EMPLOYMENT TRIBUNALS (SCOTLAND)

GUIDANCE NOTE TO ACCOMPANY AGENDA FOR PRELIMINARY HEARING (Respondent) IN A CLAIM MADE UNDER THE EQUALITY ACT AND A CLAIM RELATING TO PUBLIC INTEREST DISCLOSURE (WHISTLEBLOWING)

The preliminary hearing (PH) that has been fixed will involve a discussion between an Employment Judge (referred to in the remainder of this guidance note as the "Judge") and the parties and/or their representatives about the case(s), held in private so that it can be full and frank. You will have the opportunity to ask the Judge anything about how the case will be dealt with and the procedure that will be followed. However the Judge cannot give legal advice.

The purposes of the PH are:

(1) To identify the nature of the case (i.e. the type of complaint(s) being made and the law that applies).

(2) To work out what issues need to be dealt with in the case.

(3) To decide how those issues are to be resolved or decided by the Tribunal.

(4) To make orders to ensure that the proceedings are as fair, effective and efficiently conducted as possible.

(5) To list the case for a hearing.

What is meant by "the issues" is simply the questions the Tribunal must answer in order to decide whether or not a claimant should win his or her case. (This is often referred to as a claimant being "entitled to a remedy"). It is important to identify the issues at an early stage so that both parties and the Tribunal understand what has to be addressed and about what matters evidence needs to be led.

Having identified the type of complaint(s) being made and the issues which need to be resolved, the Judge will consider whether there are any legal matters that need to be decided at a further preliminary hearing or whether the case can proceed to a final hearing.

The Judge will then make orders to ensure that any future hearing is as fair and efficient as possible. These orders may require one or both parties to provide information or documents to the other and will usually include fixing a date or dates for future hearings

As a party in the case, you, or your representative, should assist the Judge at the PH by:

(1) Completing the Agenda as far as possible and relevant to the claim and in accordance with the time scale set out in that document.
(2) Considering in advance what needs to be discussed and communicating with the other party (or parties) about it. In particular, you should tell all of the other parties about any orders you will request at the PH; what you believe to be the issues; and any views you have about the likely value of the claim.
(3) Having a detailed knowledge of the history and background of the case and/or having someone present who has that knowledge.
(4) Having information with you about availability of witnesses and representatives for future hearings.

Completing the Agenda

The purpose of this document is to ensure that both parties have fair notice of the matters to be discussed at the PH and each other's position on each matter and to ensure that the time allocated for the PH is used efficiently. The claimant and the respondent have different versions of the agenda. The claimant has been asked to complete his/her version of the Agenda first and send it to you so that, in replying, you can take into account information provided by the claimant which may help to clarify issues and areas where there may be scope for agreement.

If you are unsure about how to respond to any question, answer as best you can. If you don't think a particular question is relevant to your case, mark it as "not relevant". The answers you provide will not form part of your response unless the Judge directs that any part is to be accepted as further particulars. However, the Judge will provide a Note of the discussion which takes place at the PH and that Note may refer to the answers you have provided.

You will have the opportunity to discuss your answers with the Judge at the PH. However the Judge cannot give advice to either party. You may therefore wish to seek advice before completing the Agenda. This may be from a solicitor, your local Citizen's Advice Bureau or other voluntary organisation. Information is also available from ACAS (www.acas.org.uk) or the Equality and Human Rights Commission (www.equalityhumanrights.com)

The following guidance is intended to assist you to complete the Agenda.

1 Parties

R1.1 The claimant and respondent(s) are known as the "parties" to the case. It is important to ensure that the names of the parties are correct. The respondent must be a "legal person" such as an individual or a registered company. If the respondent is described merely by a trading name, such as "Smith Leisure", any judgment is likely to be unenforceable. The correct respondent is likely to be "John Smith, trading as Smith Leisure" or "Smith Leisure Limited". You may have provided this information already on your response.

R1.2 Sometimes it is not clear who the correct respondent should be (e.g. there may be confusion about who actually employed the claimant). Similarly, more than one person or body may be liable legally if something has happened which does breach the relevant legal provisions. If there is more than one person or organisation which may be liable for any failure to comply with the relevant law, then the Judge may decide that another person or company should be added as an additional respondent. The matter of who is in fact liable may need to be resolved later, usually at a preliminary hearing.

R1.3 Equally if a person has been named as a respondent and it is now agreed that he/she was not the correct respondent then it is appropriate that he/she be removed from the proceedings. Most claims can only be made against the claimant's employer. However, claims of discrimination may be made against the employer and other individuals (most commonly employees of the employer) or can be made against other organisations such as trade unions and professional bodies of various types.

