

EMPLOYMENT AND EQUALITY TRIBUNAL RULES 2018 - EXPLANATORY NOTES

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Introduction

The Employment and Equality Tribunal (EET), which superseded the Employment Tribunal on 1st January 2019, deals with complaints under the Island's employment statutes, such as the Employment Act 2006 and also deals with complaints under the Equality Act 2017. Permissible complaints under the Equality Act comprise not only complaints about employment but also complaints about the provision of goods and services, premises, education etc.

The Employment and Equality Tribunal Rules 2018 are made under powers contained in the Equality Act. Schedule 17 to the Act sets out the following process for making the EET Rules

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Rules as to Tribunal procedure

After consulting the Deemsters, the Council of Ministers may by rules.... make such provision as appears to it to be necessary or expedient with respect to proceedings before the Tribunal.

The 2018 Rules are based closely on the former Employment Tribunal 2008 Rules but the opportunity was taken to modernise the new Rules in certain respects and to introduce some provisions from the current rules in force in Great Britain, Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237).

The 2018 Rules were amended by the Employment and Equality Tribunal (Amendment) Rules 2019 to set out the procedure for bringing work of equal value complaints before the Tribunal. The amendments made by the 2019 Rules came into operation on 1st January 2020.

The main contents of this document are as follows –

- Section 1 contains a summary of the most significant changes and their rationale and
- Section 2 comprises a set of guidance notes on the rules. Any significant changes to the equivalent 2008 Rules are noted as are any new rules.

Abbreviations

The following abbreviations are used in this document-

DfE	The Department for Enterprise
The Equality Act / The 2017 Act	The Equality Act 2017
The Tribunal / EET	The Employment and Equality Tribunal
The 2008 Rules	The Employment Tribunal Rules 2008 (SD 887/08)
The 2018 Rules	The Employment and Equality Tribunal Rules 2018 (SD 2018/0314)
The 2019 Rules	The Employment and Equality Tribunal (Amendment) Rules 2019 (SD 2019/0506)

Section 1: Summary of main changes

This section sets out the most significant changes to the Employment Tribunal Rules 2008.

(a) **The overriding objective**

The overriding objective of the Rules, the purpose of which is to enable the Tribunal and Chairperson to deal with cases justly, has been updated to include avoiding unnecessary formality and seeking flexibility in the proceedings (Rule 7). This is intended to ensure the Tribunal will remain informal.

(b) **Use of prescribed forms**

Under the new Rules use of a prescribed complaint and response form (to be issued by the Chief Registrar) becomes mandatory (Rule 8 & Rule 11) whereas it was optional under the 2008 Rules. The use of forms is intended to be helpful to complainants and respondents and to ensure that all the information required by the Tribunal to deal with a complaint and response is submitted in all cases.

(c) **Protected disclosures**

There is a new rule (Rule 10) whereby, in a whistleblowing case, the Tribunal may, with the consent of the complainant, send a copy of the complaint to a regulator listed in Schedule 1 to the Public Interest Disclosure (Prescribed Persons) Order 2016. This should help to ensure that any whistleblowing issues are appropriately investigated.

(d) **Entitlement of respondent who has not presented a response etc.**

Under the 2008 Rules a respondent who had not responded, or whose response had not been accepted, was not allowed to take any part in the case, (with some narrow exceptions). Rule 13(2) gives the Tribunal or Chairperson an express power to permit a respondent to take part in proceedings if it appears to the Tribunal or Chairperson "in the interests of justice" to do so.

(e) **Decision where a claim is uncontested**

There is a new rule (Rule 10) whereby the Chairperson may issue a judgment without a hearing where a response has not been received or accepted or is uncontested. In such circumstances the Chairperson may decide whether, on the available material (including further information which the parties are required by the Chairperson to provide) a determination can properly be made of the claim or part of it. To the extent that a determination can be made, the Chairperson may issue a judgment accordingly. Such a judgment may deal solely with liability or also with remedy.

