarding any technical difficulties that may be experienced by another party to proceedings.
3. Further guidance issued by HMCTS on telephone and video hearings during the Coronavirus outbreak can be found at <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>. HMCTS guidance on joining such hearings can be found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876566/Guide_on_joining_court_hearings_by_video_call_or_phone_27_March_2020.pdf

Deciding whether to have a remote hearing

4. The Employment Tribunal (ET) will, where practicable, seek the parties' views on whether a remote hearing is appropriate in connection with any hearing other

than a case management preliminary hearing. (Examples of factors which are likely to be relevant in making that decision are given to in the Practice Direction concerning the Fixing and Conducting of Remote Hearings.) Parties should use that opportunity to make sure that they let the ET know of any concerns or difficulties they have in connection with the hearing taking place remotely. If this has not been done before the hearing, then parties should, at the start of the hearing, raise any concerns they have about the hearing taking place remotely. If they consider that having a remote hearing would not be just and equitable or in accordance with the ET's overriding objective (which is set out in Rule 2 of the Employment Tribunal Rules of Procedure) then they should tell the Tribunal that and explain what makes them think that this is so.

5. Parties are expected to contact any witnesses they intend to bring to check that they have the necessary equipment and internet connection to enable them to take part in a remote hearing. If a party is represented, the representative is expected to make those enquiries of the party they represent and to ensure that the necessary enquiries are made in respect of any witnesses. These enquiries should be made as soon as parties become aware that a remote hearing is being considered. If there is to be a case management preliminary hearing where one of the matters to be considered is listing a hearing, it would be helpful if parties can make these enquiries in advance of such a hearing.
6. Parties (or their representatives) should advise the Tribunal as soon as possible if they consider there will be any difficulties for a party, representative or witness taking part in a remote hearing and set out who is affected and what the difficulties are.
7. During the Covid-19 pandemic, it may be that, in order to avoid delay, remote hearings will be considered when they would not otherwise have been. Nonetheless, avoiding delay is just one aspect of the ET's overriding objective and parties should draw any concerns they have to the attention of the Tribunal so that all the circumstances can be considered when making the decision about whether or not to have a remote hearing.

Telephone hearings

8. Telephone hearings are commonly used for case management hearings so in many instances conducting such a hearing in this way will be an example of 'business as usual'; it is what would have happened in normal circumstances before the Covid-19 pandemic. However, although rule 46 permits the use of telephone hearings for other preliminary or final hearings, they are usually not suitable for long hearings or where there are a number of witnesses. On the other hand, telephone hearings may be appropriate where legal submissions only are being made or where the evidence to be heard is not expected to be lengthy. They might also be a possible means of conducting judicial mediations and hearings about whether a party should pay a deposit under rule 39 of the ET Rules.
9. Telephone hearings will usually take place using BTMeetMe which is a telephone conference facility. Parties will be asked to provide a suitable telephone number and the Tribunal clerk will phone them just before the start time of the hearing. Once all parties are on the line, the clerk will telephone the Employment Judge (hereafter the 'Judge'). This facility does not incur any cost for the participants. While it is appreciated that many parties and representatives

may be working from home during the Covid-19 pandemic, and would generally be reluctant to give out their private telephone number, it is important to note that the telephone number that is provided will be used by the ET listing team only. It will not be disclosed to the other party or their representative and the note taken of the number will be destroyed at the conclusion of the hearing.

10. If a telephone hearing is a public hearing under the Rules of Procedure, this fact will be made clear on the Tribunal Cause List (the list of hearings taking place each day), which is put on the Internet. The Cause List will provide information so that any member of the press or public who would like to listen in on the call is able to do that although they will have no right to speak (other than where a member of the press makes it clear (if possible, at the beginning of the hearing) that they wish to make a submission in connection with any matter relevant to their interests, including the effective provision of a public hearing).

