

ELA Covid-19 Working Party

Virtual Hearing – ET Practicalities

England & Wales and Scotland

24 March 2020

Introduction

The Employment Lawyers Association's ("ELA") Legislative and Policy Committee has set up a standing working party to respond and make recommendations on measures relevant to employment law during the current coronavirus crisis.

ELA is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

A sub group of the working party has prepared the paper below to consider practicalities around virtual ET hearings. The sub group members are as follows and the full ELA Working Party is listed at the end of this paper.

Emma Burrows, Trowers & Hamlins
Kiran Daurka, Leigh Day
Nadia Motraghi, Old Square Chambers

Alongside ELBA, ELA's working party agrees that the priority should be to ensure that cases are progressed to hearing where possible. We welcome the latest Presidential Direction which cancel longer hearings only up to June 2020. Below are some issues that ELA considers need to be urgently addressed to ensure that cases can be progressed remotely.

1. Issues with open justice

1.1 Live Broadcast

- 1.1.1 The Coronavirus Bill, Sch 24, makes provision for the "live broadcast" of hearings within Courts and the First Tier and Upper Tribunals. Employment Tribunals or EAT do not appear to have been given the ability to live broadcast hearings.

1.1.2 There is some concern as to how open hearings can go ahead without giving access to the public – it is also unclear why Tribunals have not been included in CV Bill. Is this an oversight and do we need to urgently feed this in to BEIS for amendment to ensure that it can be included before the Bill is passed on 30/03/20?

1.1.3 ELA understands from Schona Jolly QC that an urgent question has been raised via Sir Bob Neill MP, who is chair of the Commons Justice Committee, to the government as to why the ET and EAT have been missed from Sch 24.

2. Technical Options to allow remote hearing

2.1 What technical options are available to the judges in the Employment Tribunals (ETs)?

ELA hears of the provision of more laptops and the removal of blocks on hardware to enable the use of applications such as skype. Has this happened in the ETs?

2.2 Is it possible for hearings to take place with meeting technology such as Microsoft Teams, Google meet and Zoom, and for these to be posted or livestreamed on youtube subject to Sch 24 of the Coronavirus Bill?

ELA asks this with one eye on the requirement for public justice. The ET may be aware of the virtual tribunal staged by Cloisters Chambers

<https://m.youtube.com/watch?v=GnT9Deye7Ok>. ELA appreciates that the potentially discriminatory effect on some participants without access to Microsoft Office365 or other compatible infrastructure of software applications may mean that some ETs will not be able to use meeting technology for other reasons.

2.3 How open is the ET to the use of electronic bundles using data sharing platforms and what IT capacity does it have to use them?

ELA appreciates that the potentially discriminatory effect on some participants may mean that some ETs will not be able to use electronic bundles for other reasons.

2.4 What steps will the ETs take to protect the position of all participants about recordings being made of the hearing?

If live streaming is used for some hearings, ELA's working party suggests there is a higher than usual chance of participants recording the hearing. The working party suggests that a standard warning be issued at various stages of the hearing. Further, there was concern that whilst an Employment Judge would give a warning at the commencement of the hearing that these proceedings were not to be recorded, if a hearing were conducted by electronic means, members of the public could join it at any stage without being made aware of this warning. ELA suggests that a banner should be displayed on the screen at all times containing the warning issued to members of the public about the recording of proceedings.

2.5 Will the public gallery still be allowed to view documents referred to in hearings and what safeguards will be in place?

There is significant concern amongst the working party around the issue of document sharing with the public during remote hearings. There is consensus within the working party that rules around sharing bundle documents and witness statements ought to be relaxed such that the parties are not obliged to share witness statements with members of the public / journalists to ensure that information cannot be taken outside of the hearing. There is concern that documents shared on screen could be subject to screenshot without clear and constant reminders that this is prohibited. Unless a consistent warning can be placed on the screen to prevent members of the public from taking photos of documents, the preference is that this practice is relaxed for remote hearings.

3. Proposed pre- remote hearing agenda

ELA's working party proposes that the Employment Tribunal creates and issues a template agenda to be sent to the parties in good time before a remote hearing to ensure that it is able to go ahead remotely.

The parties are strongly encouraged to liaise with each other before completing the questions below:

1. Do you consider this case is suitable for remote hearing? If not, please give reasons.
2. Which platform should be used? (The Tribunal has the following available: [Insert, e.g. Skype for Business, Zoom])
3. What if any additional requirements do you have if a remote hearing is to take place?
4. Is this case suitable for electronic disclosure of documents?
5. Can an electronic bundle be produced to be uploaded to the platform? If so, who will take responsibility for this?
6. What further orders are required to prepare for a remote hearing?
7. On what date will the parties provide to the Tribunal the email addresses/ phone numbers of all attending the remote hearing so that invitations can be issued?
8. When should an all participants test hearing take place? [Date/ time]
9. How many pages long will the substantive hearing bundle be, to the nearest 50 pages? (If a Pre Hearing is needed prior to the final hearing, you should also state how long that will be.)

Any party agreeing to a remote hearing is required to liaise with any witnesses they are calling in advance of such a hearing to ensure that they have access to electronic devices (laptop/tablets) and have familiarised themselves with the relevant platform.

Members of ELA Covid-19 Working Party

Co-chairs: Paul McFarlane, Weightmans; Kiran Daurka, Leigh Day
Shubha Banerjee, Leigh Day
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