(f) **Chairperson's powers**

The Chairperson has a new power to make an order striking out or amending all or part of a complaint or response on the grounds that it is scandalous or vexatious or has no real prospect of success (Rule 15(2)(i)). The purpose of this is to allow a complaint or response, or any part of it, to be dismissed, either because there are no arguable complaints or defences or for lack of jurisdiction.

(g) **Postponements**

There is a new rule (Rule 17(3)) on postponements under which a party is generally limited to two postponement requests. Additional postponements may, however, be granted where the reason is ill health relating to an existing long term health condition or disability and in other exceptional circumstances.

(h) Lead cases

There is a new rule (Rule 18) on lead cases which can be used where the Chairperson or Tribunal, considers that two or more complaints give rise to common or related issues of fact or law. In such circumstances an order may be made specifying one or more of those complaints as a lead case and staying the other complaints.

(i) Chairperson sitting alone

The Chairperson is given power to sit alone to hear a wider range of complaints than under the 2008 Rules (Rule 27(2)).

(j) Time limits during hearings

The Tribunal may impose limits on the time that a party may take in presenting evidence, questioning witnesses or making submissions, and may prevent the party from proceeding beyond any time so allotted (Rule 28(5)). This is intended to focus the parties' minds on the core issues and to assist with the efficient running of the Tribunal.

(k) Privacy and restrictions on disclosure

A new rule (Rule 33) sets out both the circumstances where the Tribunal or the Chairperson may make an order preventing or restricting public disclosure and the kinds of orders that may be made, including a restricted reporting order.

The circumstances where a restricted reporting order can be made under the 2008 Rules are extended to include some proceedings which relate to disability.

(l) The Register

There is an explicit power to keep the Register or part of it on a website (Rule 34(2)).

The circumstances where omissions from the Register may take place are extended to include matters which could lead to the identification of some persons with a disability (Rule 34(5)) and publication may also be restricted in cases of national security.

(m) National security

A new rule (Rule 35) sets out the procedure which could be used in respect of cases which may touch on national security and, in particular, enables the Tribunal to sit in private if the Chief Minister considers it to be expedient to do so in the interests of national security.

(n) Costs

Rule 40 makes the following changes as regards costs -

- The maximum amount of costs that the Tribunal may award without detailed assessment is increased from £500 to £2,000. (The corresponding limit in the British Rules is now £20,000. But the general principle that a costs order or preparation time order will not normally be made will, however, remain in place.
- The circumstances where a costs order or preparation time order may be made are widened to include: where a complaint or response has no real prospect of success; where a party has made a false or exaggerated allegation; and where the Chairperson decides that a complaint or response should not be accepted but the complainant or respondent takes that decision to review and is unsuccessful in his or her application.

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- Provision is made for preparation time orders; these are orders which require a complainant or respondent to make a payment to another party, who is not legally represented, in respect of their preparation costs. The amount of a preparation time order is the number of hours assessed multiplied by an hourly rate of £25, to a maximum of £2,000. But, as above, the general principle is that such an order will not normally be made.
 - Where, very exceptionally, the Tribunal orders costs to be determined by detailed assessment, the Tribunal is given a discretion to undertake this task itself though the High Court may still assess costs if ordered by the Tribunal. The main advantage is that it saves time and expense for both the paying and receiving party.
 - Provision is made to order a party to pay witness expenses.
 - The Tribunal is given a new discretion to order that any costs order or preparation time order be paid in instalments.
 - Whereas under the 2008 Rules “the Tribunal or Chairperson *shall* have regard to the paying party’s ability to pay” under the 2018 Rules the Tribunal or Chairperson *may* have regard to a party’s ability to pay. The reason for this is that requiring the Tribunal or Chairperson to have regard to the paying party’s ability to pay could be taken as limiting the ability to make a costs order where a party with very limited financial resources had acted extremely badly.

