Ministry of Justice

Presidential Guidance – General Case Management

The Guidance is issued on the thirteenth day of March 2014 under the provisions of Rule 7 of the first schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013 ("the Rules").

Note:

Whilst the Tribunals in England and Wales must have regard to such Guidance they will not be bound by it and have the discretions available to them as set out in the Rules as to how they would apply the various Case Management provisions.

This Presidential Guidance in relation to General Case Management matters does not supersede or alter any other Presidential Guidance.

Hyperlinks are provided for the examples set out below. Those hyperlinks and the information provided are a guide to parties but are not binding upon the Tribunal in England and Wales. If parties require advice in such matters they should take such advice separately.

Background

1. The overriding objective set out in Rule 2 applies.

2. Rule 29 of the Rules permits a Tribunal to make Case Management Orders. The particular powers subsequently identified in the Rules do not restrict the general power contained in Rule 29.

3. Any Case Management Order may vary, suspend or set aside any earlier Case Management Order where that is necessary in the interests of justice, in particular where a party affected by the earlier Order did not have a reasonable opportunity to make representations before it was made.

4. Rule 30 specifies details of how an application for a Case Management Order is made generally. Rules 31, 32, 34, 35, 36 and 37 deal with specific instances where Case Management Orders may be made.

5. Rule 38 deals specifically with the situation where Unless Orders can be made.

6. Rule 39 deals with the provision relating to Deposit Orders.

7. The Rules generally contain other Case Management provisions, for example Rule 45 in relation to timetabling.

8. In applying the provisions of the Rules this guidance attempts to set out the procedure, processes and considerations that will normally apply in the circumstances specified below.

Action by Parties:

9. Whilst any application for a Case Management Order can be made at the hearing or in advance of the hearing, it should ordinarily be made in writing to the Employment Tribunal office dealing with the case or at a Preliminary Hearing which is dealing with Case Management issues.

10. Any such application should be made as early as possible.

11. Where the hearing concerned has been fixed, especially with agreement by the parties, that matter will be taken into account by the Employment Judge considering the application

12. The application should state the reason why it is made; why it is considered to be in accordance with the overriding objective to make the Case Management Order applied for; and where a party applies in writing, they should notify the other parties or other representatives if they have them that any objections should be sent to the Tribunal as soon as possible.

13. All relevant documents should be provided with the application

14. If the parties are in agreement that should also be indicated in the application to the Tribunal.

Examples

15. These are examples of Case Management situations:-

15.1 Disclosure of documents and preparing bundles
15.2 Witness statements
15.3 Amendment to the claim and response including adding and removing parties
15.4 Disability
15.5 Remedy
15.6 Costs
15.7 Timetabling
15.8 Concluding cases without a hearing
15.9 Judicial Mediation

16. Where the parties circumstances or contact details have changed such changes should be notified to the Tribunal and the other parties immediately.

Action by the Employment Judge

17. Where the appropriate information has been supplied then the Employment Judge will deal with the matter as soon as practicable. If any information has not been supplied an Employment Judge may request further relevant information which will have the effect of delaying consideration of the application.

18. The decision of the Employment Judge will be notified to all parties as soon as practicable after the decision has been made

19. Orders are important. Non compliance with them may lead to sanctions. Therefore if a party is having difficulty in complying with such an Order

they should discuss it with the other parties and then apply to the Tribunal to vary the Order.

Agenda for Preliminary Hearing

20. In preparation for a Preliminary Hearing concerned with Case Management matters the Tribunal will often send out an agenda to the parties in advance of such Preliminary Hearing. The agenda should be completed in advance of that Preliminary Hearing and returned to the Tribunal. If possible it should be agreed by the parties. A copy of the current form of agenda can be found at Agenda for Case Management at Preliminary Hearing.

13th March 2014

David J Latham
President

DISCLOSURE OF DOCUMENTS AND PREPARING BUNDLES

1. The Tribunal often orders that the parties must co-operate to prepare a set of documents for the hearing. Even if no formal order is made, the Tribunal prefers that documentary evidence is presented in one easily accessible set of documents (often known as "the hearing bundle") with everyone involved in the hearing having an identical copy.

Why have an agreed set of documents?

2. Early disclosure of documents helps the parties see clearly what the issues are and prepare their witness statements and their arguments. There is no point in withholding evidence until the hearing as this serves only to delay and to add to the costs and may put you at risk of having your case struck out.

3. Agreeing a set of documents means that all parties agree which documents are relevant and the Tribunal will need to see. It does not mean they agree what the documents mean.

4. It avoids problems at a hearing when a party produces a document which the other party has not seen before. This is unfair and may lead to the hearing being delayed or adjourned, which is costly to all concerned and may result in the offending party paying the costs of the adjournment.

5. An agreed set - rather than each party bringing their own set of documents to the hearing - prevents uncertainty and delay at the hearing.

What is the disclosure of documents?

6. Disclosure is the process of showing the other party (or parties) all the documents you have which are relevant to the issues the Tribunal has to decide. Although it is a formal process (governed by the Civil Procedure Rules), it is not hostile but requires co-operation in order to ensure that the case is ready for hearing.

7. Relevant documents may include documents which record events in the employment history, for example a letter of appointment, statement of particulars or contract of employment; notes of a significant meeting such as a disciplinary interview, a resignation or dismissal letter or even electronic and social media documents. The claimant may have documents to disclose which relate to looking for and finding alternative work.

8. Any relevant document in your possession (or which you have the power to obtain) which is or may be relevant to the issues must be disclosed. This includes documents which may harm your case as well as those which may help it. To conceal or withhold a relevant document is a serious matter.

9. A party is usually not required to give a copy of a "privileged" document, for example something created in connection with the preparation of a party's Tribunal case (such as notes of interviews with witnesses); correspondence between a party and their lawyers; correspondence between parties marked "without prejudice" or part of discussions initiated on a "without prejudice" basis with a view to settlement of the matters in issue or records of exchanges with ACAS.

How and when does disclosure take place?

10. The process should start and be completed as soon as possible. A formal order for disclosure of documents usually states the latest date by which the process must be completed.

11. In most cases, the respondent (usually the employer) has most or all of the relevant documents. This often makes it sensible for the respondent to take the lead in disclosure. Each party prepares a list of all relevant documents they hold and sends it as soon as possible to the other party.

12. Sometimes the parties meet and inspect each other's documents. More commonly they agree to exchange photocopies of their documents in the case, which should be "clean" copies.

How is the hearing bundle produced?

13. They then co-operate to agree the documents to go in the bundle, which should contain only documents to be mentioned in witness statements or cross-examined upon at the hearing and which are relevant to the issues in the proceedings. If there is a dispute about what documents to include, the disputed documents should be put in a separate section or folder and this should be referred to the Tribunal at the start of the hearing.

14. One party – often the respondent, because it is more likely to have the necessary resources - then prepares the documents in a proper order (usually chronological), numbers each page ("pagination") and makes sufficient sets of photocopies which are stapled together, tagged or put into a ring binder.

