

The Employment Lawyers Association

A practical guide for remote hearings in the Employment Tribunals

The guide may, from time to time, be updated and readers should consult the ELA website where any updated guide will be published.

1. [How are ET hearings being conducted now?](#)
2. [Are there any guidance documents from the ET about remote hearings?](#)
3. [What sort of cases are being heard by which method?](#)
4. [Who decides the method by which a hearing will be conducted?](#)
5. [When is the decision taken as to how a hearing will proceed?](#)
6. [When and how can I indicate my views on the method of the hearing?](#)
7. [What can I do if a decision has been taken on the method of the hearing but I want to challenge that decision?](#)
8. [How does the ET decide what method is appropriate for determining a case?](#)
9. [When might a hybrid hearing be listed?](#)
10. [What video conferencing platform do the ETs use?](#)
11. [Filing documents to the ET before a Preliminary Hearing held by CVP.](#)
12. [Are there any GDPR considerations involved in remote hearings?](#)
13. [Are electronic bundles now mandatory?](#)
14. [Is there any guidance about electronic bundles?](#)
15. [How do you deliver large electronic bundles to the ET?](#)
16. [What equipment do you need for using electronic bundles?](#)
17. [Can witnesses use a hard copy of the bundle if they prefer?](#)
18. [How do you ask a witness to compare documents when using electronic bundles?](#)
19. [How can the public observe Tribunal proceedings?](#)
20. [What about other judicial proceedings like mediations? Can they be conducted remotely?](#)
21. [What technology is required for a hybrid hearing?](#)
22. [How do you take instructions from clients in a hybrid hearing?](#)
23. [How do you conduct conferences with clients during a hybrid hearing?](#)
24. [What do you do about witnesses who are overseas that need to give evidence?](#)
25. [What responsibility do representatives have to ensure the hearing runs smoothly?](#)
26. [How can we ensure that witness evidence is as effective as possible?](#)
27. [What should participants do if the technology fails?](#)
28. [What can representatives do to support and enhance the virtual hearing?](#)
29. [How can we ensure effective communication between a witness / party and solicitors and counsel during a remote hearing, to give or take instructions for example?](#)

1. How are ET hearings being conducted now?

ETs have a range of options open to them as to how to conduct hearings. These include:

- (a) Fully attended (in-person) hearings, in which all involved attend the Tribunal building in person;
- (b) Partly remote / partially attended “hybrid” hearings, where some participants attend in person, whilst others attend remotely; and
- (c) Fully remote hearings (with all parties attending virtually).

There are no hard and fast rules about which types of hearing will be heard by which method.

2. Are there any guidance documents from the ET about remote hearings?

There have been numerous documents promulgated by the Presidents of the Tribunals. In reverse order (with the most recent first) these are:

- (a) On 14 September 2020, the ET President (England & Wales) issued two documents applicable to Tribunals in England and Wales:
 - (i) the Presidential Guidance on remote and in-person hearings (“Presidential Guidance E&W”).¹ ETs must have regard to this guidance, but they are not bound by it;
 - (ii) the Presidential Practice Direction on remote hearings and open justice (“Practice Direction E&W”)²;
- (b) On 11 June 2020, the President of the ET in Scotland issued a Practice Direction: Fixing and Conduct of Remote Hearings and a Practical Guidance on Remote Hearings in the ETs (Scotland) (“Practice Direction Scotland”)³;
- (c) On 3 April 2020, the ET presidents jointly published a FAQs document which has been updated since⁴;
- (d) On 19 March, the ET Presidents (E&W and Scotland) issued a Joint Direction for case management (amended by the announcement of 24 March 2020);
- (e) On 18 March 2020, the ET Presidents (E&W and Scotland) jointly issued the Presidential Guidance in connection with the conduct of ET proceedings during the COVID-19 pandemic.

3. What sort of cases are being heard by which method?

Cases of all kinds are now being heard and there are no fixed rules about whether the case will be heard in-person, remotely or a hybrid of the two. Practice varies across Great Britain and some regions⁵ have had access to the technology necessary for conducting remote and hybrid hearings more quickly than others. It is therefore vital that you check which method is being used in your case and ensure you are well prepared to participate.

4. Who decides the method by which a hearing will be conducted?

This is ultimately a decision for the Tribunal (see para 14 of the Presidential Guidance E&W and para 8 of the Practice Direction Scotland). However, parties are

¹ <https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PG-Remote-and-In-Person-Hearings-1.pdf>

² <https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PD-Remote-Hearings-and-Open-Justice.pdf>

³ <https://www.judiciary.uk/wp-content/uploads/2015/03/11-June-20-SPT-ETS-PD-Fixing-and-Conduct-of-Remote-Hearings.pdf> and <https://www.judiciary.uk/wp-content/uploads/2015/03/12-June-20-SPT-ETS-Remote-hearings-Practical-Guidance.pdf>

⁴ <https://www.judiciary.uk/wp-content/uploads/2020/06/FAQ-edition-date-1-June-2020.pdf>

⁵ References in this document to ‘regions’ are to be taken to include Scotland.

permitted to make representations on this matter and if there are specific circumstances of the case (or any of the parties or witnesses) that weigh in favour of a particular format, parties are well advised to inform the Tribunal of this in good time. See below for more specific guidance on this.

5. When is the decision taken as to how a hearing will proceed?

The decision can be taken by the Tribunal at any time, for example, after receipt of the claim, after receipt of the ET3, at a case management hearing, or at any time thereafter. In Scotland, fast track cases are being listed for a CVP hearing on receipt (unless the Claimant has indicated on the ET1 that this is not possible). Parties can make representations if they wish this to be changed to an in person hearing.