Section 2: Guidance Notes on the Rules

These guidance notes have been prepared by the Department for Enterprise in order to assist the reader in understanding the Rules. They do not purport to be a complete or definitive statement of the law.

The most significant changes to the 2008 Rules (apart from their extension to cases under the Equality Act) are noted, as are any new rules.

PART 1: GENERAL

Rule 1. Title

Rule 1 sets out the title of the Rules.

Rule 2. Commencement

Rule 2 provides for the Rules to come into force on 1st January 2019.

Rule 3. Revocation

Rule 3 revokes the Employment Tribunal Rules 2008 (“the 2008 Rules”), subject to Rule 6 (see below).

Rule 4. Interpretation

Rule 4 defines various terms that are used throughout the Rules.

Rule 5. Application of rules

Rule 5 applies the Rules to all proceedings before the Employment and Equality Tribunal (“the Tribunal”) commenced on or after 1st January 2019 and allows the Tribunal or Chairperson to regulate its, his or her own procedure. Where proceedings are referred to the Tribunal by the High Court (for example, proceedings relating to equal pay may be referred under section 119 of the Equality Act 2017), the Rules are to apply as if they had been started in the Tribunal.

Rule 5A. Rules of procedure for equal value claims

Rule 5A, which is inserted by the Employment and Equality Tribunal (Amendment) Rules 2019, introduces **the Schedule** which applies to modify the Rules in relation to proceedings which involve an equal value complaint.

Rule 6. Transitional provision

Under Rule 6 the 2008 Rules continue to apply to any proceedings commenced before the new Rules come into operation.

Rule 7. Overriding objective

Rule 7 sets out the overriding objective of the Rules, which is to enable the Tribunal and Chairperson to deal with cases justly. The criteria for dealing with cases justly is defined as -

- ensuring that the parties are on an equal footing;
- dealing with the case in ways which are proportionate to the importance and complexity of the issues;
- avoiding unnecessary formality and seeking flexibility in the proceedings;

- avoiding delay, so far as compatible with proper consideration of the issues; and
- saving expense.

Rule 7(3) charges the Tribunal or Chairperson to give effect to the overriding objective when exercising power under the Rules, or when interpreting them. In turn, parties to cases are also expected to assist the Tribunal or Chairperson to further the overriding objective of the Rules.

Significant change

The criteria for dealing with cases justly have been updated; “avoiding unnecessary formality and seeking flexibility in the proceedings” is new.

PART 2: STARTING A COMPLAINT

Rule 8. Starting a complaint

Rule 8 sets out how a complainant should bring a complaint to the Tribunal. This must be in writing in a form prescribed under Rule 45 and contain all the relevant required information, which is listed at Rule 8(2). This includes details about the complainant and respondent and other information. Rule 8(3) prohibits two or more complainants from presenting their complaints in the same document (though the Chairperson has power under Rule 15(2)(k) to consolidate complaints where he or she considers this to be appropriate).

Significant change

Use of a prescribed form of complaint is obligatory (under the 2008 Rules it was optional).

Rule 9. Initial action on receipt of complaint

Rule 9 addresses the way in which the Clerk is to deal with a complaint when he or she receives it.

Under Rule 9(2) the Clerk is required to consider in the first instance whether or not the complaint should be accepted. He or she must refuse it if it —

- is not in the prescribed form,
- does not include all the information required by Rule 8(2), or
- is presented out of time and does not include an application for an extension of time and state the reasons why it could not have been presented in time.

In either case the Clerk will return the complaint to the complainant, indicating what information or other matters should be included in it.

Under Rule 9(3), where a complaint is made outside the relevant time limit but contains an application for an extension of time, it will be referred to the Chairperson.

Under Rule 9(4), if it appears to the Clerk that for any reason other than the expiry of a time limit (e.g. because it is outside the Tribunal's jurisdiction), the Tribunal does not have the power to consider the complaint, the Clerk will refer it to the Chairperson.