15. Each party should have at least one copy and the Tribunal will need 5 copies for a full Tribunal panel or 3 copies if the Employment Judge is to sit alone (one copy for the witness table, one for each member of the Tribunal and one to be shown to the public, where appropriate). The Tribunal's copies must be brought to the hearing and should not be sent to the Tribunal in advance, unless requested.

Are the documents confidential?

16. All documents and witness statements exchanged in the case are to be used only for the hearing. Unless the Tribunal orders otherwise, they must only be shown to a party and that party's adviser/representative or a witness (insofar as is necessary). The documents must not be used for any purpose other than the conduct of the case.

17. Since it is a public hearing, the Tribunal will enable persons present at the hearing to view documents referred to in evidence before it (unless it orders otherwise).

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WITNESS STATEMENTS

1. The Tribunal often orders witness statements to be prepared and exchanged. Even if no formal order is made, the Tribunal generally prefers evidence to be presented by means of written statements. These are normally read in advance by the Tribunal so that they stand as the evidence in chief (the main evidence before questions are put in cross-examination), without being read out loud by the witness.

Why prepare witness statements?

2. It helps to write down what you have to say in evidence. You often remember much more and feel more comfortable when giving evidence having done so.

3. Early exchange of statements enables the parties to know the case they have to meet and what the issues are going to be. All the relevant evidence will come out at the hearing and there is nothing to gain (and much to lose) by withholding it until then.

4. Preparation of witness statements helps the Tribunal identify the issues and ensure that the case is completed in the time allowed.

How should a statement be set out and what should it contain?

5. It is easier for everyone if the statement is typewritten or word-processed (although a clear and legible handwritten statement is acceptable) with each page numbered.

6. The statement should be in logical numbered paragraphs. It should cover all the issues in the case and set out fully what the witness has to tell the Tribunal about their involvement in the matter, usually in date order.

7. The statement should be as full as possible because the Tribunal might not allow the witness to add to it, unless there are exceptional circumstances and the additional evidence is obviously relevant.

8. When completed, it is good practice for the statement to be signed particularly if the witness is unavailable to attend the hearing, and a copy should be provided to the other party. You should bring 5 copies with you to the hearing if there is a full Tribunal panel and 3 copies if the Employment Judge is to sit alone (one copy for the witness table, one for each member of the Tribunal and one to be shown to the public, where appropriate).

9. If you realise that your statement has left out something relevant when you receive the other party's statements, you should make a supplementary statement and send it immediately to the other party - but you do not need to comment on or respond to every point in the other side's statements or repeat what you said originally.

How should a statement be exchanged?

10. When the statements are ready, a copy should usually be sent to the other side, whether or not their statements have been received or are ready to be exchanged.

11. Exchange at the same time is the norm, but it is not always appropriate. In some cases, it makes sense for the claimant's witness statement to be sent first. The respondent will then know exactly what case has to be answered. This avoids irrelevant statements being taken from witnesses who are not needed. In other cases, however, it may make sense for the respondent's statements to be sent first. Any particular directions made by the Tribunal must be followed.

12. Unless there is a different date fixed, the exchange of statements should be completed by no later than two weeks before the hearing.

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AMENDMENT TO THE CLAIM AND RESPONSE INCLUDING ADDING AND REMOVING PARTIES

Amendment

1 Amendment means changing the terms of the claim or response. This note concentrates on amendments to the claim. The tribunal can allow amendments but will generally only do so after careful consideration and taking the views of the other parties. In some cases a hearing may be necessary to decide whether to allow an amendment.

2 Generally speaking minor amendments cause no difficulties. Sometimes the amendment is to give more detail. There may have been a typographical error, or a date may be incorrect. The tribunal will normally grant leave to amend without further investigation in these circumstances.

3 More substantial amendments can cause problems. Regard must be had to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. If necessary, leave to amend can be made conditional on the payment of costs by the claimant if the other party has been put to expense as a result of a defect in the claim form.

4 The Tribunal in deciding whether to grant an application to amend must carry out a careful balancing exercise of all of the relevant factors, having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment.

5 Relevant factors would include: -

(1) The Amendment To Be Made – applications can vary from the correction of clerical and typing errors to the addition of facts, the addition or substitution of labels for facts already described and the making of entirely new factual allegations which change the basis of the existing claim. The Judge must decide whether the amendment applied for is a minor matter or a substantial alteration, describing a new complaint.

(2) Time Limits – if a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended. Once the amendment has been allowed, and time taken into account, then that matter has been decided and can only be challenged on appeal. An application for leave to amend when there is a time issue should be dealt with at a preliminary hearing to address a preliminary issue and to allow all parties to attend, to make representations and possibly even to give evidence.

(3) The Timing And Manner Of The Application –An application can be made at any time as can an amendment even after Judgment has been promulgated. Allowing an application is an exercise of a discretion. A party will need to show why the application was not made earlier and why it is being made at that time. An example which may justify a late application is the discovery of new facts or information from disclosure of documents.

6 The tribunal draws a distinction between amendments as follows: -

(1) those that seek to add or substitute a new claim arising out of the same facts as the original claim; and

(2) those that add a new claim entirely unconnected with the original claim

7 In deciding whether the proposed amendment is within the scope of an existing claim or constitutes an entirely new claim, the entirety of the claim form must be considered

8 **Re-labelling** – Labelling is the term used for the type of claim in relation to a set of facts. Usually, mislabelling does not prevent the relabelled claim being introduced by amendment. Seeking to change the nature of the claim may seem significant but very often all that is happening is a change of label. For instance, a claimant may describe his claim as for a redundancy payment when, in reality, he or she may be claiming that they were unfairly dismissed. If the claim form includes facts from which such a claim can be identified, the tribunal as a rule, adopts a flexible approach and grants amendments that only change the nature of the remedy claimed.
There is a fine distinction between raising a claim which is linked to an existing claim and raising a new claim for the first time. In the leading case the claimant tried to introduce an automatically unfair dismissal claim on the specific ground of his trade union activity in addition to the ordinary unfair dismissal claim in his claim form. The appeal court refused the amendment because the facts originally described could not support the new claim. Furthermore, there would be a risk of hardship to the employer by increased costs if the claimant was allowed to proceed with this new claim.

9 While there may be a flexibility of approach to applications to relabel facts already set out there are limits. Claimants must set out the specific acts complained of as tribunals are only able to adjudicate on specific complaints.

A general complaint in the claim form will therefore not suffice. Further, an employer is entitled to know the claim he has to meet.

10 **Time Limits** – the tribunal will give careful consideration in the following contexts: -

(1) The fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment. In one case a Tribunal allowed the amendment of a claim form complaining of race discrimination to include a complaint of unfair dismissal. The appeal court upheld the Tribunal's decision although the time limit for unfair dismissal had expired. The facts in the claim form were sufficient to found both complaints and the amendment would neither prejudice the respondent nor cause it any injustice.

