PROPOSED CHANGES TO EMPLOYMENT TRIBUNAL RULES OF PROCEDURE

By Rachel Tandy

In November 2011, the Government asked Mr Justice Underhill to lead a comprehensive review of the current Employment Tribunal Rules of Procedure, set out in Schedule 1 of the ***Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861)****. On 11 July 2012, it published his recommendations.*

BACKGROUND

The Underhill review was commissioned in response to a Government consultation on resolving workplace disputes. Much of the feedback received in the course of that consultation indicated that the existing rules were unwieldy, impractical, and difficult to navigate.

As a result, Underhill J was asked to lead a working group to review the existing rules, and to recommend a revised procedural code. The group was asked to have particular regard to the need for simplicity, consistency, efficient and proportionate case management, and robust powers to strike out weak statements of case.

The published recommendations broadly address those considerations. The key changes proposed are:

(i) Clearer and shorter rules, drafted in plain English with less focus on “legalese”;
(ii) Stronger and broader case management powers;
(iii) Express provisions setting out practices which have largely been adopted but never previously formalised;
(iv) One (relatively simple) rule governing the approach to privacy and reporting restrictions; and
(v) The abandonment of the £20,000 costs cap.

CLARITY AND BREVITY

The proposed new rules are noticeably shorter than the existing regime. Underhill J commented that they are less than half the length of the provisions contained in Schedule 1, despite having in fact added several new requirements.

In part, this has been achieved by simplifying the style and structure of the rules; there are certainly fewer sub-paragraphs and technicalities to navigate. Underhill J's approach appears to have been to strip away any unnecessary clutter and retain only the more general principles underpinning the regime. In his letter to the Government summarising the changes, he described this approach as *"leaving some general case-management discretions unglossed."* Presumably the power retained by the President to issue guidance on particular issues will resolve any ambiguities arising out of this newly "unglossed," slimmed-down version of the rules. However, although such guidance is far from a new concept, it is not binding on the Tribunals, and in that sense their powers are arguably broader as a result of the modifications.

One example is the change to what is currently rule 10, which lists all the Tribunals' case management powers, in an apparent attempt to emulate CPR r3.1. The new rules do specify some of the most commonly-used powers, such as disclosure, the substitution of parties, and the power to strike out statements of case. However, the need to provide an apparently exhaustive list is now avoided by rule 26, which provides for a general power of case management and states that *"the particular powers identified in the following rules do not restrict that general power."*

In addition, some procedural requirements which were deemed to be simply unnecessary have been abandoned altogether. For example, a claimant wishing to withdraw his or her claim can now simply notify the Tribunal of that fact. There is no longer a need for the respondent to file a notice requesting that the Tribunal formally dismiss the claim – the Tribunal *"will normally"* issue a dismissal of its own initiative (although rule 38 provides no clues as to what circumstances might qualify as "normal" in this context).

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At first glance, the impact of this change is significant, given that a formal dismissal prevents a claimant from being able to bring the same claim to the Tribunal again at a later date. However, the new rules also provide for the claimant to expressly reserve his or her right to bring that claim again,

if the Tribunal is satisfied that there is *"a legitimate reason for doing so."* Essentially, then, the onus has shifted, from a presumption that *res judicata* does not apply unless a respondent seeks a dismissal from the Tribunal, to a presumption that *res judicata* does apply unless a claimant shows there is a legitimate reason to reserve his or her rights.

STRONGER CASE MANAGEMENT POWERS

The new rules introduce an initial "sift" stage, at which an Employment Judge considers the claim and response *"with a view to confirming that there are arguable complaints and defences within the jurisdiction of the Tribunal."* The Employment Judge can then strike out either the claim or the response for want of a reasonable prospect of success. If such action is not necessary, the Employment Judge will instead provide written case management directions.

The biggest change here is the apparently mandatory nature of rule 25. Under the existing regime, Tribunals can provide case management directions at any stage – and indeed, as Underhill J pointed out, many undertake this task at the start of proceedings as a matter of course. However, the issue ultimately falls to the Tribunals' discretion. In contrast, it appears that the new rules oblige them to consider and issue the necessary directions at an early stage in every case. The implication is that Employment Judges not only *may*, but in fact *must*, identify any relevant preliminary issues at the start of proceedings.

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Another significant change is the replacement of pre-hearing reviews and case management discussions with a single "preliminary hearing," at which the parties can address both procedural and substantive issues. Rule 39 does permit more than one "preliminary hearing," and indeed either party can apply for one at any time. Nevertheless, it is evident that this new approach – coupled with the focus of rule 25 on the early identification of relevant issues – is an attempt to streamline and limit the amount of time spent on case management or preliminary matters.

CODIFYING GOOD PRACTICE

Although the overall focus seems to be on "de-cluttering" the existing provisions, the new regime also adds some procedures which have historically been adopted as good practice, although never formally included in Schedule 1. So, for example, there are now specific rules relating to the initial "sifting" of cases, the Tribunals' ability to set time limits for witness evidence, cross examination and submissions, and the emphasis on utilising alternative dispute resolution (ADR) where appropriate.