The decision as to the format of the hearing sometimes changes after it has been made. On occasion, this can be on very short notice (a matter of days). Changing the format of the hearing can cause problems particularly where the parties are not legally represented or where one or other of the parties is represented on a public access basis. ELA believes that there should be a target of notifying the parties 7 days in advance of the hearing of any change to the format. Clearly this will not always be achievable where uncontrollable events, like a witness needing to self-isolate, occur very close to the hearing.

Parties making last-minute applications to change the format of the hearing need to copy the other side into the application. Immediate thought needs to be given to making the consequential arrangements that may arise if the hearing format changes (e.g. preparing an electronic bundle). Of course, if the proposed change would render the process unfair, or prejudice the other side, representations can be made in response to the application, and the ET may decide to adjourn or make other directions as necessary.

6. When and how can I indicate my views on the method of the hearing?

The new ET1 and ET3 forms include a box for the parties to indicate their views on what method is most appropriate to determine a case. However, even for cases already proceeding through the system (using the old forms) the parties can make representations in writing at any stage of the proceedings or make representations orally at any preliminary hearings.

For complex cases in which preliminary hearings are routinely held, this might be the most appropriate time to raise the relevant factors in favour of a method of determination.

For more simple cases that might not normally have a preliminary hearing, it might be necessary to write to the Tribunal in advance to make representations about why a particular format is better and a preliminary hearing may need to be listed to discuss the issue.

7. What can I do if a decision has been taken on the method of the hearing, but I want to challenge that decision?

Where a decision has already been made by the ET as to the format of a hearing, and a party wishes to contest it, they can apply under Rule 29 for that decision to be varied or set aside (see paragraph 15 of the Presidential Guidance E&W).

This might arise where a decision was made by the Tribunal without reference to the parties, and it is therefore unaware of critical facts (see the list of relevant factors immediately below). It could also arise where there is a material change in the circumstances of witnesses or a party (e.g. witnesses needing to self-isolate or shield).

8. How does the ET decide what method is appropriate for determining a case?

According to paragraphs 16-17 of the Presidential Guidance E&W, the determination will take into account various factors (largely feasibility matters) and there will be regional variations as to how matters are listed (see also para 9 of the Practice Direction Scotland). Such factors include:

a) Is there enough space to be safe for an in-person hearing?

Tribunals have had to modify waiting rooms and hearing rooms by removing chairs and socially distancing the chairs that remain to ensure the correct distance between participants. In some cases, this has meant that certain hearing rooms at particular hearing centres are not fit for hearings. For cases listed at a hearing centre that has a reduced number of hearing rooms, a greater number of virtual hearings may be necessary.

In Scotland, current practice is that about 7 days before any in person hearing takes place there will be a telephone case management hearing to discuss the social distancing measures in place and how the flow of witnesses is to be managed. Parties will be expected to provide a list of witnesses and a proposed timetable in advance. Parties should attend at the start of the hearing only with the first witness but other witnesses should be close by, so that they can attend quickly when required.

b) Is safe travel to the venue possible?

Participants that are more vulnerable to COVID-19 or who live with or interact with vulnerable persons may need to participate remotely. This could include witnesses, parties or their representatives. Similarly, some judges and lay members may be at too great a risk to attend hearings in person.

Closely aligned with the issue of safe travel, is whether participants can get to the hearing centre at all. For example, they may be living overseas where there are restrictions on travel and/or even if they are technically able to travel, they might be subject to a quarantine upon entry to the UK or to their home country, which might make physical attendance unworkable.

c) Does the Tribunal and do the participants have access to suitable hardware and software to allow for remote hearings?

If the particular hearing centre is not adequately equipped to conduct a remote hearing, but the parties are and they wish for the matter to be conducted remotely, it might be possible to request a transfer to a different hearing centre in the region that is suitably equipped.

d) Are there sufficient Tribunal staff to support a remote hearing?

Tribunal staff are being deployed to operate the technology used in virtual hearings, as well as facilitating in-person hearings. Some staff are themselves

working remotely due to the risks posed by the pandemic. Accordingly, different regions may have different resources in this respect, and this may influence how cases are heard.

e) How much delay would be involved if the hearing was in person rather than held remotely?

If a party seeks to delay a matter to a time when an in-person hearing might be more likely, the Tribunal would be likely to consider the impact of delay on all concerned. This factor is likely to be particularly relevant in cases where there is an ongoing employment relationship. The position of individually named respondents and claimants are likely to be relevant factors (including whether any party is unrepresented or has a specific vulnerability or disability, about which, see below).

f) Personal circumstances of participants, such as particular vulnerability, language issues or disability (which might suggest one kind of hearing is more appropriate or fairer than another).

Certain disabilities or other characteristics might mean that participants are best placed to attend in person so as to better understand the process. They may find attending virtually too tiring (it is now widely recognised that joining meetings by video is more tiring than face to face). In other cases, a disability may mean they are unsafe to attend in person. Parties must think carefully and well in advance about such participants and ensure representations are made to the ET about the conduct of the hearing in light of this. It might be that the best solution is a combination of methods and reasonable adjustments (such as regular breaks and shortened hearing days etc.) to ensure effective participation.

As for language barriers, interpreters attending through video might make it even more difficult to ensure a fair hearing than attendance in person.

g) Whether parties are legally represented

The Tribunal is likely to consider the impact of any inequality of arms in the context of remote determination. For example, it will be likely to consider whether a litigant in person will be able to understand the proceedings and participate effectively if all parties attend remotely. Another relevant consideration may be that having professional representation (even for just one party) may enable the matter to be adapted to remote determination where the represented party adopts a cooperative approach with the other parties. The overriding objective requires parties to cooperate with each other, as well as the ET. Thus, for example, a represented Respondent may adopt a greater burden in preparing for the matter to ensure a remote hearing is possible for all.

h) Whether participants can operate the necessary technology

Thought should be given to the needs of all participants to ensure that technology facilitates rather than hinders a fair hearing. For example, it may be inappropriate for a party to join a final hearing by video link using a mobile phone.

i) In matters in which there are contested facts, whether the need to evaluate evidence makes a face to face hearing more appropriate

The Tribunal may consider the nature of witness evidence (e.g. are the witnesses testifying to facts or are they expert witnesses? Are there many facts in dispute? Will the case largely turn on oral evidence or is the main evidence in the case documentary?). ETs may be more likely to wish to have in-person attendance for the most key / critical witnesses of fact and for cases where credibility of witnesses is very important.