(2) It will not always be just to allow an amendment even where no new facts are pleaded. The Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Where for instance a claimant fails to provide a clear statement of a proposed amendment when given the opportunity through case management orders to do so, an application at the hearing may be refused because of the hardship that would accrue to the respondent.

11 **Seeking to add new ground of complaint**

(1) The tribunal looks for a link between the facts described in the claim form and the proposed amendment. If there is no such link, the claimant will be bringing an entirely new cause of action.

(2) In this case, the Tribunal **must consider** whether the new claim is in time.

(3) The tribunal will take into account the tests for extending time limits –

(a) the just and equitable formula in discrimination claims; and
(b) the not reasonably practicable formula in most other claims;
(c) the specific time limits in redundancy claims; and
(d) the special time limits in equal pay claims.

12 **Adding a new party** The Tribunal may of its own initiative, or on the application of a party, or person wishing to become a party, add any other person as a party by adding them or substituting them for another party. This can be done if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings.

Adding or removing parties

13 These are some of the circumstances which give rise to addition of parties:

(1) Where the claimant does not know, possibly by reason of a business transfer situation, who is the correct employer to be made respondent to the claim.

(2) Where individual respondents, other than the employer, are named in discrimination cases on the grounds that they have discriminated against the claimant and an award is sought against them.

(3) Where the respondent is a club or an unincorporated association and it is necessary to join members of the governing body.

(4) Where it is necessary in order to decide a claim which involves a challenge to a decision of the relevant Secretary of State. The Secretary of State is responsible by statute for certain sums of money in different insolvency situations. The tribunal decides if a refusal to pay is correct, provided conditions are met in relation to timing.

14 Asking to add a party is an application to amend the claim. The tribunal will have to consider the type of amendment sought. The amendment may deal with a clerical error, add factual details to existing allegations, or add new labels to facts already set out in the claim. The amendment may if allowed make new factual allegations which change or add to an existing claim. The considerations set out above in relation to amendments generally apply to these applications.

15 When you apply to add a party you should do so promptly. You should therefore set out clearly in your application the name and address of the party you wish to add and why you say they are liable for something you have claimed. You should further explain when you knew of the need to add the party and what action you have taken since that date.

16 The Tribunal may also remove any party apparently wrongly included. A party who has been added to the proceedings should apply promptly after the proceedings are served on them if they wish to be removed.

17 A party can also be removed from the proceedings if the Claimant has settled with them, or no longer wishes to proceed against them.

18 The Tribunal may permit any person to participate in proceedings on such terms as may be specified in respect of any matter in which that person has a legitimate interest. This could involve where they will be liable for any remedy awarded, as well as other situations where the findings made may directly affect them.

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DISABILITY

1 Disabled and disability are words in common use. In discrimination cases in Employment Tribunals, disability has a particular meaning.

The Meaning of Disability

2 The Equality Act 2010 provides that a person has a disability if:

They have a physical or mental impairment and
The impairment has a substantial and long term adverse effect on their ability to carry out normal day to day activities.

3 A disabled person may be a person who has or who has had a disability.

4.1 What matters is whether, at the date or during the period of any discrimination, the claimant had

A physical impairment or impairments, and if so what it was or what they were
A mental impairment or impairments and if so what it is or what they were.

4.2 If neither, whether the claimant had at any time in the past, a physical or mental impairment or impairments in the past and if so, what, when and for how long.

4.3 The Tribunal will have to consider whether any impairment adversely affects or affected the claimant's ability to carry out normal day to day activities.

Day to Day Activities

5 Relevant day to day activities are not necessarily work activities but may be. Although the list is not exhaustive, the following are included: -

Mobility
Manual dexterity
Physical co-ordination
Continence
Ability to lift, carry or otherwise move everyday objects
Speech, hearing or eyesight
Memory or ability to concentrate, learn or understand
Perception of the risk of physical danger

Substantial Adverse Effect

6 In considering whether an impairment has or would be likely to have a substantial adverse effect the parties and the Tribunal should: -

Ignore any measures especially medical treatment or the use of any prosthesis or other aid except spectacles or contact lenses.

Think about what the claimant <u>cannot do</u> or <u>can only do with difficulty</u> rather than what he or she can do.

7.1 Care has to be taken to decide whether any adverse effect was minor or trivial and relevant is any substantial adverse effect.

7.1 A Tribunal will need to be satisfied that at the date or during the period of any discrimination the substantial adverse effect had either lasted or was likely to last at least 12 months in total or for the remainder of the claimant's life.

7.2 If, at the date of any discrimination an impairment existed but did not at the time have a substantial adverse effect but there has been such an adverse effect in the past, the Tribunal will need to consider whether recurrence of any substantial adverse effect is likely and, if so, when.

7.3 A severe disfigurement is treated as having a substantial adverse effect.

7.4 A progressive condition which results in an impairment which has/had an adverse effect on normal day to day activities but was no more than minor or trivial, the Tribunal will consider whether any progressive condition is likely eventually to cause a substantial adverse effect.

Conditions which always amount to disability

8 Certain medical conditions namely cancer, HIV infection and multiple sclerosis are each a disability.

Conditions which cannot amount to disability

9 Certain conditions are **NOT** to be treated as disabilities, these are: -

- Addiction to alcohol, nicotine or any other substance, unless the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment;
- A tendency to set fire;
- A tendency to steal;
- A tendency to physical or sexual abuse of others;
- Exhibitionism;
- Voyeurism;
- Seasonal allergic rhinitis – which includes, for example, hay fever BUT the condition can be taken into account if it aggravates the effect of another condition.

Guidance

10 For assistance see the Guidance on Matters to be Taken into Account in Determining Questions relating to the Definition of Disability – see link. The Equality Act 2010 Guidance on the Definition of Disability – see link and the website of the Equality and Human Rights Commission – see link.

Evidence

11.1 A claimant may be able to provide much of the information required without medical reports. A claimant may be able to describe their impairment and its effects on their ability to carry out normal day to day activities.

11.2 Sometimes medical evidence may be required. For instance, where there is a dispute about whether the claimant has a particular disability or where an impairment is under effective control by medication or treatment.

11.3 The question then to be answered is what effects the impairment would have if the medication was withdrawn. Once more, a claimant may be able to describe the effects themselves but respondents frequently call for some medical evidence in support.

11.4 Claimants must expect to have to agree to the disclosure of relevant medical records or occupational health records.

11.5 Few people would be happy to disclose all of their records or for disclosure to be given to too many people. Employment Judges are well used to such difficulties and will limit documents to be disclosed and the people to whom disclosure should be made. It can be remembered as well that in proceedings disclosure in general is for use only in the proceedings and not for sharing with outsiders.

11.6 Even after a claimant's description of their impairment and disclosure of documents respondents may dispute that they are disabled. If that happens the intervention of an Employment Judge may be necessary. Possibilities include: -

11.6.1 That the claimant has to agree to undergo medical examination by a doctor or specialist chosen and paid for by the respondent.