Where a complaint is referred to the Chairperson, under Rule 9(5) the Chairperson will either decide without a hearing whether or not it can be accepted, or else order that the decision be made at a pre-hearing review. Whatever he or she decides, the Chairperson will notify the Clerk of the decision, in writing, with reasons.

Where the complaint is accepted or there is to be a pre-hearing review to determine the matter, Rule 9(6) sets out the steps the Clerk must take to progress the complaint. These include –

- sending a copy of the complaint to each respondent (recording in writing when it was sent);
- informing the parties of the case number and the address to which all related correspondence should be sent; and
- informing the respondent how to respond to the complaint, the deadline for doing so, and the consequences of not responding.
- advising the respondent of his or her right to receive a copy of any judgment of the case; and
- where relevant, making the parties aware of the availability of the services of an industrial relations officer or other conciliator.

Where the Chairperson decides that a complaint should not be accepted, he or she will record his or her decision and reasons in writing. The Clerk will then inform the complainant in writing both of the decision and of the reasons for the complaint not being accepted. The complainant will also be advised as to how the decision can be reviewed.

A decision to accept a complaint does not bind the Chairperson or Tribunal where any of the issues fall to be determined later in the proceedings.

Significant change

In the 2008 Rules if it appeared to the Clerk that for any reason other than the expiry of a time limit (e.g. because it is outside the Tribunal's jurisdiction), the Tribunal did not have the power to consider the complaint, the Clerk either advised the complainant, giving him or her the option to confirm within 21 days that he or she wished to proceed with the complaint, or referred it to the Chairperson. If the complainant subsequently confirmed that he or she wished to proceed with the complaint, the Clerk referred it to the Chairperson. Under the amended procedure the Clerk is to refer the complaint directly to the Chairperson for a decision. This is intended to save time.

Rule 10. Protected disclosure claims: notification to a regulator

Under Rule 10 the Chairperson or Tribunal may, with the consent of the complainant, send a copy of the complaint to a regulator listed in Schedule 1 to the Public Interest Disclosure (Prescribed Persons) Order 2016 (SD 2016/321)¹.

Significant change

This is a new provision.

Rule 11. Responding to the complaint

Rule 11 sets out the procedure for responding to a complaint which has been accepted by the Tribunal. The respondent must ensure that any response to the complaint reaches the Clerk within 28 days of the date on which he or she was sent a copy of the complaint. The response must be in writing in a form prescribed under Rule 45, give the required

¹ See the [Public Interest Disclosure \(Prescribed Persons\) Order 2016](#)

information specified in Rule 11(3), including an indication of whether or not the respondent intends to resist the complaint, and if so, on what grounds.

There is provision for a respondent to seek an extension of the 28 day time limit for the submission of the response. The Chairperson has an express power to extend the time, on an application by the respondent before or at the same time as a response is lodged. The application must state the reasons why the response cannot or could not be presented in time.

Significant change

Use of a prescribed form of response is obligatory (under the 2008 Rules it was optional).

Rule 12. Action on receipt of response

The Clerk will consider whether or not a response to a complaint should be accepted. The procedure is similar to that under Rule 9.

Where the Chairperson decides not to accept the response, the Clerk will inform the complainant and the respondent of the decision and the reasons for it and, in addition, inform the respondent as to how the decision can be reviewed or appealed.

Where the complaint is accepted or there is to be a pre-hearing review to determine the matter, Rule 12(6) requires the Clerk to send a copy of the response to all other parties, recording in writing when it was sent.

Significant change

Where the Clerk decides not to accept a response he or she has 14 days to return the response to the respondent whereas in the 2008 Rules he or she had only 7 days. (The Tribunal Office requested this change).