The following matters are likely to be relevant:

j) The wishes of the parties

Do all parties agree on the same method of determination and the timing of it? If not, EJs may take a view as to whether a party's position is tactical (i.e. a Respondent seeking to avoid / delay paying remedy damages) or based on legitimate factors. Ultimately, the type of hearing is a judicial decision and not one that the parties can themselves agree or decide.

k) Complexity of the case

The more complex a matter, the more likely it is that some in-person attendance may be required. Parties should consider if the issues can be narrowed by agreement. Is every point in the list of issues genuinely an issue or might the parties be able to agree that some matters are not in contention?

l) Length of hearing

Longer matters may be more difficult to determine exclusively remotely. It has been noted by psychologists that people suffer from "screen fatigue". It is the experience of the authors of this guidance, from other jurisdictions, that courts cannot get through the same volume of work in a virtual hearing as they can in the same period spent in a face to face hearing. A matter originally listed for 10 days may need 12-13 if being done fully or partly by CVP. This has an impact on the parties' costs and the ETs' resources. Further, a greater number of days operating by video will be ever more tiring than a shorter listing.

m) Nature of the matter at stake

Is time of the essence? Some matters (such as interim relief in whistleblowing cases) will need to be determined swiftly. If this is during a period of strict or partial lockdown, there may be a pressing need to determine the matter remotely even if this would not be ideal in other situations. In cases where the case contains sensitive allegations and evidence (such as sexual harassment claims) ETs may feel it inappropriate for certain matters (or certain witnesses in certain matters) to give evidence remotely. There is a qualitative difference between say wages / money claims and sexual harassment claims. In the latter, the EJ may wish to see some witnesses face to face, on the other hand, witnesses may be keener to give evidence from their own home, through a screen.

n) Whether parties and witness have adequate equipment and connection

Parties should check the position well in advance of the hearing, giving themselves enough time to implement solutions to any problems identified.

9. When might a hybrid hearing be listed?

Hybrid hearings are useful when one or more participants is/are unable to attend the ET, but there is value in the remaining participants being in person. Examples include a shielding or self-isolating witness or panel member who might need to join the hearing via CVP, sometimes with little notice. Meanwhile, it might be necessary for others to attend in person (such as a litigant in person) so as to facilitate their understanding of the process or because the person does not have appropriate technology to allow them to effectively join by CVP. Further, a hybrid hearing might be valuable where a witness' in-person evidence is essential to allow an assessment of their credibility, but other evidence can be received remotely.

10. What video conferencing platform do the ETs use?

ETs use the Cloud Video Platform "CVP" for remote hearings. It is an online video conferencing platform provided by HMCTS. The ELA understand there are currently in excess of 300 CVP rooms across England, Wales and Scotland at the disposal of the ETs. CVP can be used on Windows and Mac computers and on Apple, Windows and Android tablets and smart phones. The ET recommends using Google Chrome as the browser.

CVP can be accessed by smartphone. However, the functions available are more limited and CVP is best joined using a Windows computer or a Mac. This allows the user to use the presenter features of CVP when acting as advocate at a trial.

It is recommended that participants join the CVP room in advance of the hearing starting – ET Guidance normally provides that participants should join 10 minutes before the hearing. Participants join a waiting room without anyone else in it. This gives participants the opportunity to check the settings, security or preferences on their device and ensure their browser has access to the camera and microphone. Other browsers should be closed completely when using CVP. Additionally, if using Zoom, or another video platform, close those programmes in advance so that there is no competition for use of the microphone or camera.

All CVP hearings will be managed by the ET. It will be necessary for the parties to supply the court with the email address for all those who wish to participate in the hearing.

HMCTS have produced Guidance⁶ on how to join Cloud Video Platform (CVP) for a video hearing. This explains how to join CVP using an internet browser (the best experience) and how to join using Microsoft Teams, or Skype. Judicially written Guidance in Scotland on a variety of practical matters has also been produced⁷.

11. Filing documents to the ET before a Preliminary Hearing held by CVP.

If the Preliminary Hearing is simply for case management, it is helpful for the parties to send in the completed agenda documents and a list of issues in advance (agreed by both sides if possible).

If the hearing involves something more than simple case management (i.e., identifying the issues and giving directions to prepare the case for trial) then it will usually be necessary for the parties to produce a paginated electronic hearing

⁶ <https://www.gov.uk/government/publications/how-to-join-a-cloud-video-platform-cvp-hearing/how-to-join-cloud-video-platform-cvp-for-a-video-hearing>

⁷ <https://www.judiciary.uk/wp-content/uploads/2015/03/12-June-20-SPT-ETS-Remote-hearings-Practical-Guidance.pdf>

bundle. The bundle should be limited to the documents needed for the ET to understand the issues that will be resolved at the hearing.

12. Are there any GDPR considerations involved in remote hearings?

GDPR considerations may arise in the processing of the personal data contained in hearing papers and more generally in the context of a remote hearing.

If papers are to be hosted using a cloud service, issues may include:

- (a) Whether that cloud service transfers data outside the EU
- (b) How and by whom the data can be accessed (e.g., is it password protected, or can anyone with a link access it?)
- (c) Can it be edited by a 'rogue' participant?
- (d) If materials such as medical notes, pay information, and contact details are included and could be seen by members of the press or public, should they be redacted?

