



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Judge Susan Walker KC (Hon)**

**President**

**Employment Tribunals (Scotland)**

### **PRESIDENTIAL GUIDANCE ON OPEN JUSTICE IN EMPLOYMENT TRIBUNAL PROCEEDINGS IN SCOTLAND.**

- 1 Under rule 8 of The Employment Tribunal Procedure Rules 2024 (“the Rules”) a President may publish guidance as to matters of practice in the Employment Tribunals in the area for which the President is responsible.
- 2 This Guidance applies to hearings in Employment Tribunals in Scotland. Employment Judges and Employment Tribunals in Scotland must have regard to the Guidance but they are not bound by it.
- 3 In this Guidance, “Tribunal” means an Employment Tribunal in Scotland.

#### **Relevant provisions in the Rules**

- 4 Rule 57 provides that any final hearing must be in public. That is subject to rules 49 and 93.
- 5 Rule 54 provides that preliminary hearings must be held in private unless the preliminary hearing involves a determination of a preliminary issue or consideration of strike out of all, or part of, a claim or response. Rule 54 is also subject to rules 49 and 93.
- 6 Rule 49 provides that a Tribunal may make an order preventing or restricting the public disclosure of any proceedings so far as it considers it necessary in the interests of justice or in order to protect the Convention rights of any person. That would include an order that a hearing that would otherwise be held in public would be conducted in whole or in part in private. Rule 49(4) provides that any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order is made under rule 49 may apply to the Tribunal in writing for the order to be revoked or discharged.

- 7 Rule 93 makes specific provision, among other matters, for a hearing to be held in private in the interests of national security.
- 8 Rule 44 provides that, subject to rules 49 and 93, if witness statements are used during the hearing and if the statement is to stand as the witness's evidence in chief, that statement must be available for inspection during the hearing. There is an exception, where the hearing is being conducted entirely by telephone or video ("a fully remote hearing") when inspection may be otherwise than during the course of a hearing.
- 9 Where reasons for a decision have been given orally, a party may request that written reasons be provided in accordance with rule 60(4). Written reasons must be provided if requested by the Employment Appeal Tribunal or a court. (Rule 60(5)).

#### **Other relevant matters**

- 10 In Scotland, witness statements are not used routinely and witnesses are not admitted to observe the hearing until after they have given their own evidence.
- 11 Subject to any technical malfunction, all hearings are audio recorded. Parties, and non-parties, may obtain a transcript of the whole or any part of an audio recording of a hearing subject to the terms of any Practice Direction. The current Presidential Practice Direction ([PD: Recording of Employment Tribunal hearings and the transcription of recordings](#)) provides that the person applying for a transcript will be required to pay the charges authorised by any scheme in force unless provision of a transcript at public expense has been approved.
- 12 The written judgment of the Tribunal (including any written reasons provided) is the definitive expression of the Tribunals' judgment (see [Kumar v MES Environmental Limited](#) [2022] EAT 60, paragraphs 37 to 39). Any transcript which is produced will not include any oral judgment or reasons given at the hearing.
- 13 With a few exceptions, all judgments and written reasons are available to the public by virtue of Regulation 14 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

#### **Private hearings**

- 14 Where a hearing takes place in private, whether that is because that is what the Rules require or because an order has been made to that effect under rule 49, observation by the public (including members of the press) will not be permitted.

### **Observing a hearing – attending a venue**

- 15 Where a public hearing takes place in person (and that includes a “hybrid” hearing where some of the participants are in person and some joining remotely), members of the public may attend at the venue where it is taking place. It is not necessary to apply in advance. It is not necessary to provide identification. However, observers will be asked by the Tribunal staff to confirm that they will not be a witness in the case. If they have still to give evidence, the person will not be admitted without the permission of the Tribunal.
- 16 If there is insufficient space to accommodate the number of people wishing to observe, The Tribunal should give directions. It will usually be appropriate to permit a limited number of observers to support the parties and witnesses. Thereafter, priority should usually be given to journalists and legal commentators as the eyes and ears of the public.
- 17 Observers will be required to comply with the security arrangements in place at the venue. This may include a bag search or being required to sip test liquids. Hot drinks and food will not be permitted in the hearing room.
- 18 Observers must enter the hearing room quietly and if they need to leave the hearing room, again this must be done quietly and, where possible, at a break in the proceedings.
- 19 While the hearing is taking place, observers must not speak or make audible noises or visible gestures such as shaking the head or otherwise. An observer who is disrupting the hearing may be removed at the direction of the Tribunal.
- 20 Observers should not discuss the evidence they have heard with anyone who has still to give evidence in the proceedings until that person has completed their evidence.