Rule 13. Taking no further part in the proceedings

Under Rule 13(1), a respondent who has not responded, or whose response has not been accepted, will not be allowed to take any part in the case with the following exceptions –

- where he or she is seeking to have a decision reviewed under Rule 36 on certain grounds (see Rule 36(4)(a), (b), (c) and (f));
- where he or she is called as a witness by the Chairperson, Tribunal or another person; or
- to be provided with a copy of a decision or judgment, or corrected entry.

Rule 13(2) gives the Tribunal or Chairperson an express power to permit a respondent to take part in proceedings if it appears to the Tribunal or Chairperson "in the interests of justice" to do so.

However, Rule 13(1) does not preclude the Tribunal or Chairperson from permitting a respondent to take part in proceedings if it appears to the Tribunal or Chairperson "in the interests of justice" to do so.

Significant changes

Under the 2008 Rules the respondent could only be called as a witness by "another person". Under the new rule the respondent may be called as a witness "by the Chairperson, Tribunal or another person".

The express power of the Tribunal or Chairperson to permit a respondent to take part in proceedings if it appears to the Tribunal or Chairperson "in the interests of justice" to do so is also new.

Rule 14. Decision where claim is uncontested etc.

Under Rule 10 the Chairperson may issue a judgment without a hearing where a response has not been received or accepted (and no application for a review or an extension of time is pending) or is uncontested. In such circumstances the Chairperson may decide whether, on the available material (including further information which the parties are required by the Chairperson to provide) a determination can properly be made of the claim or part of it. To the extent that a determination can be made, the Chairperson may issue a judgment accordingly. Such a judgment may deal solely with liability or also with remedy.

Under Rule 14 Rule 15(3), a decision must be recorded in writing and signed by the Chairperson and it is the duty of the Clerk to inform the parties of any order as soon as reasonably practicable.

Significant change

This Rule is new.

Rule 15. General power to manage proceedings

Rule 15 deals with the Chairperson's ability to manage Tribunal proceedings, and specifically provides him or her with the power to give directions to the parties, either on the application of a party or on his or her own initiative, with a view to ensuring the smooth and efficient conduct of the case. The Chairperson can issue an order on any matter he or she thinks fit, having considered the relevant papers, either in the absence of the parties or at a hearing.

Rule 15(2) lists examples of orders the Chairperson might give, although others are open to him or her also.

Rule 14(3) deals with issues of time and place with regard to any actions required by an order. An order can impose conditions on the parties and must inform them of the possible consequences of non-compliance. These are set out in Rule 20 and include the issuing of costs or preparation time orders, or the striking out of a complaint or response as appropriate. Under Rule 15(4) the person subject to a requirement may apply for the order to be varied or revoked.

Rule 15(6) and (7), require an order under Rule 15(2)(c) or (d), which relate to attendance at the Tribunal and disclosure of documents to set out the consequences of non-compliance. In employment proceedings this can be a fine of up to £5,000 and in other proceedings a fine or committal by the High Court.

Rule 15(8) states that where the Chairperson proposes to issue an order to have different complaints considered together, he or she can do so only if all relevant parties have been advised of this intention and have been given the opportunity to explain, either orally or in writing, why they think such an order should or should not be made.

Under Rule 15(9), orders must be recorded in writing and signed by the Chairperson and it is the duty of the Clerk to inform the parties of any order as soon as reasonably practicable.

Significant change

Rule 15(2) (i) is new. This gives the Chairperson power to make an order striking out or amending all or part of a complaint or response on the grounds that it is scandalous or vexatious or has no real prospect of success. (However, there was a

comparable power at Rule 19(8) of the 2008 Rules which has been carried over into Rule 26(6) of the 2018 Rules).

PART 3: CASE MANAGEMENT

Rule 16. Applications in proceedings

During a case, parties can make written applications to the Clerk for particular orders to be issued by the Chairperson or for a pre-hearing review to be held. Such requests can also be made orally at a hearing. Reasons for making the application must be provided. Parties can also apply for orders to be varied or revoked. Where the application is for a pre-hearing review it must specify the type of order sought. Under Rule 16(3), the Clerk must provide details of the application to all parties, together with the reasons why the order is being sought. Objections to the application must similarly be copied to the Clerk and all other parties. Under Rule 16(4), where the Chairperson refuses the application for an order, the Clerk will inform the other parties in writing of the refusal unless the application is refused at a hearing.