Other GDPR issues during remote hearings include whether other information is visible via a participant's camera, such as case papers or files in other matters, or via reflections or during breaks.

13. Are electronic bundles now mandatory?

In E&W, as far as the hearing is concerned, where at least one of the parties in a remote hearing is professionally represented, and unless the ET directs otherwise, the witness statements and the bundle *must* be supplied to the ET in PDF form. However, parties can explain that hard copy documents and bundles may be the fairer option in the interests of justice (see paras 23 and 25-30 of the Presidential Guidance E&W). In Scotland, the use of electronic bundles, even where there are professional representatives, would only be directed if both parties agreed to it.

It should also be recognised that it is important in every case that the hearing is conducted in a fair manner: not all parties, witnesses or representatives have the same IT skills as others. It is perfectly acceptable for anyone who prefers to work from a hard copy bundle to do so even if others are using electronic bundles, though care will be needed to ensure that page references can be mutually understood.

14. Is there any guidance about electronic bundles?

Yes. Where the parties are professionally represented, the Presidential Guidance E&W says electronic bundles are to be formatted in particular ways (see paragraph 24). These are discussed below. In Scotland directions regarding the formatting of bundles will be the subject of specific orders, see para 10 of the Practice Direction Scotland.

a) What type of electronic file should the bundle be?

The bundle should be a PDF file.

b) The Presidential Guidance E&W says optical character recognition must be used. What is that and why is it important?

If a PDF file is created by scanning a hard copy document, then usually each page of the PDF file is just a picture of the document that has been scanned. Although the

picture looks like writing to the human eye, the computer does not recognise it as such. As a result, lots of useful functionality is lost, for instance the text cannot be electronically searched by keyword, nor can it be copied to the clipboard and pasted into other documents.

Optical character recognition (OCR) is a software process that solves this problem. It enables text which is saved as an image to be read by the computer.

Applying OCR to a PDF file is a simple process if you have the right software. Many PDF programmes, such as Adobe Acrobat, have an OCR function. Be warned, however, that it takes a few seconds per page to apply OCR. If you are working with a large bundle it could take a long time.

c) Does there need to be an index?

Yes. Just as a hard copy bundle needs an index, so too does an electronic bundle.

Pay close attention to the case management orders because some ETs ask for the index to be provided as a separate file to the documents in the bundle.

The Presidential Guidance E&W says that ideally the index will hyperlink to each indexed document. This means that if you click on a document listed in the index you are taken to it.

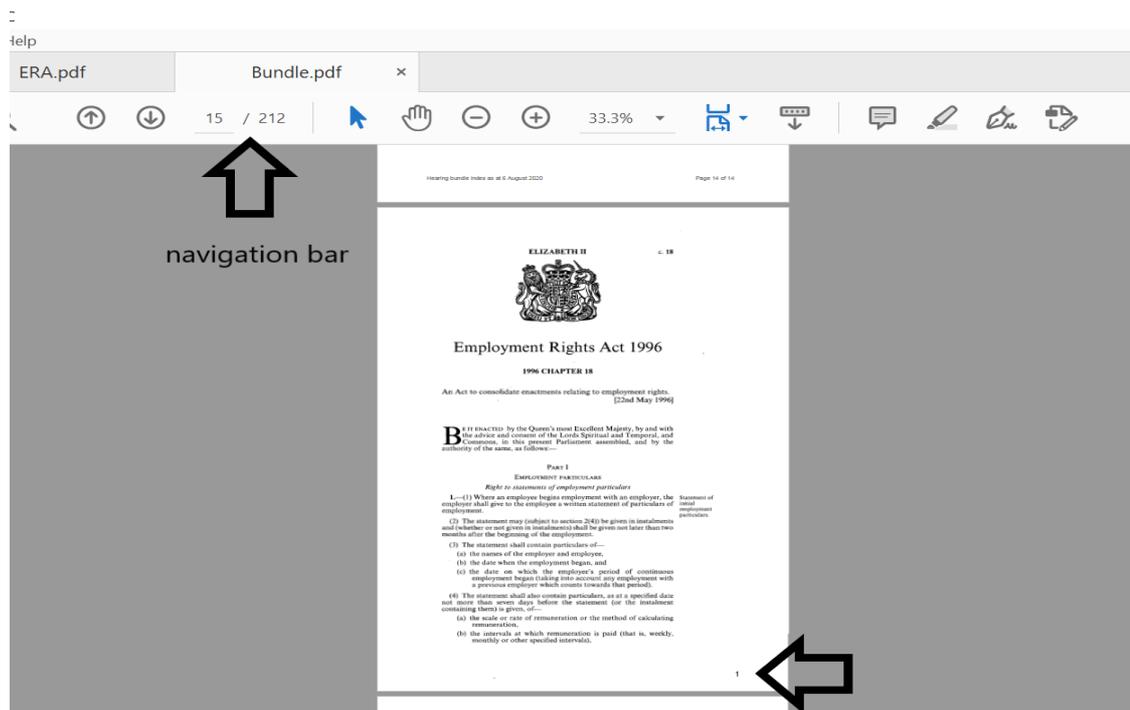
d) How should pages be orientated?

The Presidential Guidance E&W says that "*Pages should appear the right way up in portrait mode. If an original document is in landscape, it should be inserted so that it can be read with a 90-degree rotation clockwise*".

e) What does the Presidential Guidance E&W mean by "*Pages must be numbered so that, including the index, they correspond to the automated PDF numbering system?*"

For electronic bundles to work efficiently, the pagination marked on each page of the bundle needs to match the pagination of the electronic file. If they do not match up, then it becomes harder and more time consuming to find documents because you cannot just put the page number of the bundle you want to go to in the navigation bar. So, you must scroll instead, which is time consuming.