### **Observing hearings remotely**

- 21 Where a public hearing is a fully remote hearing, details of how to join such a hearing should be published on the cause list which is available on the Court Serve website <https://www.courtserve.net>.
- 22 If the hearing is taking place in person, it may still be possible for members of the press or public to observe it remotely. An application should be made to the Tribunal office at which the hearing is taking place.
- 23 As with physical attendance in a hearing room, the number of remote observers may be limited. For example, there may be a maximum number of people who are able to access the hearing remotely without impacting on the overall system as a

whole. If it is necessary to restrict the number of people who may observe remotely, priority should be given to journalists and legal commentators as the eyes and ears of the public.

### **The basis for the judicial direction**

- 24 The decision on whether to allow or refuse permission to observe remotely is a judicial direction for the purposes of section 85A(2) of the Courts Act 2003 and a case management order for the purposes of rule 30 of the Rules. Such a direction may be made in advance or during a hearing and may relate to all or part of the hearing. If an application is made during the hearing, it will be referred to the Tribunal for consideration at the next convenient time. This may mean that there is a delay in accessing the hearing. It is therefore preferable for an application to be made in advance.
- 25 The Tribunal must be satisfied that it would be in the interests of justice to make the direction and that there is technological capacity to enable transmission and that giving effect to the direction would not create an unreasonable administrative burden (Regulation 3 of The Remote Observation and Recording (Courts and Tribunals) Regulations 2022, “the 2022 Regulations”).
- 26 Regulation 4 of the 2022 Regulations sets out the factors that the Tribunal must take into account in deciding whether and on what terms to make a direction to allow remote observation. These are:
  - (a) the need for the administration of justice to be, as far as possible, open and transparent;
  - (b) the timing of any request or application to the court or tribunal to make a direction, and its impact on the business of the court or tribunal;
  - (c) the extent to which the technical, human and other resources necessary to facilitate effective remote observation are or can be made available;
  - (d) any limitation imposed by or under any enactment on the persons who are entitled to be present at the proceedings;
  - (e) any issues which might arise if persons who are outside the United Kingdom are among those watching or listening to the transmission;
  - (f) any impact which the making or withholding of such a direction, or the terms of the direction, might have upon—
    - (i) the content or quality of the evidence to be put before the court or tribunal;
    - (ii) public understanding of the law and the administration of justice;
    - (iii) the ability of the public, including the media, to observe and scrutinise the proceedings;
    - (iv) the safety and right to privacy of any person involved with the proceedings.

- 27 Regulation 4 is not an exhaustive list and the Tribunal must consider all the circumstances in any case and give reasons, albeit the reasons can be brief.
- 28 Regulation 5 sets out that in any direction permitting remote observation , provisions must be included which have the effect of:
- prohibiting any person other than a person entitled to be present at those proceedings from watching or listening to the transmission;
  - requiring any person so entitled to demonstrate, in such manner as specified in the direction, the capacity in which that person is so entitled.
  - ensuring that no person will be able to watch or listen to the transmission without first, when identifying themselves to the court, providing their full name and their email address, unless the court dispenses with this requirement;
  - requiring as a condition of continued access that any person given access will during the transmission conduct themselves appropriately and in particular in accordance with any requirements of the direction or instructions of the judge for persons observing the proceedings.
- 29 While the decision to permit or refuse remote observation is a judicial decision, it may be necessary to consult with the administration before making the decision. For example, there may be a maximum number of people who are able to access the hearing remotely without impacting on the overall system as a whole.
- 30 **If a public hearing is fully remote and there is no other way for the public to observe it, remote observation should be permitted. Failure to do so may mean that the hearing is void ([Storer v British Gas PLC](#) [2000] EWCA Civ B528). Such hearings will be referred to an Employment Judge in advance to give permission on a prospective basis.**