11.6.2 The claimant agrees to provide further medical evidence at their own expense.

11.6.3 The claimant and respondent may agree to get a report jointly. That would involve sharing the decision as to who to appoint, the instructions to be given and the cost of any report. This may be most effective course but neither party may in the end be bound by the findings of the report even if they agree to this course of action.

11.6.4 It can be expensive to obtain medical evidence. Limited financial assistance may be available but whether it is granted is a matter which only a member of the administrative staff of the Tribunal can decide. Any application for such assistance should be made to the manager of the relevant regional office.

11.6.5 Care should be taken to decide whether a medical report is necessary at all. For instance if a claimant has epilepsy which is well controlled by medication then medical evidence may be unnecessary for a Tribunal to consider what effect would follow if the medication was not taken.

11.6.6 Claimants must remember that they have the burden of proving that they are disabled. They may be satisfied that they can do this, perhaps with the assistance of the records of the General Practitioner and their own evidence.

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REMEDY

What is remedy?

1. After a tribunal has decided whether the claimant's claim succeeds it will consider how a successful party should be compensated. This part of the judgment is called "Remedy". Sometimes it is done immediately after the merits judgment, but in long or complex cases it may be adjourned to another day.

2. The tribunal has different powers for each different type of claim. It must calculate loss and order an appropriate remedy for each part of a successful claim. Accurate and often detailed information from both parties is needed to make correct calculations and issue a judgment which is fair to all, but sometimes the tribunal can only estimate the loss, for example for how long a party may be out of work.

Different types of remedy.

3. For some claims the only remedy is to order the employer to pay a sum of money – for example wages due, holiday and notice pay.

4. For unfair dismissal the tribunal may:

    - order the employer to "reinstate" the dismissed employee, which is to put them back in their old job, as if they had not been dismissed; or to "re-engage" them, which is to employ them in a suitable different job. In each case the tribunal may order payment of lost earnings etc.
    - If those orders are not sought by the claimant or are not practicable, it may order the employer to pay compensation, calculated in two parts: a "Basic Award", which is calculated in a similar way to a redundancy payment, and a "Compensatory Award", which is intended to compensate the employee for the financial loss suffered.

5. In claims of unlawful discrimination, the tribunal may;

    - make a declaration setting out the parties' rights; and/or
    - order compensation to be paid by the employer and/or fellow workers who have committed discriminatory acts, but if the employer can show that it has taken all reasonable steps to prevent employees from committing such acts (called the "Statutory Defence") the only award which can be made is against the fellow worker, not the employer; and/or
    - make a recommendation, such as for the claimant's colleagues or managers to be given training to ensure that discrimination does not happen again.

Mitigation

6. All persons who have been subjected to wrongdoing are expected to do their best, within reasonable bounds, to limit the effects on them. If the tribunal concludes that a claimant has not done so, it must reduce the compensation so that a fair sum is payable. The tribunal will expect evidence to be provided by claimants about their attempts to obtain suitable alternative work; and by respondents who consider that the claimant has not tried hard enough, about other jobs which the claimant could have applied for. (See "Information needed for the tribunal to calculate remedy" below)

Statement of Remedy

7. The tribunal will usually order the claimant to make a calculation showing how each amount claimed has been worked out (eg. *x* weeks' pay at £*y* per week). Sometimes this is called a "Schedule of Loss". As tribunals are expected to calculate remedy for each different type of loss - sometimes called "Heads of Loss" or "Heads of Damage"- the statement should show how much is claimed under each head. If the claimant has received state benefits it should also specify the type of benefit, the dates of receipt, the amount received and the claimant's national insurance number. (See also "Recoupment" below).

8. Typical heads of loss include;
   - wages due
   - pay in lieu of notice, where no, or inadequate, notice was given
   - outstanding holiday pay
   - a basic award or redundancy payment
   - past loss of earnings
   - future loss of earnings
   - loss of future pension entitlements
   - in discrimination cases:
     injury to feelings
     aggravated or exemplary damages, (which are rare)
     damages for personal injury- but only when the act of discrimination is the cause of the claimant becoming ill
   - any tribunal fee paid

9. The tribunal will usually order the statement to be produced early in the proceedings, as it can help in settlement negotiations and when considering mediation, and when assessing the length of the hearing. It should however be updated near to the hearing date.

Submissions on Polkey and Contributory Fault

10. If an employee has been dismissed but the employer has not followed a proper procedure (such as the ACAS Code), tribunals will follow the guidance in Polkey v AE Dayton Services Limited and subsequent cases and consider whether, if a fair procedure had been followed, the claimant might still have been fairly dismissed, either at all, or at some later time. This question is often shortened to "Polkey". There are also cases where the dismissal may be procedurally unfair but the employee's own conduct has contributed to the position they now find themselves in. This is called "contributory conduct".

11. Where either or both of these are relevant, the tribunal will reduce the compensation awarded by an appropriate percentage in each case. This means that there may be two reductions, which, where there has been really serious misconduct, could be as high as 100%, so that nothing would be payable.

12. Generally the tribunal will decide these issues at the same time as it reaches its decision on the merits of the claim, and sometimes at a separate remedy hearing. It should explain at the *start* of the hearing which of those options it will follow, but if it does not, then the parties should ask for clarification of when they are expected to give evidence and make submissions (see separate guidance on "Timetabling") on these matters.

Injury to Feelings

13. In discrimination cases and some other detriment claims, tribunals may award a sum of money to compensate for injury to feelings. When they do so they must fix fair, reasonable and just compensation in the particular circumstances of the case, bearing in mind that compensation is designed to compensate the injured party not to punish the guilty one, and that awards should bear some relationship to those made by the courts for personal injury.

14. They follow guidelines first given in Vento v Chief Constable of West Yorkshire Police, which have since been updated by Da Bell v NSPCC and Simmons v Castle, but are still referred to as the "Vento" Guidelines. They identify three broad bands of compensation for injury to feelings as distinct from psychiatric or personal injury:

    - The lower band is for less serious acts of discrimination. Awards in this band are currently between £660 and £6,600.
    - The middle band is for cases which are more serious but do not come into the top band. These awards tend to be from £6,600 to £19,800.
    - The top band is for the most serious cases such as where there has been a lengthy campaign of harassment. These awards are between £19,800 and £33,000, but are relatively rare. A case would have to be highly exceptional for any sum higher than this to be awarded.

15. Tribunals will expect claimants to explain in their statement of remedy which Vento band they consider their case falls in, and will also expect both parties to make submissions on this during the hearing.

Information needed for the tribunal to calculate remedy.