Usually the first document in the bundle after the index will be paginated as page 1. However, the first page of the electronic file will be the index. If there is, say, a 14-page index, the document paginated as page 1 will in fact be page 15 of the electronic file:



One solution is to remove the index and have it as a separate file. However, that is a bit clunky and there is a better solution (see below).

If the bundle contains pages that do not follow the main numerical pagination, the pagination marked on the bundle and the pagination of the electronic file will differ. For example, if there are pages marked as '10a', '10b' and '10c' in the bundle, in the electronic file these will be pages 11, 12 and 13. The page marked as page 11 will be page 14 of the electronic file. A simple solution to this problem is to add documents that do not follow the main numerical pagination of the bundle to the end rather than interposing them. However, that may not be workable, especially if a lot of documents need to be added because it may mean the documents are no longer in a sensible, e.g. chronological, order.

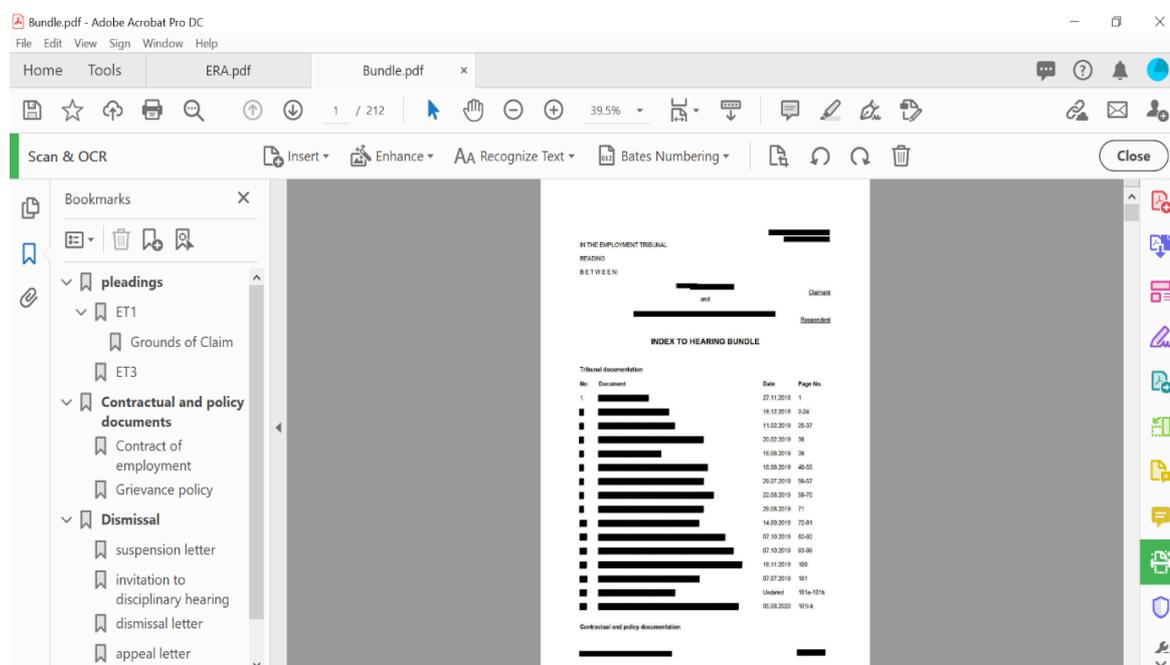
There is a comprehensive solution. Many PDF software applications allow you to manually edit the way the electronic file labels each page:

- The electronic labels attached to the pages of the index could be changed from pages 1 - 14 to pages I – XIV, or a prefix could be used, for example 'Index 1', 'Index 2' and so on. In either event the first page after the index would become page 1 of the electronic file.
- The electronic labels for the documents marked pages 10a, 10b, 10c can be changed from 11, 12, 13 to 10a, 10b, 10c. Once this is done, if you type 10a into the navigation bar, this will take you to the page marked 10a and if you type page 11 into the navigation bar this will take you to the page marked 11.

f) I find electronic bundles difficult to navigate – is there any solution?

The key to navigating electronic bundles, especially large ones, is to use bookmarking. Hence why the Presidential Guidance E&W says that all significant documents (such as any letter of dismissal) and all sections of the electronic bundle should be bookmarked for ease of navigation, with an appropriate description as the bookmark.

A bookmarked document can be accessed instantly, no matter where it is in the bundle, just by clicking the bookmark. Bookmarks can be organised according to preference; they do not need to reflect the order of documents in a bundle. They can also be categorised. So, you could have a series of bookmarks organised thematically as in the example below:



g) Can I add in extra documents after the bundle is finalised or during the trial?

From a technological perspective, the answer is 'yes' if you have a suitable PDF software application. With many such applications it is possible to add new documents to an existing PDF file and the software allows you to insert new documents anywhere you like (whether interposing them between existing documents or adding them to the end).

If the bundle has not yet been sent to the ET and if the other side agrees, then there is no difficulty in adding documents to the bundle in this way. However, if the bundle has already been sent to the ET or if there is a dispute about whether or not the new documents should go into the bundle, then the right approach is to save the new documents as a separate PDF file and distribute them to the other side and the ET. The ET will have to decide whether the extra documents should be admitted and if so how the documents will be managed (i.e., whether they will remain separate files or whether they will be added to the existing bundle).

15. How do you deliver large electronic bundles to the Tribunal?

Large electronic files, over 20MB, are too big to send to the ET as one email attachment. Rather than break the file down into multiple sections, it is best to contact the ET to discuss what file share options are most appropriate, for example, Dropbox, One Drive, Mime Cast or Google Drive.

The ETs are currently trialling the use of a specifically developed secure document upload centre. Look out for further information about this service in due course.

