A practical approach to the Employment Tribunal Rules 2013

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General Observations

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1. The provisional views expressed in this paper do not reflect any general view of the Employment Tribunal Judiciary. I will not summarise the regulations, but concentrate on a number of general principles that I consider of particular interest.

2. The Employment Tribunal Rules 2013 (the new rules) represent a significant evolution of Employment Tribunal practice and procedure. It is likely that the interpretation of the new rules will develop as they bed in and guidance is provided by the EAT, and above.

3. The Overriding objective is centre stage, Rule 2:

> **Overriding objective**
>
> **2.** The overriding objective of these Rules is to enable Employment Tribunals to deal with cases **fairly** and **justly**. Dealing with a case fairly and justly **includes**, so far as practicable—
>
> (a) ensuring that the parties are on an **equal footing**;
> (b) dealing with cases in ways which are **proportionate** to the **complexity** and **importance** of the issues;
> (c) **avoiding unnecessary formality** and seeking **flexibility** in the proceedings;
> (d) **avoiding delay**, so far as compatible with proper consideration of the issues; and
> (e) **saving expense**.
>
> A Tribunal **shall** seek to give effect to the overriding objective in **interpreting**, or **exercising any power** given to it by, these Rules. The **parties and their representatives shall assist** the Tribunal to further the overriding objective and in particular shall **co-operate** generally with each other and with the Tribunal.

4. Any application for an Order should identify the rule under which it is made and set out, succinctly, how it will further the overriding objective.

5. Alternative dispute resolution is emphasised and parties should be ready to consider it at all stages of the proceedings: Rule 3.

6. The rules permit active case management, with the possibility of weeding out unarguable complaints or defences. This may involve:

   6.1. Rejection of a claim for substantial defects; ie lack of jurisdiction or where it cannot sensibly be responded to, or is otherwise an abuse of the process: Rule 12. The rejection may be reconsidered where it was wrong or can be rectified: Rule 13. However, note that where the defect

is rectified the claim shall be treated as presented on the date of the rectification.

6.2. Initial consideration by an Employment Judge under rule 26; which provides for confirmation of whether there are arguable complaints and defences within the jurisdiction of the Tribunal; and may result in rejection of the Claim (Rule 27) or Response (Rule 28) if all or part of the claim or response has no reasonable prospect of success, if necessary after the provision of further information; subject to the possibility of reconsideration.

6.3. Consideration at a preliminary hearing where all or part of the claim or response may be struck out under Rule 37 if it has no reasonable prospect of success. It is to be noted that while there are specific notice requirements before a preliminary issue can be determined (Rule 54) there are not such formal requirements before a strike out, although fairness and pursuit of the overriding objective may often require it.

7. It is clearly in the interests of justice, and in accordance with the scope of the new rules, that unarguable claims and defences should be dismissed as early as possible. This saves the parties and tribunal time and money. A party gains no advantage by being able to advance a complaint or defence that has no reasonable prospect of success, but is likely to be put to great cost, often both monetary and emotional.

8. However, while the opportunities for consideration of strike out have increased, the wording of the test remains the same and there does not appear to be any reason to believe that the cases under the old rules will not remain valid. It must be shown that the complaint or defence has no reasonable prospect of success: See **Balls v Downham Market High School & College** [2011] IRLR 217 where Lady Smith stated at para 6:

> "[. . .] the tribunal must first consider whether on a careful consideration of all the available material it can properly conclude that the claim has *no* reasonable prospect of success. I stress the word 'no' because it shows that the test is not, whether the Claimant's claim is likely to fail nor is the matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

9. The Tribunal will ensure that parties have a reasonable opportunity to bring arguable complaints and defences to a hearing. Unnecessary preliminary hearings should be avoided: see **QDOS Consulting Ltd v Swanson** UKEAT/0495/11, Judge Serota QC at para 47:

> I would observe, bearing in mind the high cost to employers of conducting a hearing in the Employment Tribunal not only in terms of its legal costs but the expense of its employees attending lengthy proceedings (for example, I note that the Claimant's claim against Sandwell Borough Council took some 17 days), there is a temptation to take advantage of a procedural shortcut to avoid these expenses. As Bingham LJ put it in the passage that I have cited, "a technical knockout in the first round is much more advantageous than a win on points after 15". However, applications to strike out on the basis that there is no reasonable prospect of success should only be made in the most obvious and plain cases in which there is no factual dispute and which the Applicant can clearly cross the high threshold of showing that there are no reasonable prospects of success. Applications that involve prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of the witnesses should not be brought under r 18(7)(b) but must be determined at a full hearing. Applications under r 18(7)(b) that involve issues of discrimination must be approached with particular caution. In cases where there are real factual disputes the parties should prepare for a full hearing rather than dissipate their energy and resources, and those, I would add, of Employment Tribunals, on deceptively attractive shortcuts. Such applications should rarely, if ever, involve oral evidence and should be measured in hours rather than days.