R1.4 If claims arise out of the same facts, it may be convenient for those claims to be heard together or for a lead case to be selected. This avoids duplication of evidence and usually saves expense. If you are aware of other claims which may be similar you should indicate this and whether you consider any other claim could conveniently be combined with the claim which is being considered at the PH. You may also wish to object to claims being combined if you consider that they do not arise out of the same facts or it would be unjust to hear them together.

2 Details of the response

It is an important part of preparing a case for a final hearing that the respondent identifies any matters that it is prepared to "concede". This does not mean that you are not defending the case but just that you do not dispute that particular matter. So, for example, in an unfair dismissal case, you might agree that the claimant was dismissed but not that that dismissal was unfair. In a discrimination case, you may agree that certain events occurred but dispute that this was because of sex, race, age etc. You might

accept that a policy you have puts people having a protected characteristic at a disadvantage but argue that this was justified.

You are asked in this section of the form if there are any matters you can concede at this stage. This assists the Tribunal (and the parties) as it means the tribunal can focus on the issues that are in dispute and it will usually mean that the Hearing is shorter. While you cannot be forced to concede any matter (and should not feel under pressure to do so) , if you are found to have acted unreasonably in conducting the proceedings or your response or part of it has been held to have been misconceived, expenses may be awarded against you. Such awards are not common. A similar provision applies to the claimant.

R2.1 The Equality Act defines a "disabled person" as someone who has a physical or mental impairment that has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities. It may be that you are prepared to agree at this stage that the claimant was a "disabled person" at the time of the alleged discrimination while denying that there was disability discrimination. Alternatively you may require the claimant to prove that s/he is a disabled person. This may involve the preparation of medical reports and possibly a separate hearing. You are asked to consider carefully whether such a concession can be made at this stage.

R2.2 To succeed in some complaints of disability discrimination, the Tribunal must be satisfied that you knew (or should have known) that the claimant was a disabled person at the time that the alleged discrimination took place. This would include knowledge of your employees. Again you are asked to consider carefully whether you concede that matter.

R2.3 If the claimant says that you failed to make a "reasonable adjustment" for his/her disability, the claimant should have identified in Schedule 2 (answer to D.6) , the provision, criterion or practice etc that he/she says put him/her at a substantial disadvantage and should have been adjusted. You are asked whether it is conceded that such a provision, criterion or practice etc was in place and that it put the claimant at a substantial disadvantage compared to someone who is not disabled.

R2.4 Following from R2.3, a claim for failure to make reasonable adjustments requires that the respondent knew or should have known of the alleged disadvantage at the time there was the alleged failure to make adjustments. You are asked if this is conceded.

R2.5 If the claimant is alleging indirect discrimination, he/she should have identified in Schedule 1 (answer to S.5) the provision, criterion or practice that he/she says was discriminatory. You are asked whether you concede that such a provision, criterion or practice was applied to the claimant.

R2.6 There is special protection where someone has been dismissed or otherwise disadvantaged as a result of making a protected disclosure. What qualifies as a "protected disclosure" is set out in s43A of the Employment Rights Act 1996. You are asked here if you agree that the claimant has made such a disclosure. This does not mean that the claimant will succeed. It still will have to be shown that the claimant suffered dismissal or other disadvantage as a result.

R2.7 If there is any other matter you can concede at this stage it is helpful for this to be identified here.

R2.8 You may ask the Tribunal for an order for information to be provided either by the claimant or a third party. The judge will usually expect that you will have sought this information on a voluntary basis first. S/he will also require to be satisfied that the information is relevant and necessary to decide the case. You will need to explain what the information is that you seek to recover. You will not be permitted to undertake a "fishing expedition" if you have no real knowledge of what information there may be or what it may contain.

3 Remedy

If a claimant wins his or her case, the Employment Tribunal will be able to award what is known legally as a "remedy". The remedy most often sought by a claimant is financial compensation. However in unfair dismissal cases it is possible to ask to be reinstated or re-engaged into the previous employment and in discrimination cases the claimant might ask for the tribunal to make a recommendation that you

take action of a particular type designed to reduce the impact of any discrimination as well as award compensation.

The claimant has been asked to set out how what is sought by way of remedy and if it is compensation, the amount of money which s/he claims to have lost as a result of what is stated to have occurred with an explanation how that sum has been worked out.

