COVID-19 AND EMPLOYMENT TRIBUNAL PROCEDURE

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(1) Introduction

1. This note outlines the effects that the new Coronavirus ("**COVID-19**") is having and will likely have on Employment Tribunal procedure, and the tools that the Employment Tribunal Rules give practitioners and the ET to mitigate the long-lasting effects that COVID-19 is likely to have.

2. This note does not address immediate short-term changes to Tribunal procedure necessitated by COVID-19 (such as the use of videoconferencing and the attendance at the ET of parties and their representatives). Guidance on this point has been issued by the Government, the Ministry of Justice and relevant professional bodies and is fast-moving. Rather, this note outlines the difficulties in the conduct of Tribunal litigation that may be faced in the longer term as a result of COVID-19.

(2) Non-attendance at a hearing

3. COVID-19 will undoubtedly result in non-attendance at hearings for medical and other reasons. In the face of non-attendance at a hearing, Rule 47 provides as follows:

> *If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.*

4. Rule 47 applies to all kinds of hearing, and gives the Tribunal a wide-ranging power to deal with non-attendance. Where attendance is unexplained, the ET has a "*very wide discretion*" to discretion to deal with the claim, including by dismissing it (*Roberts v Skelmersdale College* [2004] IRLR 69, at [14] *per* Mummery LJ (decided under the old Rule 9(3)). Mummery LJ continued at [15], that:

> *the rule does not impose on Employment Tribunals a duty of their own motion to investigate the case that is before them, nor does it impose a duty on them to be satisfied that, on the merits, the respondent to a case has established a good defence to the claim of the absent applicant.*

5. Instead, under Rule 47, the Tribunal is obliged to consider "*any information which is available to it* […] *about the reasons for the party's absence*". In practice, this will include calling the absent party or their representative. However, it currently appears that (within the bounds of the overriding objective) the Tribunal will not be adopting a lax attitude to attendance at a hearing. Thus, [20] of the Presidential Guidance on COVID-19 provides:

> *Rule 47 allows a Tribunal, in the event of non-attendance by a party, to dismiss a claim or proceed with the hearing in the absence of a party. Any party who is not able to attend for Covid-19 related reasons, and who does not wish either of these steps to be taken, should do all they can to inform the Tribunal Office of the reason for nonattendance in advance of the hearing so that this information is available to the Employment Judge who is to hear the case.*

6. One of the authors of this note has been involved in a claim which was dismissed under Rule 47 for unexplained non-attendance at a preliminary hearing listed for a day during the COVID-19 pandemic. The ET will expect absences to be justified with evidence.

(3) Postponement/adjournment applications

7. COVID-19 is likely also to result in postponement applications from both Claimants and Respondents, for health reasons and otherwise. Where non-attendance at a hearing is anticipated in advance for COVID-19 reasons, parties should make an application for postponement in accordance with the relevant rules and Presidential Guidance on postponement applications in order to avoid the possible consequence of having the claim dismissed or the hearing proceed in their absence under Rule 47. COVID-19 may of course present postponement applications that arise directly out of the ill-health of one of the parties, their representatives or witnesses. However, due to arrangements relating to working from home, parties may also be facing genuine administrative difficulties in the preparation for Tribunal hearings which may justify an adjournment application.

8. Applications for postponements must be made as soon as possible after the need for a postponement becomes known (Rule 30A(1)). Rule 30A provides specific rules that apply where postponement applications are made fewer than seven days in advance of the start of the hearing:

> *(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—*
>
> *(a) all other parties consent to the postponement and—*
>
> *(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or*
> *(ii) it is otherwise in accordance with the overriding objective;*
>
> *(b) the application was necessitated by an act or omission of another party or the Tribunal; or*
>
> *(c) there are exceptional circumstances.*

9. Note also that where the Tribunal has ordered two or more postponements of a hearing in the same proceedings on the application of the party which is seeking a further adjournment, such an application may also only be granted on the above principles, regardless of the time before remaining before the start of the hearing (Rule 30A(3)).

10. Practically, most postponement applications in light of COVID-19 that are not consented to will fall to be considered under 'exceptional circumstances'. Rule 30A(4)(b) confirms that the term 'exceptional circumstances' may include "*ill health relating to an existing long term health condition or disability*". This rule is drafted permissively, not restrictively; there is nothing to prevent COVID-19 from constituting such an exceptional circumstance.

11. Where postponements are sought for a party or their witness on medical grounds, the Tribunal must be satisfied that the inability to attend is genuine, and the applicant will bear the burden of proof in proving this to the satisfaction of the Tribunal (*Teinaz v Wandsworth* [2002] IRLR 721, [21] *per* Peter Gibson LJ). Medical evidence should therefore be prepared where it is available.

12. In the absence of evidence in support of an application for postponement, the Tribunal will ordinarily not consider the application unless there are exceptional circumstances (Presidential Guidance on Postponements, 'Action by Parties' [4]). The Presidential Guidance on Postponements continues that where a party is unable to attend for medical reasons:

> *All medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition*

and an indication of when that state of affairs may cease (Presidential Guidance on Postponements, Examples [1]).

13. Similar information should also be provided where a representative is unavailable to attend (*Presidential Guidance on Postponements, Examples [3]).*

14. Other points that will be relevant for the Tribunal to consider include:

14.1. Whether the parties are in agreement as to the postponement (*Presidential Guidance on Postponements, Action by Parties [5]); and*

14.2. *Whether the hearing date in question was fixed with agreement by the parties* (*Presidential Guidance on Postponements, Action by Parties [6]).*

14.3. *Where postponements are requested for COVID-19-related reasons, parties should set out any steps that they have taken in an effort to avoid a postponement being necessary (Presidential Guidance on COVID-19, [18]).*

(4) Non-compliance with Rules and Orders

15. Relatedly, Rule 6 of the Tribunal Rules deals with non-compliance of a party with Rules (except certain rules relating to the presentation of claims and responses) or Orders of the Tribunal. It provides:

> *A failure to comply with any provision of these Rules […] or any order of the Tribunal [...] does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just […].*

16. Rule 6 goes on to list the following possible consequences of non-compliance which the Tribunal may take:

16.1. Waiving or varying compliance with the Rule or Order;

16.2. Striking out the claim or response, in whole or in part;

16.3. Barring or restricting a party's participation in the proceedings; and

16.4. Awarding costs.

17. The list above is indicative and non-exhaustive. The Tribunal will respond to non-compliance in accordance with the overriding objective.

(5) General points of good order

18. The Presidential Guidance on COVID-19 provides the following points of good order that should be considered by all practitioners dealing with COVID-19-related issues:

18.1. When making any application for COVID-19-related reasons are expected to provide whatever evidence is available which shows or tends to show that the reason put forward for the application is a valid COVID-19 related one (Presidential Guidance on COVID-19, [18]).

18.2. Requests for case management orders or other correspondence should be sent to the Tribunal electronically, which will assist in ensuring that case management referrals can be made to the judge expeditiously (Presidential Guidance on COVID-19, [19]).

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