#### **General conditions for observers**

- 31 The observer will be required to confirm that they will not be a witness in the case. If they have still to give evidence, they will not be permitted to observe the hearing until they have done so.
- 32 The observer will be provided with joining details, usually by email, to enable them to access the remote hearing. The observer will also be provided with details of any conditions the Tribunal has imposed relating to the observation. Failure to comply with these conditions may lead to the permission to observe being revoked.
- 33 Remote observers may not share joining instructions with anyone else without the express permission of the Tribunal and may not permit someone else to observe the hearing without the express permission of the Tribunal. The observer may be asked by the Tribunal to identify themselves when joining the hearing to ensure that they are the person to whom the link was provided.

- 34 It is for the person wishing to observe to ensure that they have the necessary equipment and internet connection to enable them to do so. The government website ([www.gov.uk/guidance/what-to-expect-when-joining-a-telephone-or-video-hearing](https://www.gov.uk/guidance/what-to-expect-when-joining-a-telephone-or-video-hearing)) provides information on how to self-test if you can join a video hearing.
- 35 As remote observation is the means by which public access is given to a fully remote hearing, the Tribunal should not start or continue with such a hearing if an observer is not able to join remotely because there is a malfunction of the Tribunal equipment. However, if the difficulty is on the part of the putative observer or their equipment or connection the Tribunal need not delay or adjourn for that reason.
- 36 If the hearing is in person and members of the public can access the hearing at the venue, it will not usually be necessary to delay the hearing because an observer is having difficulty joining remotely. However, this is a matter for the Tribunal in any individual case taking into account the principle of open justice.

#### **Remote observation - behaviour**

- 37 Remote observers must comply with any directions given by the Tribunal.
- 38 Remote observers must not communicate anything they have observed to anyone who is going to be a witness in the case and has not yet given their evidence.
- 39 Remote observers should be in an appropriate location, which is private and quiet, and is suitable for the observation of a formal judicial hearing. They should ensure that the proceedings cannot be overheard by others who have not been authorised to observe remotely.
- 40 When directed to do so, remote observers must turn off their camera and “mute” their microphone.
- 41 Remote observers should behave appropriately for a formal judicial process as if they were attending in person. They should not interrupt proceedings or attempt to speak to the Tribunal, whether by unmuting or using the “chat” facility. If they have connection difficulties or otherwise wish to bring something to the attention of the Tribunal, they should contact the Tribunal clerk using the email address used to send the joining instructions.
- 42 Remote observers who disrupt the hearing, or otherwise refuse to follow directions, may be disconnected after a warning has been given.
- 43 Remote observers who appear to have stopped actively observing the hearing may be disconnected.

- 44 Remote observers must abide by any reporting restrictions that may be in place or directed during the course of, or following, the hearing.

### **Live tweeting**

- 45 Journalists who are registered with Scottish Courts and Tribunals Service and/or who have a UK Press Card Authority (UKPCA) press card may use live, text based forms of communication while observing a hearing unless the Tribunal has directed otherwise. It is not necessary to obtain permission in advance. However, they must advise the Tribunal administration in advance that they plan to do so and provide evidence of their credentials in the form of a registration card. For those relying on a UKPCA card, they must also provide their personal pin or password if requested by the Tribunal administration. The Tribunal administration should notify the Tribunal listed for the hearing that a journalist plans to use such communication.
- 46 Other journalists, commentators and members of the public who are observing a hearing, whether in person or remotely, and who wish to use live, text based communications during the hearing, must apply to the Tribunal for permission. That application should be made in advance of the hearing if possible. If the application is made on the day, it should be made to the clerk and not directly to the Tribunal. The application will be considered by the Tribunal at the next appropriate point in proceedings and may be refused if the Tribunal considers that such live communication may interfere with the administration of justice. There may be a delay in permission being granted if the application is made during the hearing.
- 47 The Tribunal may impose conditions on live text-based communications that are permitted under paragraphs 45 or 46 such as:
- (i) where evidence is quoted or summarised, that must be done fairly and accurately.
  - (ii) any inaccurate or misleading communication will be corrected.
  - (iii) the parties must direct their witnesses not to access such communications before they have given evidence.
  - (iv) each witness being required to confirm on oath or affirmation that they have not read the text based communication before giving evidence.
- 48 Permission to use live, text based communication (whether that permission is given generally by this Guidance under paragraph 45 or specifically by the Tribunal under 46) may be withdrawn by the Tribunal if any conditions are not complied with or if the Tribunal is concerned that the live communications will interfere with the administration of justice.