16. This varies in each case dependant on what is being claimed. Each party should look for, provide to the other, and include in the bundle, copies of any of these which could help the tribunal with any necessary calculations in their case:

    - Copy contract of employment or statement of terms & conditions with the old employer, including the date the claimant started work, and details of any pension scheme
    - Copy pay slips for the last 13 weeks in the old employment or any other document showing the claimant's gross and net pay
    - Proof of any payments actually made by the employer, such as a redundancy payment or pay in lieu of notice
    - Any document recording the day s/he last actually worked
    - Any document explaining how many days/hours per week the claimant worked
    - Any document explaining how overtime is paid
    - Any document recording when the holiday year starts,
    - Any document recording when holiday has been taken in that year and what has been paid for those days
    - Any documents setting out the terms of the former employer's pension scheme
    - Any document showing the claimant's attempts to find other work
    - Copy contract of employment and payslips for any new job
    - Documents such as bank statements if losses for bank charges are claimed.
    - Medical reports or "Fit" notes if unable to work since dismissal

- Any document showing that jobs were/are available in the locality for which the claimant could have applied.

17 The witness statements should tell the tribunal which parts of these documents are important and why. Providing enough information to the tribunal at an early stage could help to promote a settlement and so avoid a hearing.

Is all loss awarded?

18 For claims such as unpaid wages, holiday and notice pay the tribunal will order the difference between what should have been paid and what has actually been paid. Wages and holiday pay are usually calculated gross, but pay in lieu of notice is usually calculated net of tax and national insurance. The judgment should specify whether each payment ordered has been calculated gross or net.

19 In the case of unfair dismissal there are several limits (called statutory caps) on what can be awarded:

- For the basic award there is a maximum sum for a week's pay, which, for dismissals on or after 1 February 2013, is £450 per week. It is usually increased each year.
- For the compensatory award there are two separate limits. The first is an overall maximum, which for dismissals on or after 1 February 2013 is £74,200 and usually increases each year. However under the Unfair Dismissal (Variation of the Limit of Compensatory Award) Order 2013, where the dismissal took effect on or after 29 July 2013 (subject to rules about the minimum notice having been given) the maximum which can be awarded to any individual is one year's salary.
- There is no limit to the maximum compensatory award where the reason for the dismissal was that the claimant made a Public Interest Disclosure, or complained of certain Health and Safety related matters, and no limit to an award for discrimination, as long as it genuinely compensates for loss actually incurred as a result of the discrimination.

Grossing up

20 The rules on when tax is payable on awards made by tribunals are too complex for inclusion here. When it is clear that the claimant will have to pay tax on the sum awarded, the tribunal will award a higher figure, calculated so that tax can be paid and the claimant will receive the net sum which properly represents the loss. This calculation is called "grossing up".

Interest

21 There are two separate situations where interest is relevant.

22 Firstly, when a tribunal calculates compensation for discrimination, it is obliged to consider awarding interest. If it decides to do so, it calculates interest from the date of the act of discrimination up to the date of the calculation, except for interest on lost wages, where the calculation is done from the middle of that period (as that is simpler than calculating interest separately on each missing wage but leads to a roughly similar result). The tribunal will then include that interest in the award made. For claims presented on or after 29 July 2013 the rate of interest is 8%. For claims presented before that date, it is 0.5%.

23 In addition, interest of 8% is payable on awards for all claims if they are not paid when due. In respect of all claims presented on or after 29 July 2013 interest is calculated from the day after the day upon which the written judgment was sent

to the parties, unless payment is actually made within the first 14 days, in which case no interest is payable. For claims presented before 29 July, interest is payable 42 days after the day upon which the written judgment was sent to the parties.

24 Employment Tribunals play no part in enforcing payment of the awards they make. That is done by the civil courts, who issue separate guidance on how to enforce payments.

Recoupment

25 For some claims, such as unfair dismissal, if the claimant has received certain state benefits the tribunal is obliged to ensure that the employer responsible for causing the loss of earnings reimburses the State for the benefits paid. In those cases the tribunal will order only part of the award to be paid to the claimant straight away, with the rest set aside until the respondent is told by the State how much the benefits were. The respondent then pays that money to the State and anything left over to the claimant. This is called "recoupment". The judge should set out in the judgment whether or not recoupment applies, and if it does, how much of the award is set aside for recoupment purposes. If either party is in any doubt about recoupment, they should ask the Judge to explain how it affects them.

Costs

26 See the separate guidance on "Costs"

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COSTS

1. The basic principle is that employment tribunals do not order one party to pay the costs which the other party has incurred in bringing or defending a claim. However, there are a number of important exceptions to the basic principle as explained below.

What are costs?

2. 'Costs' means some or all of the fees, charges, payments or expenses incurred by a party in connection with the tribunal case. It includes Tribunal fees (since these are not part of any remedy awarded) and the expenses incurred by a party or witness in attending a hearing.

What orders for payment of costs can be made?

3. There are three different types of payment orders: costs orders; preparation time orders (sometimes referred to as PTOs); wasted costs orders. These specific terms have the following meanings.

4 A costs order generally means that a party is ordered to pay some or all of the costs paid by the other party to its legal representatives (barristers and solicitors) or to its lay representative. No more than the hourly rate of a preparation time order, see paragraph 17 below, can be claimed for a lay representative. Separately, costs orders can be made for a party's Tribunal

fees and expenses reasonably and proportionately incurred by a party or witness in attending a hearing.

5 Preparation time orders are for payment in respect of the amount of time spent working on the case by a non-represented party, including its employees or advisers, but not the time spent at any final hearing.

6 Wasted costs orders are for payment of costs incurred by a party as a result of any improper, unreasonable or negligent act or failure to act by a representative or for costs incurred after such act where it would be unreasonable to expect the party to bear them. They require payment by a representative to any party, including the party represented by the payer.

When may orders for costs and preparation time be made?

7 Apart from costs orders for Tribunal fees and the attendance of witnesses or parties at hearings, a party cannot have both a costs order and a preparation time order made in its favour in the same proceedings. So it is often sensible for a Tribunal in the course of the proceedings (for example, at a preliminary hearing) to decide only that an order for payment will be made, but to leave to the end of the case the decision about which type of order and for how much.

8 Orders for payment of costs or for preparation time may be made on application by a party, a witness (in respect of their expenses) or on the Tribunal's initiative, up to 28 days after the end of the case. If judgment on the claims is given at a hearing, it will usually be sensible to make any application for costs or PTOs then, in order to avoid delay and the additional cost of getting everyone back for another hearing. The circumstances when payment orders may be made are as follows.

9 If an employer in unfair dismissal proceedings requires an adjournment to obtain evidence about the possibility of re-employment, the tribunal must order the employer to pay the costs of the adjournment provided:

- the claimant notified the desire to be re-employed at least seven days before the hearing;
- the employer cannot prove a special reason why it should not pay.

10 A party may be ordered to pay costs or preparation time to the other party, without any particular fault or blame being shown, where:

- the paying party has breached an order or practice direction; or
- an adjournment or postponement is granted at the request of or due to the conduct of the paying party; or
- the receiving party had paid a Tribunal fee for a claim and has wholly or partly won the claim.