16. What equipment do you need for using electronic bundles?

When using electronic bundles, it is important to ensure that the participant has a device which is separate to the device they will use to connect to the hearing. Reviewing documents on a small phone screen while using a main computer screen for the call is far from satisfactory. Ideally, if a party, witness or representative is going to work from an electronic bundle, the screen that they will look at it on will be at least tablet sized. If such a device is not available, then serious thought should be given to providing a hard copy bundle instead.

As with all aspects of a remote hearing, there is no substitute for practising use of electronic bundles in advance of the hearing.

17. Can witnesses use a hard copy of the bundle if they prefer?

Judges and members are using electronic bundles where feasible as this significantly aids working remotely where it is harder to acquire access to hard copy bundles or Court files. This doesn't necessarily mean that all participants must be paperless and those who will find it too difficult to cope with soft copy bundles will be able to use a hard copy.

It is important to ensure that the pagination is the same across hard and electronic copies so that participants can all find the relevant pages easily and quickly.

If some witnesses or representatives are not using electronic bundles, it is essential that printed witness statements and a hard copy of the bundle are sent to them early enough to make it safe for them to be physically handled: it is recommended that at least 24 hours passes before they are handled by the receiver and hard copies must be sent to the ET if required, a week in advance of the hearing.

18. How do you ask a witness to compare documents when using electronic bundles?

Comparison between documents in an electronic bundle may be less easy than with paper documents: participants with plenty of screen space and the requisite technology and expertise may be able to open different pages of a single PDF (or multiple PDFs) on different screens/spaces, but some participants may only be able to view a single bundle page at a time. Therefore, if, for example, multiple versions of notes or a document and a translation of it need to be considered, it may be necessary to plan for how participants can easily consider a comparison. This could involve preparing a single document that shows the differences between document versions (using the Microsoft Word compare documents function, for example), or a document that shows original text and a translation side-by-side. Alternatively, participants might want to have hard copies of the documents they need to compare or refer to at the same time, so they can review on document on the device and one in paper copy.

19. How can the public observe Tribunal proceedings?

For in-person hearings, members of the public are permitted to attend the hearing room and watch proceedings, provided it is not a private preliminary hearing (for case management) or otherwise listed as a private hearing. However, there will be occasions where members of the public cannot be fitted

into a socially distanced room and need to be accommodated in another room, getting access via a CVP link into the hearing. Most cases are open to the public to observe. However, where an open hearing is conducted remotely, or partly remotely, how can the public observe it?

Where the Tribunal panel (or judge alone) sits in a Tribunal room, with others attending remotely, members of the public can attend remotely by contacting the administrative staff of the ET in advance by email to obtain dial in details / a link to the matter (para 9 of the Practice Direction E&W). Under Rule 46 of the 2013 ET Rules (as amended) they have a right to hear what the ET can hear and, so far as practicable, see any witness as seen by the ET.

The integrity and order of the hearing will be preserved by such log-in details not being forwarded to anyone else without the ET's permission (paragraph 9 of the Practice Direction E&W). Whatever the format of the hearing, the following rules will continue to apply:

- (a) Members of the press are permitted to "live-tweet" as usual, but members of the public must seek permission to do so from the ET (Practice Direction E&W para 12.6);
- (b) It will be a contempt of court for anyone to record or broadcast any kind of hearing, remote or in person without the ET's consent (Presidential Guidance E&W para 35).

With regard to the position in Scotland see paragraphs 18 to 21 of the Practice Direction Scotland.

20. How can observers obtain access to copies of statements relied upon in the hearing?

Under the old Rule 44 of the 2013 ET Rules, witness statements had to be made available to the public during the course of the hearing (save for cases where there was a privacy restriction under Rule 54, or in national security proceedings under Rule 94). For in-person hearings, this convention is likely to continue, whereby additional copies of the statement are made available at the time each respective witness gives their evidence. They are usually placed on a seat in the public gallery of the Tribunal room, for observers to pick up and read, but not take away with them. Additional measures may need to be taken to minimise the transmission risk of multiple people handling copies in the Tribunal. This might include having statements on a tablet that can be wiped / disinfected, providing multiple paper copies, or requiring observers to use hand sanitiser or wear single-use gloves when handling the statement.

For all cases proceeding on or after 8 October 2020 (irrespective of when the claim form was presented) statements may now be provided "otherwise than during the course of the hearing". This gives the ET flexibility in ensuring virtual observers can still read statements in hybrid and virtual hearings. There are various ways in which this can be achieved. However, different considerations apply in Scotland – see paragraph 21 of the Practice Direction Scotland. It should be remembered that unless expressly ordered by the ET witness statements are not used in Scottish proceedings.

Paragraph 9.3 of the Practice Direction suggests that where a video platform is being used, the statement can be "shared" on the screen during proceedings, or during a break. If this is not practicable, the ET may require the witness to read their

statement aloud. This used to be the norm in ET proceedings, however, witnesses often felt unnerved by reading their statements aloud (especially witnesses with limited literacy skills or those for whom English was not their first language). With very lengthy statements, reading aloud was often impractical and will have the same effect again in remote hearings if this practice is reinstated.

If a witness statement cannot be read from the screen or if reading it aloud would cause disproportionate delay to the hearing, the ET will most likely invite submissions on the best way to ensure open justice. Ways in which this could be achieved include:

- (a) Placing the documents on a website on the day of the hearing (at the point that each respective witness gives their evidence) for observers to download.
- (b) Placing the document on a time-limited sharing platform that does not possess a download option and which removes the document after a specific time, will minimise the risk of it being copied and distributed.
- (c) Placing an audio recording of the statement, being read aloud, (which is provided by the party and not an audio recording of any part of the hearing) on a platform to be played only once at a specific time and requiring all those granted access to the recording not to record or distribute any notes.

In each case, the ET could require that anyone who is given access to the evidence must confirm that they will not seek to copy or distribute it.