Video hearings

11. Video hearings will normally take place on the HMCTS Cloud Video Platform (CVP) which has been developed by the Ministry of Justice specifically for court and tribunal hearings. CVP is 'browser' based; browser-based applications only require an Internet connection and an installed web browser on your computer to function. A web browser allows a computer or similar device to access the Internet. There are various web browsers available but for best sound and picture on CVP it is strongly recommended that parties use Google Chrome as the browser, which is available to download free. A video hearing using CVP will also work with Microsoft Edge **provided that** a version released in February 2020 or later is used. **CVP is not compatible with Firefox or Internet Explorer.** There is also an app called Pexip Infinity Connect that is free to download and can be used to connect to CVP.
12. In terms of equipment, all that parties need to use CVP is a smartphone, tablet, laptop or PC. However, the bigger the screen available the easier it is likely to be to participate, especially if documents are being shown during the hearing.
13. Although CVP is the preferred option it may be possible to use another computer programme such as Microsoft Teams or Skype for Business to hold a video hearing if there is a particularly good reason to do so. If you want the hearing to take place using a particular programme or video platform you should raise this with the Judge at any telephone case management hearing taking place before the video hearing or by sending an email to the tribunal office (copied to the other party in the case), explaining what programme or platform you want to use and why that is your preference. It will be for the Judge to make the final decision about what video programme/platform is to be used.

Before the video hearing

14. Parties will be **not** be provided with the details required to join the video hearing in the Notice of Hearing. Parties (or their representatives, if any) will be provided with details to take part in a test, a few days before the hearing to ensure that they will be able to connect to the remote hearing. There will be separate tests for each party. This test will take place with a clerk and not a Judge.
15. It is very important that parties, their representatives and any witnesses take part in the test. The parties must ensure that any witnesses they intend to call

are provided with the joining details for the test. If the details have been provided to a representative, the representative must ensure that these are provided to the party they represent as well as to any witnesses for their side of the case. If the test is not satisfactory, a Judge may decide that the remote hearing cannot take place.

16. If the test is satisfactory, the Tribunal will confirm to the parties (or their representatives) the joining details to be used for the remote hearing. These may be different to the joining instructions for the test. Again the parties (or their representatives) must ensure these instructions are passed on to everyone participating in the hearing for their side of the case.

Providing documents to be used in the video hearing

17. The Judge will issue Orders in advance of the hearing which will include how documents should be prepared and provided to the Tribunal. In some cases the Judge may order that parties are to provide documents electronically. In other cases it may be that the Judge will order that the documents are to be provided to the Tribunal in paper form. Generally a Judge will discuss with the parties what format is best for the particular hearing that is to take place. In every case it will be very important that the parties follow precisely the Orders made by the Judge because these will have been designed to try to ensure that the relevant documents can be accessed by everyone participating in the hearing as easily and quickly as possible. This includes any witnesses. It is for the party calling a witness to ensure that they can access any relevant documents.

Connecting to the hearing

18. Parties must bear in mind that even although the hearing is being conducted by video it is still a formal ET hearing. Parties, and all others playing a role in the hearing, should behave and dress in an appropriate business-like manner, just as they would were they to be attending a hearing in an ET hearing centre.
19. It is important that participants should be somewhere private and quiet without distractions and where they will not be disturbed for the duration of the hearing. They should be alone, unless assistance from anyone else has been authorised by the Tribunal.
20. Background noise should be minimised as far as possible. Ideally, sources of light should be in front of or directly above the participant so that their face can be seen clearly. Lighting from behind (such as a window) is to be avoided if possible.
21. If a participant intends to join by using a mobile device such as a phone or tablet, it must be positioned so that the camera is stable, still, and producing a good image of the participant.
22. Only one device should be connected to the hearing in any one physical room to avoid interference. The use of headphones and headsets, including simple mobile phone headphones, also helps to avoid echoes, feedback and other interference. Mobile phones should be switched off, or set to silent, unless they are being used to connect to the hearing or to communicate in a permitted manner with other participants.