11 A party may be ordered to pay costs in the form of the expenses incurred or to be incurred by a witness attending a hearing, without any particular fault or blame being shown. The order may be in favour of or against the party who called the witness. It may be made on the application of a party, the witness or at the Tribunal's own initiative and may be payable to a party or to the witness.

12 A party may be ordered to pay costs or preparation time to the other party where the Tribunal considers that:

- a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or defending the proceedings or in its conduct of the proceedings; or
- the claim or response had no reasonable prospect of success.

13 The circumstances described at paragraph 11 require a tribunal to consider first whether the criteria for an order are met. Each case will turn on its own facts, but examples from decided cases are that it could be unreasonable where a party has based the claim or defence on something which is untrue (sometimes called 'a lie'). That is not the same as something which they have simply failed to prove, nor does it mean something they reasonably misunderstood. Abusive or disruptive conduct would include insulting the other party or its representative or sending numerous unnecessary e-mails. If the criteria are met, the Tribunal is at the threshold for making an order and will decide whether it is appropriate to order payment. It will consider any information it has about the means of the party from whom payment is sought, the extent of any abusive or unreasonable conduct and any factors which seem to indicate that the party which is out-of-pocket should be reimbursed. For example, some times it becomes clear that a party never intended to defend on the merits (that is, for example, whether the claimant was unfairly dismissed), but pretended that it was doing so until the last minute, causing the claimant to use his lawyer more, before conceding what was really always obvious.

When may a wasted costs order be made?

14 A Tribunal may consider making a wasted costs order of its own initiative or on the application of any party, provided the circumstances described at paragraph 6 above are established. This is a very rare event. When it happens, usually a party will seek costs from the other party and, in the alternative, wasted costs from that party's representative. The representative from whom payment is sought is entitled to notice and so is the party – because they may need separate representation at this costs hearing.

Amount of costs, preparation time and wasted costs orders

15 Broadly speaking, costs orders are for up to the amount of legal fees and related expenses reasonably incurred, based on factors like the significance of the case, the complexity of the facts and the experience of the lawyers who conducted the litigation for the receiving party.

16 In addition to costs for witness expenses and Tribunal fees, the Tribunal may order any party to pay costs:

- up to £20,000, by forming a broad-brush assessment of the amounts involved, working from a schedule of legal costs or, more frequently and in respect of lower amounts, just, for example, the fee for the barrister at the hearing;
- calculated by a detailed assessment in the County Court or by an Employment Judge, up to an unlimited amount;
- in any amount agreed between the parties.

17 Preparation time orders are calculated at the rate of £33 per hour (until April 2014, when the rate increases by £1 as every April) for every hour which the receiving party reasonably and proportionately spent preparing for litigation. This requires the Tribunal to bear in mind matters such as the complexity of the proceedings, the number of witnesses and extent of documents.

18 Wasted costs orders are calculated like costs orders, amount wasted by the blameworthy (as at paragraph 6) conduct of the representative.

19. When considering the amount of an order, information about a person's ability to pay may be considered, but the Tribunal may make a substantial order even where a person has no means of payment. Examples of relevant information are: the person's earnings, savings, other sources of income, debts, bills and necessary monthly outgoings.

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TIMETABLING

1. The overriding objective means that each case should have its fair share of available time, but no more, otherwise other cases would be unjustly delayed. Also, each party must have a fair share of the time allowed for the hearing of their case.

What is timetabling?

2. Each party has a duty to conduct the case so that wherever possible the tribunal can complete the case within the time allowed. Failing to do that may mean a delay of many weeks, and also that other cases waiting to be heard might be delayed. To avoid the risk of this happening the tribunal sometimes divides up the total time allowed for a hearing into smaller blocks of time to be allowed for each part of the hearing. This is called "timetabling". It is necessary in particularly long or complicated hearings, or sometimes where a party has no experience of conducting hearings.

How and when is timetabling done?

3. Judges estimate the amount of time to be allowed for a hearing based on all the information they have when the hearing is listed. In straightforward cases that might be when the claim first comes in, or when the response arrives; in complex cases it is often done at a preliminary hearing.

4. For very short cases it is rare for a formal timetable to be issued, although for a hearing of one day it might be helpful for the judge and parties to agree at the beginning of the hearing roughly how long they expect each of the various stages to take. For longer or complex hearings a timetable is often decided in consultation with the parties at a preliminary hearing, or at the start of the hearing itself.

5. Fairness does not always mean that the hearing time must be divided equally between the parties or each witness. For example the party giving evidence first, (in unfair dismissal cases usually the employer, but in discrimination cases often the employee) will often have to explain the relevance of the documents referred to, which requires time. Also, some witnesses might have to give evidence about many separate incidents, whereas others just one short conversation. If an interpreter is required, extra time has to be allowed. The tribunal will take these things into account when estimating how long the evidence of each witness should take.

6. The tribunal will set the timetable using its own experience, but the Judge will often ask for the parties views on how long each stage of the hearing might take.

7. The stages involved in a typical hearing are:

- At the start the tribunal should, if this has not been done before, make sure that everybody understands the questions the tribunal has to answer (called "Identifying the Issues") and check that everyone has copies of all of the documents etc.
- Often the tribunal will then read the witness statements and any pages in the agreed bundle of documents to which they refer.
- Each witness is then questioned on their own statement (called "cross–examination") and the tribunal may also ask questions. A specific time may be allocated for questions in respect of each witness.
- When the evidence is finished, each party is entitled to make "submissions", which means to summarise the important evidence in their case and to highlight any weak parts of the other side's case, and also to refer the tribunal to any legal authorities which might be relevant. Although each party has the right to make submissions, they are not obliged to do so.
- After submissions, the tribunal will reach its decision. Sometimes it needs to "retire" (which means to leave the tribunal room) in order to consider everything that has been said. The length of time it needs to do this might just be a few minutes in a simple straightforward case or may be days in a very long case.
- The tribunal will then tell the parties what has been decided and why (called "delivering judgment"). This might be done orally – that is by telling the parties in the tribunal room - or, if the decision is made later, then it may be sent in writing.
- After delivering judgment, the tribunal will, if the claim succeeds, hear evidence about the claimant's loss. The parties may then make submissions on what award is necessary.
- The tribunal may then have to retire again to decide on remedy. It will then deliver its judgment on remedy either orally, or reserve it and send it later in writing.
- Lastly the tribunal might have to consider orders in respect of fees or any costs matters. Orders for costs are, however, rare. It will then give judgment with reasons on those matters, again either orally or in writing.

8. If a party believes that the time estimate for the whole or any part of the hearing is wrong, the tribunal will expect them to say so as soon as possible. Waiting till the day before the hearing or the start of it, to ask for extra time, is not helpful. It can save time to try to agree a more accurate estimate and then to ask the tribunal to change the timetable.

What can a party do to assist the Tribunal to keep to the timetable?

