

Employment



Managing ET and EAT litigation during the pandemic

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There has been a flurry of Presidential Guidance in respect of the management of Employment Tribunal (“**ET**”) and Employment Appeal Tribunal (“**EAT**”) cases in response to the COVID-19 pandemic. This post summarises the recent guidance and suggests steps that could be taken to manage cases as effectively as possible in these difficult circumstances.

In ET cases, **all in-person hearings** listed to commence on or before 26 June 2020 have been postponed, subject to review on 29 April 2020 and 29 May 2020 to take account of any updated advice. Any hearings listed prior to **26 June 2020** are automatically converted to case management hearings (“**CMH**”) by telephone or other electronic means on the first day allocated for the hearing, with the remaining hearing dates vacated. Parties remain free to make any application to ETs, although a swift response is unlikely.

Parties should therefore contact the relevant ET in advance of the CMH to obtain dial-in details. However, it appears certain ETs, which were significantly stretched prior to the pandemic, have struggled to arrange any telephone hearings. London Central ET has postponed all hearings, perhaps as a result of its staff or judges self-isolating, or technical issues. Telephone hearings may resume from 30 March, although this is not guaranteed. In contrast, Croydon ET has proceeded successfully with certain hearings with parties using Skype for Business, the video conferencing facilities currently used by the judiciary. While the application is being phased out by Microsoft in favour of Microsoft Teams, invitation links to attend as a guest should work and participants may also be able to connect using other versions of Skype. It is best to connect directly from your own computer, and not via an office or chambers remote-desktop, or similar.

The purpose of the CMH is to discuss how the case can best proceed in light of the constraints upon the ET and parties. Parties will be expected to co-operate with each other, more so than usual, in seeking to agree a List of Issues, Statement of Agreed Facts or directions. Adaptation of usual case management directions will be necessary, provided the overriding objective is addressed. Correspondence, bundles and witness statements will need to be provided electronically, and perhaps directly to the judge (by identified means) if there is a shortage of staff or equipment. Parties may also be asked to agree whether a claim can proceed in front of a single judge, or a judge and one lay member, in the event of illness.

Preliminary hearings which do not involve the determination of substantive issues, or judicial mediation, will probably take place by telephone. Any substantive preliminary or final hearings, i.e. those that require live evidence, may need to take place by video conferencing which allows public access, provided appropriate security measures are in place. After evidence has been heard, submissions could be dealt with in writing, obviating the need for parties to continue remote attendance. Taking a pragmatic approach, parties should also consider whether a case could be disposed of by written submissions alone, which may be suitable in cases involving e.g. issues of contractual construction. The vast majority of decisions and reasons will probably be provided in writing, and are therefore publishable, so parties may wish to give further consideration to commercial settlements.

Difficulties will no doubt arise with cases involving litigants-in-person (“**LIP**”), which will need to be explored at the telephone CMH to ensure access to justice is preserved where possible. Judges may need to take a proactive role in

explaining the relevant law or procedure in writing to LIPs, or requesting further information, in advance of the hearing. Opposing parties should be prepared to provide written submissions in advance of the hearing to allow a LIP to consider the position. Consideration will also have to be given to the extent to which a LIP has (or can obtain) access to technology and what measures can be taken to avoid further delay.

In respect of appeals, the President of the EAT has directed that **all hearings** (in London and Edinburgh) listed to take place up to and including **15 April 2020** are postponed. When hearings resume, they will initially be conducted by telephone, Skype or other electronic means. EAT staff will contact the parties to request remote contact details to arrange such hearings. Appeals involving represented parties should be able to proceed in a relatively straightforward manner, with greater reliance upon written submissions. Rule 3(10) hearings, which often involve LIPs, may present a greater challenge and require more flexible directions from the judge.

Parties should also be aware that the time limits for instituting appeals and the requirements for the proper and effective institution of an appeal, remain as set out in the EAT's Rules and Practice Direction, although Notices of Appeal should be sent by email for now. It should be remembered that there are limits on the size of the attachments which the EAT can receive by email.

While the Tribunal system and its users are placed under significant pressure in these unprecedented times, one silver lining may be that more efficient ways of managing ET/EAT litigation are identified and developed. It is hoped that the pandemic will result in Tribunals receiving much-needed additional resources to invest in more efficient technology, which will assist in dealing with the backlog of claims once normality is restored.

Marianne Tutin's areas of practice are Employment, Tax, Commercial Litigation, Professional Negligence, and Insurance & Reinsurance work. She is adept at advocacy and frequently appears in the Employment Tribunal, First-tier Tribunal, High Court and Employment Appeal Tribunal.

Devereux's employment team continue to work through the ongoing disruption and are keeping up to date on all relevant management advice and guidance.