Rule 17. Postponements

Under Rule 17(1) an application for the postponement of a hearing must be made and communicated to the other parties as soon as possible after the need for the postponement is known.

Under Rule 17(2) and (3) an application for a postponement presented less than seven days before the date of the hearing, or to a party that has been granted two previous postponements of hearings in the same proceedings, will only be granted in very exceptional circumstances (which may include ill health relating to an existing long term health condition or disability).

Applications caused by an act or omission of the Chairperson, the Tribunal or another party or where the parties agree the need for a postponement in order to facilitate a settlement are excluded from the new rules.

Significant change

This is a new provision. It is intended to reduce avoidable delays.

Rule 18. Lead cases

Under Rule 18(1) where the Chairperson or Tribunal considers that two or more complaints give rise to common or related issues of fact or law, an order may be made specifying one or more of those complaints as a lead case and staying the other complaints.

Under Rule 18(2) the Clerk must send a copy of that decision to each party in each of the related cases. The decision is binding on each of those parties but under Rule 18(3) a party may apply in writing for an order that the decision is not to apply to, and is not binding on the parties to, a particular related case.

Under Rule 18(4) if a lead case is withdrawn before the Chairperson or Tribunal makes a decision in respect of the common or related issues, an order must be made as to whether another claim is to be specified as a lead case and whether the previous order should be set aside or amended.

Significant change

This is a new provision.

Rule 19. Chairperson acting on own initiative

The Chairperson can undertake a range of actions on his or her own initiative. These include making an order without reference to the parties, or holding a pre-hearing review. Where an

order is made in such circumstances, the Clerk has to send a copy of the order to the party affected by it. That party must also be informed of his or her right to apply to have the order varied or set aside. Where a party chooses to exercise this right, he or she must do so before the time period expires within which the order has to be complied with. Any application to vary or set aside an order must be submitted in writing to the Clerk and include reasons.

Rule 20. Compliance with orders

Rule 20 sets out the consequences of non-compliance with an order made under the Rules. These include the issuing of a costs or preparation order under Rule 40, or, subject to Rule 30, the striking out of a complaint or response, as appropriate. Rule 20(2) specifies that an order can provide that a complaint or response be summarily struck out if the order is not complied with.

Rule 20(3) and (4) deal with the situation where, in non employment proceedings a person fails to comply with an order under Rule 15(2)(c) or (d), which relate to attendance at the Tribunal and disclosure of documents. The Tribunal may certify the failure to the High Court and, after looking into the matter, the Court may deal with the failure as if it had occurred in relation to High Court proceedings.

Significant change

The ability to make a preparation time order is new. (See further at Rule 40).

Rule 20(3) and (4) are new provisions.

Rule 21. Conciliation

In those cases where a conciliator has power under section 104 of the Equality Act 2017 to promote a settlement, the Clerk is required to send a copy of the complaint, a copy of any response to it to a relevant officer², and except where the Clerk and relevant officer have agreed otherwise, copies of all documents, orders, judgments, written reasons and notices in the proceedings.

Significant change

Under the 2008 Rules the only conciliators are industrial relations officers.

Rule 22. Detriment or dismissal in connection with industrial action

This Rule gives the Tribunal or Chairperson the power to stay Tribunal proceedings in cases where a complaint has been brought in respect of unfair dismissal or detriment arising from a complainant's participation in official, lawfully organised industrial action ("protected industrial action"). This deals with the case where industrial action is taken, and the employer takes the trade union to court for an injunction on the ground that the action is unlawful (e.g. because a proper ballot has not been held). Until that question is decided, the Tribunal cannot know whether the action is "protected" for the purpose of Employment Act 2006 s. 69 or 124, so it is allowed to stay the proceedings until the interim civil proceedings have been concluded.