R3.1 If you require further information about the remedy sought you should set that out in this section.

4 The issues

R4.1 If parties are legally represented they are expected to provide the tribunal with a list of proposed issues. Representatives should seek to agree what the issues are and come prepared to explain to the Tribunal what efforts they have made in this regard. If there is a failure to agree on the issues, representatives should be prepared to explain why agreement has not proved possible.

If you are unrepresented, look at the other party's claim or response as appropriate and see if there are any statements that you agree with. Matters that are not in dispute will not be "issues" so it is helpful to have that noted here.
Once the list of issues is fixed by the Tribunal that will normally set the extent of the matters that will be dealt with at the final hearing.

R4.2 This refers to matters that can be resolved before the case proceeds to a full Hearing. Examples would be if you, as the respondent, think the claim has been submitted late, or you say you did not employ the claimant or that the claimant was not employed for sufficient time to claim unfair dismissal.

5 Documents and expert evidence

R5.1 Each party is entitled to receive fair notice of any documents that the other intends to rely upon. A date is often fixed at the PH by which time a list of such documents, or the documents themselves are to be exchanged. You should insert here the date when you think you will have all your documents ready to exchange with the other party.

R5.2 It is helpful to the tribunal if both sides' documents (in Scotland often called "productions") can be combined into one "bundle" (which may be referred to in Scotland as a "set of productions") rather than having two separate sets of documents. At the PH it will be discussed who should prepare this. In practice this is usually the respondent as respondents most frequently have most of the relevant productions. If you have a view on who should undertake these tasks and when then insert it here.

R5.3 If the case requires medical evidence, for example because the issue of whether the claimant was disabled is contested , the Judge will want to fix a timetable for medical records to be disclosed and, if a joint expert is to be appointed, the process for doing so. This will be discussed at the PH but if you have any views about the need for medical evidence and how it can be obtained please include these here. Other expert evidence might be needed in a case (for example, in connection with pension loss). If you think such evidence might be needed then set that out here.

6 Witnesses

R6.1&R6.2 Each party is responsible for arranging for the attendance of any witnesses that it wishes to call. Only relevant witnesses will be allowed. The Judge will want to know how many witnesses each side intends to call, what they will give evidence about and how this is relevant to the case. It will be up to the Judge to decide whether the evidence of any witness is likely to be relevant to the issues to be decided by the tribunal.

R6.3 The tribunal can issue witness orders. These will only be issued if the Judge is satisfied that attendance of the witness is necessary and that they can give relevant evidence. You are expected to ask witnesses to attend on a voluntary basis before asking for an order. If an order is to be granted, you will need to provide the name and address of the witness.

7 The Hearing

R7.1& R7.2 You are asked to estimate how long you think it will take to present your case. Parties will be asked to agree the order and a realistic timetable for witnesses. You should set out here if possible how long you think you will need to question each witness you intend to call and how long their answers are likely to take.

R7.3 You should provide any dates on which you, your representatives and any witnesses are unavailable within the period during which you have been informed that the case is likely to be heard .On the basis of all of this, a final hearing will be fixed.

8 Judicial mediation

Judicial mediation is a process in which a specially trained Judge takes on the role of judicial mediator and tries to assist parties to resolve the case through structured discussions which take place in private. Any settlement agreed can be made legally binding. If successful a formal hearing of the case will not need to take place. Cases involving discrimination or more complex unfair dismissal claims that are expected to last three days or more may be suitable for judicial mediation. If the Judge thinks the case might be suitable, you will be asked whether you are interested in pursuing this option. If you think that the case might be suitable for judicial mediation then you can note this here. Where parties are represented, it would be of assistance for the representatives to attend the PH with their client's instructions on this possibility.

9 Privacy

Although this first PH will take place in private, as it is for case management, most hearings in an employment tribunal take place in public. Any judgments issued are placed on the online public register. The Tribunal may restrict publicity, for example by ordering that aspects of the case may not be reported or by anonymising a witness or a party in the public record. This requires a careful consideration by the Tribunal of all the relevant circumstances, including any rights under the European Convention. This is set out in Rule 50 of the Rules of Procedure. The Tribunal must give full weight to the important principle of open justice and the right to freedom of expression. It is not enough that a party would simply prefer to have the proceedings kept private. Such orders are unusual but if you think the circumstances of your case fall into this category you can ask the Judge to make such an order at the preliminary hearing.

10 Any other matters

While you may refer to any matter in this section you might, for example, include an application to amend your claim or response or any application for orders not already covered.