Courts and Tribunals Judiciary

JUDGE BARRY CLARKE

PRESIDENT | EMPLOYMENT TRIBUNALS (ENGLAND & WALES)

6 November 2023

To: All members of the ET (E&W) national user group

Dear user group members

Practice Direction and Presidential Guidance on the recording of Employment Tribunal hearings and transcriptions

The Presidents of Employment Tribunals in England and Wales and in Scotland have today published a joint Practice Direction on the recording of Employment Tribunal hearings and the transcription of such recordings. It is accompanied by joint Presidential Guidance. The two documents take effect from 20 November 2023.

I am grateful to all members of the national user group for the contributions provided when I consulted you about earlier drafts.

For the benefit of those whose interests you represent on the user groups, I thought it would be helpful to provide you with this covering letter. It explains some of the relevant context and history, and identifies the areas covered by these two documents. You can, if you wish, forward the letter to your own members and constituent groups. Its contents have been agreed with HMCTS.

I begin with a brief explanation for why, hitherto, this jurisdiction's hearings have not been routinely recorded.

As you will know, the Industrial Tribunals were established under the Industrial Training Act 1964. Their workload expanded with the introduction by the Industrial Relations Act 1971 of the right of employees not to be unfairly dismissed. Further important jurisdictions were added when statutes outlawing discrimination came into force throughout the subsequent decades,

followed by the addition of new legislation in respect of matters such as working time and public interest disclosures. A feature of this expanding judicial work was the increasing legal complexity of some of the statutory provisions a tribunal had to consider, and the increasing factual complexity of the cases brought under those provisions.

Industrial Tribunals became Employment Tribunals in 1998. At the turn of the century, administrative support was provided to the Employment Tribunals by the Employment Tribunals Service; this was an executive agency of (what was then called) the Department of Trade and Industry, and is now the Department for Business and Trade. This service transferred to the unified Tribunals Service in 2006 following the recommendations of the Leggatt Report. In 2011, the Tribunals Service merged with HM Courts Service to create HMCTS, which is an executive agency of the Ministry of Justice. As at today, therefore, the Employment Tribunals north and south of the border are provided with administrative support by HMCTS. Crucially, the provision of recording equipment, and identifying arrangements for transcribing recordings, are the responsibilities of HMCTS, and they have been since the creation of the service.

From their inception in the 1960s, Employment Tribunals and their predecessors were not intended to mirror the formality of courts, whether in terms of their nomenclature, their procedure, or their architecture. A feature of this divergence in formality was what constituted the "record of proceedings". The courts traditionally used stenographers to make an official record of proceedings. By contrast, the tribunals were less formal judicial bodies; it was thought that parties should feel free to speak as they wished, especially when they were not professionally represented (which, in this jurisdiction's early days, was the vast majority of cases). Accordingly, stenographers operated only in the courts. In the Employment Tribunals, the note taken of the hearing by the Employment Judge has traditionally been the *de facto* record of proceedings, while the judgment and reasons constitute the record of the outcome; see, further, the EAT judgments in *Heal v. University of Oxford* UKEAT/0070/19 (paragraph 49) and *Kumar v. MES Environmental Limited* [2022] EAT 60 (paragraph 30). The exemption from the listed GDPR provisions that applies by operation of paragraph 14(2) of Schedule 2 to the Data Protection Act 2018 means that an Employment Judge's notes of the hearing will not be disclosed.

Just over a decade ago, HMCTS replaced stenographers in England and Wales with an electronic system. In the Crown Court, this is known as the Digital Audio Recording, Transcription & Storage system (or "DARTS"). In the civil courts, it is known as "DARS" (the missing "T" refers to its lack of transcription functionality). These systems record the relevant trial or hearing and they allow, where appropriate, a transcription to be produced afterwards from the recording. They utilise multiple microphones and an integrated timer, which enable a transcriber to identify who is speaking (and when) when preparing a transcript. A form exists – Form EX107 – by which parties can

obtain a transcript of a hearing in the civil courts (where, most commonly, it is the transcript of the oral judgment that is requested). Accompanying guidance sets out the transcription fees charged by authorised providers, based on a cost per folio of 72 words.

The DARS systems was not installed in Employment Tribunal hearing venues a decade ago, given that this jurisdiction's hearings were not routinely recorded. Across England and Wales, the Employment Tribunals today have use of about 130 dedicated hearing rooms. Most of them are found in leasehold premises that are separate from the Crown Court, the Magistrates' Court, and the County Court, and they have no equivalent recording equipment installed. In a small number of locations in England and Wales, the Employment Tribunals are co-located with courts jurisdictions, and some of those hearing rooms do have DARTS or DARS installed.

There was a recent attempt by HMCTS to deploy portable recording equipment in the Employment Tribunals. This development was mentioned in earlier published minutes of meetings of the national user group (in February and June 2019). Those efforts were hampered by several difficulties: there were too few such devices; there were no accompanying microphones to aid audibility and transcription; and there was no protocol either for the secure storage of the resulting recordings or in respect of arrangements for transcribing them. However, the pandemic brought a change to ways of working in the Employment Tribunals, with increased use of video platforms with integrated recording systems. The main platform used has been the HMCTS Cloud Video Platform (CVP), with some use made of the HMCTS Video Hearings service (VH) and Microsoft Teams.

As already noted, the provision of recording equipment and a system for transcribing recordings is the responsibility of HMCTS. The future may involve use of technology permitting live speech-to-text transcription but, for now, the advent of video technology has provided an alternative mechanism of recording hearings.

And so we come to the present day.

With the agreement of HMCTS, for which I express my gratitude, audio recordings will henceforth be made of all Employment Tribunal hearings where the technical facility exists to do so and where such recordings can be securely retained. This is so whether they are preliminary hearings or full hearings, or hearings for case management, remedy, costs or reconsideration, and whether they are held in public or private, and whether they are held in person or remotely (or a hybrid combination). There are only two exceptions, where recordings will not be made. They are (1) hearings held under rules 3 and 53(1)(e) of the ET Rules (such as judicial mediations and dispute resolution appointments); and (2) hearings where there is an order in place under rule 94 (i.e., in the interests of national security).

I am especially grateful to HMCTS for their agreement to continue investigating other recording alternatives to give full effect to the Practice Direction.

The Practice Direction and accompanying Presidential Guidance provide direction and guidance on matters such as:

- Who is responsible for making and storing recordings, and for how long they are stored;
- The limited circumstances in which a party may be permitted to record a hearing themselves;
- The limited circumstances in which a party may be permitted to listen to an audio recording made by HMCTS;
- What happens when an audio recording cannot be made, or the recording system malfunctions;
- How both parties and non-parties can request transcripts of an audio recording (as you will know, Form EX107 was amended in August 2023 in anticipation of this Practice Direction);
- What parts of a recording of an Employment Tribunal hearing will and will not be transcribed, having regard to the EAT's judgment in the case of *Kumar*;
- How a transcript is to be funded, and the limited circumstances in which a judge will order a transcript to be provided at public expense; and
- The fact that judges will not check transcripts before they are released.

The Practice Direction and the Presidential Guidance have been uploaded to our pages on the judiciary website. The launch page is here. These pages act as a rich source of information about this jurisdiction. The PD and PG can be found by clicking on "Rules, Orders, Practice Directions and Guidance" (here) and then by scrolling down to click on "current Practice Directions and Guidance" (here). Alternatively, you can link directly to the PD here and to the PG here.

Yours sincerely

Judge Barry Clarke
President