21. What about other judicial proceedings like mediations? Can they be conducted remotely?

Judicial mediations can be and have been conducted remotely (or partially remotely) since the ETs re-opened after the full lockdown. There will be regional differences in how these are being conducted. The Presidential Guidance E&W applies equally to judicial mediations (see paragraph 36).

22. What technology is required for a hybrid hearing?

Sufficient screens are required for each participant to see and hear the remote participant and for those acting remotely to see and hear the ET room. Practice varies between ET venues as to whether the ET will provide a central screen for all to watch or rely on participants to bring sufficient devices. Where time allows, this should be discussed well in advance. If the hearing is called at short notice, advocates should not presume that the ET will be able to provide the required technology.

Thought must be given to how many devices will be needed to ensure that each participant can be seen and heard, this includes providing devices for attending witnesses to watch the evidence of those delivering it remotely. Technology, and particularly large screens and directional microphones increase substantially the effectiveness of hybrid hearings.

An example of device requirements for an unfair dismissal case with 3 witnesses for the Respondent (2 in person and 1 remote) and the Claimant giving evidence in person for themselves might be:

- Device 1 = Employment Judge;
- Device 2 = Claimant's representative;
- Device 3 = Respondent's representative;

Device 4 = Witness table (so that their evidence can be seen by the other witnesses watching from home);

Device 5 = To allow witnesses not giving evidence to watch those giving it remotely (note they could not use device 4 for this as social distancing is required).

In Scotland the position will be different as witnesses who have still to give evidence should not see, or hear, other witnesses giving their evidence.

Once the hearing is in progress, it is generally necessary for all but one computer to be muted and microphones silenced, otherwise feedback loops can cause disruptive noise. An additional microphone and/or small speaker might be necessary to allow the computer in use to pick up the voices of those asking questions as well as the witness responding. If the Tribunal wishes to ask a question, it may be necessary to mute the 'live' device so that the judge's question is picked up by their microphone, or it can be agreed that the relevant representative will repeat the question so it can be heard clearly.

It is particularly important that anyone watching remotely is told that they must mute their microphones, because while someone is giving evidence in person, no one in the ET room will be able to hear the CVP room and so if someone in the CVP room has failed to mute, they will be heard (potentially) by others also watching remotely, but not by their own representatives in person. If there are issues with the CVP room during in-person hearing it is generally best to use the CVP chat box to highlight this to the judge so any issues can be rectified.

The ELA understands that HMCTS is investing in videoconferencing equipment for use in an increased number of ET hearing rooms, to facilitate the operation of hybrid hearings.

23. How do you take instructions from clients in a hybrid hearing?

The Q&A below addresses communication during a remote hearing. The challenges are amplified during a hybrid hearing as it may be inappropriate for an advocate to be checking their phone for messages from the remote client during proceedings. A workaround is to explain to the Judge at the outset why the mobile phone is being checked or to ask an observing client to check for messages and pass them to the advocate.

24. How do you conduct conferences with clients during a hybrid hearing?

ET rooms generally have reliable Wi-Fi access. It is sensible to set up a group video call in advance so that advocates can communicate with clients over a video link before the hearing and during breaks. If the Tribunal waiting room you are in is big and might be busy and there are no consultation rooms, it may be sensible to advise anyone who is attending in person and who will wish to join a video call conference to bring headphones.

25. What do you do about witnesses who are overseas that need to give evidence?

Prior to COVID-19, it was open to a party to apply for witnesses to give evidence from overseas and this remains the case. This is reflected in paragraph 5.6, of the Practice Direction E&W on remote hearings and open justice, "*Where participants join a hearing remotely, or members of the press or public observe a hearing remotely, the locations from which they do so are, for the duration of the hearing,*

considered the precincts of the Employment Tribunal in accordance with Regulation 7(1)(c) of the Regulations.”

If the application is granted, the ET will make arrangements for the evidence to be given during the hearing at a time which is convenient to the witness and to the ET. This will normally be determined at the beginning of the hearing. Whereas previously such video evidence was given either using ET facilities or the local County Court, the current practice is for such evidence to be given using the ET’s CVP facilities. However, in order to do this, the representatives will need to access the ET’s broadband connection.

26. What responsibility do representatives have to ensure the hearing runs smoothly?

Paragraph 19 of the Presidential Guidance E&W places an onus on representatives to ensure their witnesses are ready for the remote hearing. In summary (and this is not a substitute for reading this important paragraph), this includes ensuring the witnesses have the required technical capabilities and private space at home to participate, ensuring they have a clean copy of the bundle electronically or in hard copy and agreeing a means of communicating with the witness on the day they are required to give evidence.

In Scotland there is a test before every CVP hearing. Representatives are expected to ensure that parties and witnesses attend for that test. In addition Paragraph 5 of the Practical Guidance Scotland places an expectation on parties or their representative to check with their witnesses that they have the necessary equipment and internet connection to participate.

Representatives are required to ensure their witnesses are aware of the dos and don’ts of giving evidence. Notably, that they must not be guided or influenced in their answers, that they remain under oath while giving evidence and that it is a criminal offence to broadcast the hearing without permission. Solicitors are reminded of their duty under the SRA Code of Conduct to draw the court’s attention to a procedural irregularity of which they are aware, and which is likely to have a material effect on the outcome of the proceedings.

Representatives need to consider in advance how they will communicate these important requirements and so ensure that they have satisfied their obligations under the Presidential Guidance and that the witnesses are prepared. This might be communicated through a fact sheet for remote hearings or in a pre-trial conference.

27. How can we ensure that witness evidence is as effective as possible?

Remote hearings present unique challenges to witnesses. Additional time should be spent considering the needs of witnesses to ensure they are able to participate fully and give their best evidence:

- (a) Witnesses will need a stable internet connection and a computer with video and microphone. To ensure they can be adequately heard and concentrate, they might find it useful to use a headset.
- (b) Witnesses will need to have a device for joining the hearing, but also a means of accessing their statement and the bundle. This could be by way of a second device, or, where that is not possible, a hard copy (with page numbers matching those in any electronic copy being used by others).