²(a) in relation Part 5 of the Equality Act (work) an industrial relations officer; (b) in relation to section 107(education cases) of the Act a person appointed by the Department of Education, Sport and Culture; and (c) in relation to proceedings under any other provision of the Act, an officer of the Office of Fair Trading.

Rule 23. Withdrawal of complaint

Under Rule 23(1) where a complainant informs the Tribunal or Chairperson that a complaint, or part of it, is withdrawn, the complaint, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.

Rule 23(2) requires the Clerk to inform all the other parties of the withdrawal.

Under Rule 23(3) where a claim, or part of it, has been withdrawn the Tribunal issues a judgment dismissing it (which means that, with certain exceptions, the complainant may not commence a further complaint against the respondent raising the same issue).

Significant change

Rule 23(3) makes it clear that the issuing of the dismissal judgment by the Tribunal is effectively automatic and without the need for application by the respondent.

PART 4: HEARINGS**Rule 24. Hearings – general**

Rule 24(1) lists the three different types of hearing open to the Chairperson or the Tribunal. These are: a pre-hearing review; a full hearing; and a review hearing. Rule 24(2) - (7) provides that a hearing can take place only where the Clerk has notified the parties, giving them the opportunity to make written submissions or to put their case orally at the hearing if they wish to do so and sets out various general and self-explanatory provisions in relation to such hearings.

Rule 24(8) provides for different Chairpersons, and differently constituted Tribunals, to hold successive hearings in respect of the same matter. However, once a hearing has begun it cannot continue without the consent of the parties unless the Chairperson is the same individual, or the Tribunal comprises at least 2 of the members, who began the hearing.

Rule 24(9) clarifies that the Chairperson or a member of the Tribunal can take part in successive hearings regarding the same matter.

Rule 24(10) and (11) enable the Tribunal or Chairperson to hold a hearing or receive evidence by telephone or a video link, provided that, in the case of a hearing which is required to be held in public, the public can hear everyone taking part.

Rule 25. Hearings which may be held in private

In certain circumstances, if the Tribunal or Chairperson so decides, hearings (or part of them) can be held in private. These circumstances are listed in Rule 25(1)(a) to (c) and are:

- where the submission of evidence might contravene a statutory prohibition;
- where the information contained in the evidence was communicated in confidence; or
- where disclosure would damage the business or organisation in which the person giving evidence works.

Rule 25(2) provides that a decision by the Tribunal or Chairperson to hold a hearing in private must be supported by reasons.

Rule 25(3) provides that a pre-hearing review may be held in public or in private except where a judgment is given or an order relating to a matter under Rule 29(1) is made, in either of which cases it must take place in public.

Rule 26. Conduct of pre-hearing reviews

Rule 26(2) lists the types of matter the Chairperson can consider at a pre-hearing review. These include: determining interim or preliminary matters; issuing orders in accordance with Rule 15 and Rule 30; and considering any oral or written evidence.

A pre-hearing review will usually be conducted by the Chairperson sitting alone. However, the Chairperson can order that the Tribunal will conduct a pre-hearing review, either on his or her own initiative or on a party's application, if he or she considers:

- that at least one substantive issue of fact is likely to be determined; and
- that it would be desirable for the pre-hearing review to be conducted by the Tribunal.

Rule 26(6) defines the scope of the pre-hearing review and confirms that although its primary purpose is to determine matters of a preliminary nature, the Chairperson can nevertheless, at this review stage, make judgments or rulings that may result in proceedings being struck out or dismissed, with the result that a full hearing then becomes unnecessary.

Rule 27. Full hearings

This rule defines a full hearing as a hearing that determines any matter not already disposed of in earlier hearings or disposes of the proceedings altogether. There may be more than one hearing in any particular proceedings, and there may be different types of hearing (e.g. on liability, remedies, or costs). Subject to Rule 25(1), which sets out when proceedings may be held in private), hearings must be held in public.