9. It is helpful for each party to make a list, for their own use, of the questions to be asked about each of the issues in the case. It is also useful to decide which of the questions are the most important, so that if time is running out the really important questions can be asked, even if others have to be abandoned.

10. Being able to find and quote the page number of the relevant documents in the bundle can save a lot of time. Asking questions using words the witness will understand, so that less time is wasted having to explain what is being asked, also saves time. A series of short precise questions is generally better than

one long complicated one. They take less time to ask and answer, and are easier for the tribunal to understand and for everyone to take a note of.

11. There is nothing to be gained by asking the same question several times, or "arguing" with the witness. That will just waste the time allowed. The purpose of asking questions is not to try to make the witness agree with the questioner, but to show the tribunal which side's evidence is more likely to be accurate. If necessary the tribunal can be reminded in submissions at the end of the case that, for example, the witness would not answer a question, or gave an answer which was not believable, or which was not consistent with a document in the bundle etc. An explanation of why your evidence is more reliable can be given at that stage.

What if the time allowed is exceeded?

12. The parties must try to conclude their questioning of each witness, and their submissions, within the time limit allocated. Usually the judge will, when time is nearly up, remind a party of how long they have left. If a party does not finish in time, they run the risk that the tribunal may stop their questioning of that witness, which is sometimes called "guillotining" the evidence. This is not a step tribunals like to take, but sometimes it is necessary, especially if one side takes so long that they might prevent the other side from having a fair opportunity to ask their own questions. If later witnesses take less time than expected, it might be possible to "re-call" the witness who did not have enough time.

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Concluding cases without a hearing

1 A claim or response which has been accepted may be disposed of by the tribunal at a number of stages before the final hearing. This paper sets out most of the situations generally encountered and refers you to the relevant rules.

Rejection at issue

2 A claim may be rejected by an Employment Judge at the time of issue under Rule 12 if it is one which the tribunal has no jurisdiction to consider. It may also be rejected under this rule if it is not in a form to which the respondent can sensibly respond, or is otherwise an abuse of process. The claimant may apply for reconsideration of that rejection by a Judge within 14 days on the grounds that it is wrong or that the defect can be rectified. Unless the claimant asks for a hearing the issue is decided on paper by the Employment Judge. If there is a hearing only the claimant attends.

Failure to respond and Rule 21 judgment

3 If no response is received within the prescribed time the tribunal considers whether a judgment can be issued under Rule 21 on the available material. A judge may seek further information from the claimant or order a hearing. The respondent will receive notice of the hearing but will only be allowed to participate in the hearing to the extent permitted by the judge.

Notice under Rule 26 after response received

4 If a response is accepted the tribunal conducts an initial consideration of the claim form and response under rule 26. If the judge considers that the Tribunal has no

jurisdiction to hear the claim, or that it, or the response, has no reasonable prospect of success, notice will be sent to the parties setting out the judge's view and the reasons for it and ordering that the claim or response (or part) shall be dismissed on a date specified unless the claimant or respondent has before that date written to explain why that should not happen.

5 If no representations are received the claim or response or the relevant part will be dismissed. If representations are received, they will be considered by a judge who will either permit the claim or response to proceed, or fix a hearing for the purposes of deciding whether it should be permitted to do so. Such a hearing may consider other matters in relation to preparing the case for hearing.

Preparation for the final hearing

6 If the judge directs the case is to proceed to hearing orders will normally be made under rule 29 to prepare for the hearing which is listed. These may include disclosure of documents and exchange of witness statements. Failure to comply with these orders may lead to sanctions as set out below.

Striking out under Rule 37

7 Under rule 37 the tribunal may strike out all or part of a claim or response on a number of grounds at any stage of the proceedings, either on its own initiative, or on the application of a party. These include that it is scandalous or vexatious or has no reasonable prospect of success, or the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious. Non-compliance with the rules or orders of the tribunal is also a ground for striking out, as is the fact that the claim or response is not being actively pursued. The fact that it is no longer possible to have a fair hearing is also ground for striking out. In some cases the progress of the claim to hearing is delayed over a lengthy period. Ill health may be a reason why this happens. This means that the evidence becomes more distant from the events in the case and eventually a point may be reached where a fair hearing is no longer possible. Before a strike out on any of these grounds a party will be given a reasonable opportunity to make representations in writing or request a hearing. The tribunal does not use these powers lightly and will often hold a hearing before taking this action.

8 In exercising these powers the Tribunal follows the overriding objective seeking to deal with cases justly and expeditiously and in proportion to the matters in dispute. In some cases parties apply for strike out of the opponent at every perceived breach of the rules. This is not a satisfactory method of managing a case and such applications are rarely successful. The outcome is often further orders by the tribunal to ensure the case is ready for the hearing.

9 It follows that before a claim or response is struck out you will receive a notice explaining what is being considered and what you should do. If you oppose the proposed action you should write explaining why and seeking a hearing if you require one.

Unless order under Rule 38

10 The Tribunal may, in order to secure compliance with an order for preparation of the case, make an "unless order" under rule 38 which will specify that, if it is not complied with, the Claim or Response or part of it shall be dismissed without further order. The party may apply, within 14 days of the date that the order was sent, to have the order set aside or for time for compliance to be extended. If the party does not comply with the order the case is struck out without further order. A party may also apply after dismissal for the claim or response to be reinstated.

Deposit orders under Rule 39

11 The Tribunal has power under rule 39 to order that a deposit be paid on the ground that a specific allegation or argument has little reasonable prospect of success. If such an order is made the deposit must be paid in the time specified as a condition of continuing to advance the allegation or argument. If the party fails to pay the deposit by the date specified, the allegation to which the deposit relates is struck out.

Hearing Fee: Rule 40

12 The tribunal will issue a notice to pay a fee when a final hearing is listed. If that fee is not paid by the due date the tribunal issues a notice under rule 40 specifying a date for payment or presentation of a remission application. If the fee is not paid or there is no application for remission the claim is dismissed by the tribunal. If there is an application for remission which is unsuccessful the tribunal will issue a notice for payment if the fee. Again non- payment will lead to dismissal.

13 If the claim is dismissed for non-payment of the hearing fee the party concerned may apply for the claim to be reinstated. This is effective if the fee is paid or remission is granted by the date specified in the order.

Withdrawal under Rule 51

14 When a claimant withdraws the claim comes to and end. The tribunal must issue a dismissal judgment under rule 52 unless for some reason this is inappropriate. Often the settlement of a claim includes that the claimant withdraws and a dismissal judgment is made.

Compromise contracts and ACAS

15 Section 203 of the Employment Rights Act 1996 and section 144 of the Equality Act restrict contracting out of the provisions of these two Acts. Claims can be settled using an ACAS conciliator to produce a COT3 agreement or where legal advice is available to the claimant a compromise or settlement agreement.

Conclusion

16 In the absence of one of the outcomes outlined above the case will be determined at a final hearing following consideration of the evidence and law by a tribunal.