- (c) Experience has shown that using headphones for audio output is preferred as it avoids 'loopback' which can be caused by having speakers deliver sound to an open microphone.
- (d) As detailed elsewhere, it is possible to access the CVP room early. Doing this allows witnesses the opportunity to check their settings are appropriate and their home environment is suitable. Keep the link to the hearing and pin/password handy in case it is necessary to log back in. This saves having to open emails to find the information mid trial.
- (e) There is no substitute for preparation. A practice run using the electronic bundle while engaged in a video conference will build witnesses' confidence and identify any technical issues so that they can focus on their evidence of fact once the hearing starts.
- (f) Witnesses should be encouraged to prepare a space at their home or office (wherever they will be giving their evidence from) that will enable them to participate with minimal distractions. We recommend a quiet room with a neutral background, ensuring both personal effects and confidential papers are removed. If the home environment isn't suitable, professionally represented parties might consider hosting witnesses at their premises with suitable technology.
- (g) Extra care is needed to ensure that witnesses do not have any assistance with their evidence. In the same way as during an in-person hearing, witnesses should not have any notes or marked up bundles in front of them and they must not participate in any group chats during breaks while remaining under oath. They may be asked to confirm this is the case at any time.

28. What should participants do if the technology fails?

Arrange a protocol for problems and emergencies to avoid unnecessary loss of time, panic, uncertainty, and disruption. Such problems might include:

- (a) a fire alarm at business premises from which people are participating in a hearing (so that they have to leave suddenly).
- (b) loss of internet connection.
- (c) other technology problems (e.g., a device on the which the bundle is held freezes).
- (d) sudden requirements to self-isolate by a participant or household member.
- (e) ill health or other personal or family emergencies.

A protocol might identify:

- (a) Who will be contacted and how in the event of an emergency (e.g., identify a single point of contact who can then contact others, including other parties and the ET and coordinate).
- (b) Alternative solutions in the event of a problem (e.g., a witness using a secondary device to access CVP— which can also be accessed via the Pexip Infinity Connect smart phone app).
- (c) Ensuring that an in-house IT function is available and briefed for IT problems.
- (d) Whether other issues can be dealt with during a hearing if a witness becomes temporarily unavailable, for example, interposing another witness, or using the time to address any outstanding interlocutory matters.

29. What can representatives do to support and enhance the virtual hearing?

When both sides are represented, an advance conversation as to the conduct of the hearing can be of real benefit. Matters to discuss include whether issues can be

narrowed or agreed, any special arrangements for the giving of evidence or any witness' needs, and time management of the hearing.

Remote advocacy has its own etiquette. Small movements and sounds on screen can be disruptive for all as everyone is always being watched. It is sensible to get into the habit of muting yourself when not speaking, sit still when the camera is on, turn off any electronic notifications that might sound during proceedings, only drink water and don't eat during the hearing unless permission has been given (such as for people with diabetes).

When speaking, speak more slowly than usual. Without visual cues to guide you, use pauses and articulate what you might normally do physically, such as asking out loud whether a witness is looking at the right page before asking the relevant question.

Judicial and advocate interventions are more difficult to manage remotely due in part to the time lag on a video hearing. It might be helpful for the Judge to indicate at the beginning of the hearing the best way for advocates to intervene without disrupting the flow of the hearing.

Written submissions and skeleton arguments are likely to become more common where the hearing is conducted remotely. The normal rules on exchange continue to apply. The only additional complexity will be ensuring that the written submission is sent to the Judge at the appropriate time.

CVP hearings tend to be more tiring than in person. It is sensible to move away from the screen during breaks and ensure adequate rest time during lengthy trials.

30. How can we ensure effective communication between a witness / party and solicitors and counsel during a remote hearing, to give or take instructions for example?

It is not permitted to communicate with a witness whilst giving evidence and other witnesses should not seek to influence a witness who is giving evidence by for example making comments on the evidence in the 'chat room'.

The most effective method of communication with representatives is to use a separate device and a separate platform from those being used in the hearing itself. One method where the parties are legally represented is to communicate through WhatsApp or text message (SMS) as this is often best and fastest. The WhatsApp web app or computer app can be used on a computer and enable use of a keyboard for faster typing. Where a participant prefers not to give out a telephone number, other solutions may be available which work via username rather than phone number. There are other collaboration software options available on the market which might provide solutions. Email can work too, but it is not ideal because there is sometimes a delay between the email being sent and the email being received. Sometimes a judge will allow a short period take instructions either during or at the end of cross examination. It is important to remember to mute the CVP during this process.

Where a WhatsApp Group is established, care must be taken about exactly who needs to be in the group and when witnesses should be removed for certain communications, such as during their live evidence (and for Scottish proceedings remember witnesses who have still to give evidence should not be party to discussions regarding evidence already provided). Therefore, it might be preferable for certain witnesses not to be in the group, and they can send messages to the

representative through an agreed person (HR or a solicitor) who can then raise the matter in the group chat.

Whilst having a separate Zoom, Teams or similar breakout room might work for some, switching between multiple communication channels during a remote hearing can lead to errors, such as the risk of saying something in the breakout room which is overheard in the main session. Further, managing different video chats can be more difficult than using a separate method of communication.

If a witness' video link disconnects, parties must ensure they have a way to immediately contact the witness on the days and times they are to give their evidence (Presidential Guidance E&W para 19.8).

Representatives should consider making provision for end of session debriefs with clients. This might work best by video, since there is no risk of being overheard in the main session.

Finally, it is best to make a record of all communications after a hearing.

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