## **Access to witness statements and other case materials**

- 49 If their use at the hearing has been ordered, parties will be required to provide an extra paper copy of witness statements (if these are being used as evidence in chief) that will be available for inspection during a hearing. If a witness is not called, their statement should be removed, if possible, before inspection and similarly, if any evidence is removed from the statement, the statement should be redacted before public inspection. However, it may not be practicable to do this before the hearing starts.
- 50 To ensure open justice, the Tribunal may permit inspection of witness statements before the hearing starts, or at any appropriate stage in the hearing. For example, the Tribunal may permit inspection of all witness statements for a multi-day hearing before the hearing starts or it may permit the witness statements to be inspected each day for the witnesses expected to be called. If inspection of a witness statement is permitted before the witness is called, the Tribunal should give appropriate directions. These should include a direction that if a witness does not give evidence at all or only in part, that no reference should be made by the observer to the content of the witness statement (or the relevant part that was not adopted).
- 51 Parties should also provide an extra paper copy of any documents lodged with the Tribunal for the purposes of the hearing. These will be available for inspection to the extent that the document is necessary to understand the evidence that has been given. For example, if the Tribunal reads a document referred to it by a party to itself, a copy of that document should be available for public inspection.
- 52 Even if the Tribunal has agreed to use witness statements and/or documents in digital format, a paper copy must still be provided to the Tribunal.
- 53 Sets of productions should only include documents that will be referred to in evidence and should not include documents that go beyond what is necessary. Parties should be aware that the Tribunal may permit inspection of the entire set of productions before the hearing starts, or at an appropriate stage in the hearing, subject to any necessary directions.
- 54 If the hearing is taking place remotely, witness statements and productions will be available for inspection at the Tribunal office that is dealing with the case. Where practicable, these documents will be available during the hearing but for remote hearings, it may not be possible to provide these until after the hearing has concluded.



- 55 Members of the press and public are entitled to inspect other documents (the ET1 and ET3, any further particulars and any closing written submissions) during the course of the hearing if that is necessary for open justice (see [Cape Intermediate Holdings Ltd v Dring](#) [2019] UKSC 38).
- 56 After the hearing has concluded, members of the press or the public may apply to inspect witness statements, the productions or the documents referred to in paragraph 55. Such an application should set out why it would further the principle of open justice to grant the application. The length of time that has elapsed and the practicality of providing the documents will be relevant factors. The Court of Appeal has given further guidance on this matter in [X and Y v The BBC and others](#) [2025] EWCA Civ 824. Parties' views will be sought before a decision is made. If necessary, a hearing will be convened to consider the application and hear submissions.
- 57 The Tribunal will not send electronic copies of documents to non-parties for inspection. However, it may agree to send the document to a different hearing venue in Scotland to be inspected there either during or after the hearing. This would not prevent a party, with the consent of all other parties and the Tribunal, providing copies of documents electronically to an observer.

#### **Transmission to another place**

- 58 Occasionally, if there is a high demand to observe a hearing, the Tribunal may ask the Lord Chancellor to designate another place, which could be another court room within the same or a different hearing venue, to which the proceedings could be transmitted and where members of the press and public could view the proceedings. In these circumstances, the observer need not identify themselves beyond confirming that they will not be a witness in the case. If they will be a witness, they will not be permitted to observe.

#### **Prohibition on recording**

- 59 Observers, whether in person or remote, must not record or broadcast a hearing without the permission of the Tribunal. This includes making a recording entirely for personal use. To do so without permission is contempt of court (section 9 of the Contempt of Court Act 1981) .

***Susan Walker***

**President, Employment Tribunals (Scotland)**

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