10. The particular concern in discrimination claims was set out by Lord Steyn in **Anyanwu v South Bank Students' Union** [2001] IRLR 305 at para 24:

> For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.

11. If the Tribunal is to use its powers to consider the striking out of claims or responses it is important that it is assisted to understand the factual complaints or defences that are being advanced. Counsel should assist the Tribunal to do this, as required by the overriding objective.

12. Where strike out it not appropriate there may remain the possibility of a Deposit Order.

13. The overriding objective is designed to ensure that the Tribunal processes and procedures do not disadvantage unrepresented parties through the requirement to ensure that the parties are on an equal footing, avoid unnecessary formality and be flexible, always ensuring that a party can properly understand the case it has to meet. This is often very challenging in practice. An understanding of the complaint or defence forms the proper basis for deciding whether to adopt firm case management if, when properly understood, either has no reasonable prospects of success. Unrepresented parties usually have a point, even if it may not be easy to spot or be couched in terms that appeal to the legally trained mind. A Tribunal should be slow to conclude that a document produced by an unrepresented party is incomprehensible: we should seek to understand it. It may be that once properly understood there is no reasonably arguable complaint or defence, in which case strike out will be appropriate.

14. The rules are not designed to be a playground for eager lawyers, or to allow wealthy parties to wage a war of attrition on the impecunious. The emphasis is on using the rules and case management as tools to ensure that arguable claims and defences are heard fairly, with the parties knowing what is said against them: see the comments of Mr Justice Langstaff P in **Johnson v Oldham Metropolitan Borough Council** UKEAT/0095/13/JOJ, para 2:

> "It is a critical aspect of fairness that a party knows the case it has to meet. It is also a central tenet of justice that disputes should be heard where a fair hearing is possible and cases should not lightly be ruled out on a procedural technicality without determination on the merits. These two principles may seen on occasion to be in conflict, as where a case is struck out for the failure of one party to state its case sufficiently to allow the other to answer it, but in truth they are capable of reconciliation by exercising case management powers to facilitate a hearing which is fair for both parties by ensuring that each knows sufficiently what case it has to meet."

15. The Rules allow for the provision of further information:

    15.1. On initial consideration of the claim and response by an Employment Judge: Rule 26

    15.2. Disclosure of information under Rule 31

16. Care should be taken in avoiding unnecessary Orders for further information which may obscure rather than elucidate the claim. The touchstone must be whether, with a reasonable amount of effort, the claim or defence can be understood. The aim of the parties and the Tribunal generally should be to focus claims rather than facilitate their inexorable expansion.

17. The rules are designed to allow flexibility and proportionality, giving the Tribunal power to:

    17.1. Extend (even if it has expired), or shorten, any time limit: Rule 5

    17.2. Deal flexibly with irregularities and non-compliance: Rule 6

    17.3. Consider whether a judgement should be issued on non-presentation or rejection of a response, or whether a hearing is required: Rule 21

    17.4. Allow a party whose response has not been presented, or been rejected, to participate in a hearing: Rule 21(3)

    17.5. Make case management orders of its own initiative

    17.6. Vary, suspend or set aside earlier case management orders: Rule 29

    17.7. Provide for lead cases in multiple claims: Rule 36

    17.8. Set aside dismissal for non-compliance with Unless Orders: Rule 38

    17.9. Question parties or any witnesses: Rule 41

    17.10. Timetable: Rule 45

    17.11. Use electronic communications in hearings, including the telephone: Rule 46

    17.12. Convert a preliminary hearing to a final hearing: Rule 49

    17.13. Reconsider Judgements, including on request from EAT: Rule 70

18. There is now a requirement for reasons to be given on any disputed issue: Rule 62. However, they should be proportionate and, for other than Judgements, may be very short: Rule 62(4).

19. Where parties fail to comply with the Rules or Orders of the Tribunal the response must be proportionate. Unrealistic applications for strike out should not be made: see the comments of Lord Justice Elias in **Abegaze v Shrewsbury College of Arts & Technology** [2009] EWCA Civ 96:

> "it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings; that the result of that conduct was that there could not be a fair trial; and that the imposition of the strike out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial, then the strike out should not be employed…

20. In **Abegaze** Lord Justice Elias suggested that an Unless Order may often be a proportionate way of dealing with a recalcitrant litigant. The formal procedure

provided in the new rules to set aside dismissal for breach of an Unless Order may increase their use. There may also be scope for Orders that limit a party's participation on non-compliance, rather than leading to a strike out.

21. The new rules are tools to ensure fair hearing of arguable complaints and defences and it is the responsibility of Representatives to help the Tribunal achieve that objective.

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