The latter is clearly intended to be a cornerstone of the new regime. It is given a prominent position at the beginning of the rules, preceded only by the overriding objective. Again, the language of rule 2 borders on being mandatory; it is stated that the Tribunal *"shall wherever practicable and appropriate"* encourage the use of ADR services. The message seems to be that such services must at least be considered in every case. The working group evidently attached much importance to ADR; Underhill J went as far as to issue a stark warning, in his letter to the Government, that *"the current proposal to charge a fee for judicial mediation is likely to be a powerful disincentive to its use."*

PRIVACY AND REPORTING RESTRICTIONS

Perhaps the most fundamental change proposed in the review is the new approach to privacy and reporting restrictions. The existing rules 49 and 50, derived from sections 11 and 12 of the Employment Tribunals Act 1996, allow for privacy measures to be put in place only in cases which involved allegations of sexual misconduct or disability discrimination. Although the Employment Appeals Tribunal confirmed in 2003 that the Employment Tribunals in fact had a wider power to order privacy measures in other circumstances (see *X v Commisssioner of the Police for the Metropolis* [2003] ICR 1031), the need to refer to this ambiguous power is cumbersome. Underhill J commented that *"the existing regime was poorly conceived and drafted and required revision in any event"* – a view he most likely reached in the course of his judgment in *F v G* (UKEAT/0042/11/DA), which provides a useful summary of the existing provisions.

The new rule 55, which deals with the privacy issue, simplifies matters by providing that the Tribunal may *"at any stage make orders with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice…"* Express references to the European Convention on Human Rights are included for the first time, at rules 55(1) and 55(3). Examples of the types of orders that can be made, including orders for private hearings, witness anonymity, and "extended" restricted reporting orders, are also specified.

However, given that the existing rules stem from underlying primary legislation, they cannot be abandoned in their entirety and as a result have had to be retained, making rule 55 longer and more complex than most provisions in the new proposed regime. In his letter to the Government, Underhill J expressed regret at this fact. The undertone of his comment was that it should not be necessary to have to accept this rather ungainly compromise. Instead, the subtle message seemed to be that the ultimate source of the problem – being sections 11 and 12 of the Employment Tribunals Act 1996 – should be done away with altogether.

COSTS AND REMEDIES

Under the current regime, the Employment Tribunal has no jurisdiction to award costs of more than £20,000. Instead, it must refer costs assessments to the county court where the costs to be awarded exceed that threshold. The Underhill review proposes to remove this limitation altogether. Under the new rule 72, where the amount of costs to be awarded is greater than £20,000, a detailed assessment is still necessary. However, the rule now allows for the exercise to be undertaken by an Employment Judge, rather than requiring the case to be referred to the county court for determination by a different tribunal.

Underhill J also commented that there were other changes to the costs and remedies provisions that the working group would like to have made, but were unable to effect without a root-and-branch overhaul of the primary legislation. He specifically drew the Government's attention to several recommendations, including the following:

(i) A provision allowing for parties to recoup the cost of lay representation. The current rules provide for costs in respect of legal representation, or in respect of the time a party to the dispute has spent preparing their case. A lay representative does not fall within either of these scenarios. In a forum where many choose to forego legal representation, this is certainly surprising.

(ii) An express statement that the Civil Liability (Contribution) Act 1978 is deemed to apply to claims brought in the Employment Tribunal. Underhill J cited his own judgment in *Brennan v Sunderland City Council* (UKEAT/0288/11/SM), in which he found himself forced to conclude that the Employment Tribunal did not have jurisdiction to apportion liability between co-respondents.

COMMENT

The Underhill review certainly proposes some welcome changes. The new code of practice is streamlined and easy to comprehend, which will benefit the numerous claimants and respondents who attend the Employment Tribunal without legal representation. The rules encouraging better and more efficient case management, early identification of issues, and alternative dispute resolution, are all likely to make the process simpler and less arduous for all involved.

However, there are still discernible tensions between the Government's ideal and Underhill J's recommendations. A system that fails to apportion liability, for example, will create manifestly unfair decisions for some respondents. Tension is also evident in relation to the issue of costs. In the course of the review, the Government allegedly expressed concerns about the relatively small number of cases in which costs are awarded. However, Underhill J felt that those concerns were unfounded, and resolutely refused to amend the existing criteria governing the award of costs.

It is not yet clear whether or to what extent those tensions will be resolved. When publishing Underhill J's recommendations, the Minister for Employment Relations emphasised that there will be a process of further consultation and review, and even then, the rules will, of course, still need to win the approval of both Houses of Parliament, leaving much scope for amendment. The question, then, of whether the current recommendations will make it to the statute book unscathed ultimately remains to be seen.

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