23. On the day of the hearing the parties should join the hearing 15 minutes before the scheduled start time, in case there is any delay in establishing a connection.
24. Once all the participants have successfully accessed the hearing, the clerk will invite the Judge and ET Members (if it is a full panel) to join the hearing.
25. Once the hearing starts, microphones should be muted unless it is that person's turn to speak. The video should remain switched on.
26. Parties and representatives should not enter 'mirror screen' or 'share screen' mode, or send a document or attachment, without seeking the Judge's permission.
27. The Judge will administer the oath or affirmation to witnesses in the usual way but there is no need for the witness to stand up. Holy books are not required to take the oath in Scotland.
28. There is a Chat Room facility for instant messaging between participants on the screen in the video hearing room. The contents can be seen by everyone in the room at the time. Parties and their representative should agree before the hearing, how they will communicate with each other during the hearing. This may be by text message, Whatsapp or other means. Such communication, of course, must not take place while a party is giving evidence.
29. During the hearing, if a party or their representative wishes to say something to the Judge or to object to something that someone else is saying, they should hold up their hand or send a message to the Judge using the Chat Room facility. Exceptionally, if the matter is urgent, they may "unmute" their microphone to speak.
30. Similarly, if a representative wishes a break in order to take instructions on any particular matter they should hold up their hand or send a message to the Judge using the Chat Room facility.
31. If a participant is cut-off, they should re-join using the same link.
32. If a participant experiences connection difficulties, it is possible to connect to the hearing (audio only) using the telephone number provided on the joining instructions. This may incur a charge.
33. During breaks, the parties may be asked to mute their microphone and switch off their camera or they may be asked to disconnect and re-join at a set time.
34. At the end of the hearing the parties will be disconnected from the hearing by the Judge.

Witnesses

35. Each party is responsible for ensuring that any witnesses they intend to call are provided with the details of how to connect to the test and to the hearing and that they have the necessary equipment to do that. Each party should also ensure that each witness has been provided with the documents to which they will be referred and that these are numbered in the same way as those provided to the Tribunal.

36. Parties should keep witnesses informed of when they are likely to be required to give evidence and when they should connect to the hearing. They should ensure that they have contact details for the witnesses with them at the hearing so that if there are any changes in timing the witness can be contacted easily. Any such contact between a party (or their representative) and a witness must relate **only** to the timing or other arrangements for attending the hearing and must not refer to the evidence to be given by the witness or which has already been given or may be given by any other witnesses.
37. The witness should connect to the hearing from a quiet room in which they will not be disturbed. They should be alone unless they require assistance, and this has been authorised by the Tribunal.
38. Witnesses will hear a message that tells them they are “waiting for the conference host to join” until it is time for them to give their evidence when the Judge will allow them to access the hearing. Parties should advise their witnesses that they may have to wait for some time before they are allowed into the hearing and ask them not to disconnect if that happens. Witnesses should also be told that if the call is disconnected (as may happen after an extended waiting period) they should call back using the same instructions as before.
39. Witnesses will be required to take the oath or to affirm before giving their evidence.

Recording, broadcasting and publicity

40. As noted above, a remote hearing **must not be recorded** by anyone (in whole or part), without the consent of the Tribunal, nor should any part of the hearing be broadcast by anyone. This includes taking screenshots or saving any documents. Similarly, commenting on a hearing during its course, using live text-based communications, without the consent of the Tribunal, is not allowed. **Recording or commenting using live text based communications, without the Tribunal’s consent, will breach the Practice Direction on remote hearings. Furthermore, Section 9 of the Contempt of Court Act 1981 applies: recording all or any part of a hearing without consent may lead to legal proceedings against the person who has made the recording. Broadcasting all or any part of a hearing will similarly be a breach of the Practice Direction and may lead to further proceedings. Further information is provided in the Practice Direction.**
41. However, if the remote hearing is a “**public hearing**” in terms of the Rules of Procedure:
- Where possible the hearing will be audio recorded and a copy of the recording will be stored by HMCTS for up to 12 months, pending any appeal or further procedure in the case;
 - members of the press and the public will be able to view (or, if on the telephone, hear) the hearing live if they have made an arrangement to do so. Details of how they can arrange this will be published on the Tribunal Cause (i.e. hearing) List which is available on the Court Serve website <https://www.courtserve.net/>. It is necessary to register to access the Cause Lists but there is no charge for doing so.

42. In the event that any member of the press or public does 'join' the hearing if they wish sight of any witness statement taken as read, which is not displayed on screen, they should inform the Tribunal of that fact. Similarly if they wish sight of any document relied on by parties in the case, which is not displayed on screen, then they should make a written application to the Tribunal, explaining the reason they wish to see the document. It is a decision for the Tribunal as to whether or not to grant such access.

43. Reference is made in the Practice Direction on the Fixing and Conducting of Remote Hearings to what should happen in the event it is possible to live stream proceedings. For the avoidance of doubt it is not currently possible to live stream ET proceedings and it is not envisaged that this is something that will be introduced in the foreseeable future.

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