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JUDICIAL MEDIATION

EXPLANATORY NOTE TO THE PARTIES

1. Alternative Dispute Resolution is a priority for the Government. Judicial mediation is seen as one of the possible ways to achieve this. The Employment Tribunals operate a scheme in all regions in England and Wales.

2. Judicial mediation involves bringing the parties in a case together for a mediation preliminary hearing. The judicial mediation is conducted by a trained Employment Judge, who remains neutral and tries to assist the parties to resolve their dispute. The Employment Judge will help to identify issues in

dispute, but will not make a decision about the case, nor give an opinion on the merits of the case. The role of the Employment Judge as mediator is to help the parties find ways to resolve their dispute by mutual agreement. Resolution is not limited to the remedies available at a hearing.

3. Whilst judicial mediation is part of the process of resolving employment disputes, it is an alternative to a Tribunal hearing, but not an alternative to ACAS conciliation. ACAS and the judiciary of the Employment Tribunals work collaboratively in relation to judicial mediation. The statutory duty placed on ACAS is not compromised by the process, and ACAS and the judiciary remain independent of each other at all times.

4. There are no restrictions on the jurisdictions that will be considered for judicial mediation, although it is unlikely that equal pay claims will normally be suitable for this process.

5. An important factor in assessing suitability is whether there is an ongoing employment relationship.

6. Whilst cases suitable for judicial mediation are identified in a number of different ways, identification is usually by an Employment Judge at a preliminary hearing for case management purposes. At that preliminary hearing, suitability for judicial mediation is considered, the parties advised of the possibility of an offer of judicial mediation, their interest (or otherwise) noted, and normal case management orders and directions made.

7. If the parties agree to consider an offer of judicial mediation, the file will be passed to the Regional Employment Judge, who will apply agreed criteria and determine whether the case qualifies for an offer of judicial mediation. An offer of judicial mediation is normally made at a telephone preliminary hearing with the parties when timetables for the mediation will be set, a stay or variation of the existing case management orders made if necessary, and the dates for the judicial mediation agreed. Agreement will also be reached on the issues for the judicial mediation (which may be wider than those determinable by a Tribunal at a hearing), who will attend the mediation (which must include people empowered to make decisions), and any requirements of the parties for the conduct of the mediation.

8. It is not possible to offer judicial mediation in all cases because of resource constraints and suitability of the issues to mediation. Parties are notified if an offer cannot be made.

9. Provided that the offer of judicial mediation is accepted by all parties, the matter proceeds to a one or two day mediation.

10. The judicial mediation will be carried out by an experienced Employment Judge trained in mediation. A facilitative mediation technique is adopted and applied.

11. The judicial mediation is held in private and in circumstances which are entirely confidential with appropriate facilities made available. The contents or the events at a judicial mediation may not be referred to at any subsequent hearing. The Employment Judge mediating will play no further role in the case should it proceed to a hearing.

12. The judiciary of the Employment Tribunals may, on occasions, and with the prior consent of the parties, contact ACAS to reactivate conciliation, either

during, or at the end, of the judicial mediation. This contact is usually by telephone conference call with the parties and an appropriate ACAS officer.

13. If there are any matters of concern or any explanation required then please write to the Regional Employment Judge for clarification.

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AGENDA FOR CASE MANAGEMENT AT PRELIMINARY HEARING
Rules 29 - 40 and 53 - 56 Employment Tribunals Rules of Procedure 2013

You may be assisted by reading Presidential Guidance – General Case Management

It may help the efficient management of the case if you complete this agenda, as far as it applies, and send it to every other party and the Tribunal to arrive at least 7 days before the preliminary hearing ("ph"). A completed agreed agenda is particularly helpful.

1. Parties

1.1	Are the names of the parties correct? Is the respondent a legal entity? If not, what is the correct name?	
1.2	Should any person be joined or dismissed as a respondent? If yes, why?	

2. The claim and response

2.1	What complaints (claims) are brought? This should be just the complaint title or head (eg unfair dismissal). If any are withdrawn, say so.	
2.2	Is there any application to amend the claim or response? If yes, write out what you want it to say. Any amendment should be resolved at the ph, not later.	
2.3	Has any necessary additional information been requested? If not, set out a limited, focussed request and explain why the information is necessary. If requested, can the relevant information be provided for the ph? If so, please do.	

3. Remedy

3.1	If successful, what remedy does the claimant seek? This means eg compensation or re-instatement (where that is possible) etc.	
3.2	What is the financial value of the monetary parts of the remedy? All parties are encouraged to be realistic.	
3.3	Has a schedule of loss been prepared? If so, please provide a copy.	
3.4	Has the claimant started new work? If yes, when?	

4. The issues

4.1	What are the issues or questions for the Tribunal to decide? It is usually sensible to set this out under the title of the complaint/s.	
4.2	Are there any preliminary issues which should be decided before the final hearing? If yes, what preliminary issues? Can they be added to this preliminary hearing? If not, why not?	

5. Preliminary hearings

5.1	Is a further preliminary hearing needed for case management? NB This should be exceptional. If so, for what agenda items? For how long? On what date?	
5.2	Is a further substantive preliminary hearing required to decide any of the issues at 4.1? If so, for which issues? How long is needed? Possible date/s?	

6. Documents and expert evidence

6.1	Have lists of documents been exchanged? If not, date/s for exchange of lists	
6.2	Have copy documents been exchanged? If not, date/s or exchange of copies: • for any further preliminary hearing • for the final hearing	
6.3	Who will be responsible for preparing • index of documents? • the hearing bundles? Date for completion of this task and sending a copy to the other parties?	
6.4	Is this a case in which medical evidence is required?	

	Why? Dates for • disclosure of medical records • agreeing any joint expert • agreeing any joint instructions • instructing any joint expert • any medical examination • producing any report • asking questions of any expert • making any concessions	

7. Witnesses

7.1	How many witnesses will each party call? Who are those witnesses? Why are they needed?	
7.2	Should witness statements be: - exchanged on the same date? - provided sequentially? Dates for exchange: • for further preliminary hearing • for the final hearing	

8. The hearing(s)

8.1	Time estimate for final hearing, with intended timetable. Is a separate hearing necessary for remedy? If yes, why?	
8.2	Dates to avoid (with reasons) or to list. Any dates pre-listed by the Tribunal?	

9. Other preparation

9.1	Should there be admissions and/or agreed facts? If yes, by what date/s?	
9.2	Should there be a cast list? From whom and when?	
9.3	Should there be a chronology? From whom and when?	
9.4	Are there special requirements for	

	any hearing? (eg interpreter, hearing loop, evidence by video, hearing partly in private under rule 50) If yes, give reasons.	

10. Judicial mediation

10.1	Is this a case that might be suitable for judicial mediation?	
10.2	Are the parties interested in the possibility of judicial mediation?	
10.3	JUDICIAL USE ONLY	Judge to consider whether judicial mediation criteria are met; if so, discuss with the parties; record/direct their responses. Refer to REJ, if appropriate

11. Any other matters

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