A full hearing must be heard by the Tribunal consisting of a Chairperson and two members except in respect of certain specified complaints, such as under section 25 (deductions from wages) or section 152 (insolvency etc.) of the Employment Act 2006, where the Chairperson may hear the case alone. The Chairperson may also hear a case alone where -

- both the parties consent;
- the complainant does not intend to pursue the complaint; or
- the respondent does not intend to contest the complaint or is debarred from doing so under Rule 13 (or in a case where there is more than one respondent none of them intends to contest the complaint).

Significant change

The Chairperson is empowered to hear a wider range of complaints alone than under the 2008 Rules. (Complaints of unfair dismissal will still, however, be heard by the Tribunal).

Rule 28. Conduct of full hearing

The date, time and place of full hearings are fixed by the Chairperson and the parties are then sent a notice by the Clerk. Parties are entitled to give evidence, to question witnesses and to address the Tribunal. Any evidence must be given on oath or affirmation. The Tribunal can exclude witnesses from a hearing until they are required to give evidence, if it considers this to be in the interests of justice.

Under Rule 28(5) the Tribunal may impose limits on the time that a party may take in presenting evidence, questioning witnesses or making submissions, and may prevent the party from proceeding beyond any time so allotted.

Under Rule 28(6) where a party or representative fails to attend the hearing, the Tribunal has the power to dismiss the proceedings in the absence of the party, or to adjourn the

hearing. However, where the Tribunal wishes to dismiss the case, Rule 28(7) requires it first to consider any information in its possession provided by the parties. Rule 28(8) allows the Tribunal to exercise the same powers as can be exercised by the Chairperson at a full hearing.

Significant change

The powers of the Tribunal at Rule 28(5) are new. They are intended to focus the parties' minds on the core issues and to assist with the efficient running of the Tribunal.

PART 5: DECISIONS

Rule 29. Judgments and orders

Rule 29(1) defines the two types of decisions that the Chairperson or Tribunal can issue. These are a "judgment", i.e. a final determination of the proceedings, or of a particular issue within the proceedings (e.g. a compensation award, a declaration or recommendation, or an order for costs or wasted costs); and an "order", relating to interim matters, whether or not requiring somebody to do or not to do something, or a matter falling within Rule 30(1).

Rule 29(2) clarifies the meaning of "judgment".

Rule 29(3) enables the Chairperson or Tribunal to make an order or judgment on terms agreed by the parties.

Rule 29(4) deals with the delivery of decisions. A decision (whether a judgement or an order) can be either given orally at the hearing or reserved (to be issued in writing at a later date).

Rule 29(5) enables the Tribunal to decide a case by a majority.

Rule 30. Restrictions as to certain judgments and orders

This Rule applies certain restrictions to the Chairperson's or the Tribunal's powers to make certain judgments and orders which are in the nature of final judgments and to the making of restricted reporting orders.

Rule 30(1) lists the types of judgments or orders that the restrictions apply to. They are decisions:

- as to whether a party is entitled to bring or contest the case;
- to strike out or amend all or part of a complaint or response because it is scandalous or vexatious or has no real prospect of success;
- to strike out or amend all or part of a complaint or response because the case has been conducted in a scandalous, unreasonable or vexatious way;
- to strike out a complaint because it has not been actively pursued;
- to strike out a complaint or response because a party has failed to comply with an order;
- to strike out a complaint where it is no longer possible to have a fair hearing;
- to make a restricted reporting order under Rule 33.

Rule 30(2) gives a party against whom the Chairperson or the Tribunal is about to make a judgment or order the right to provide reasons why it should not be made, unless that party has already been given an opportunity to do so. Under Rule 30(6) a judgment or order may

not be made except at a pre-hearing review or a full hearing, if one of the parties has so requested.

Rule 30(7) provides that a complaint or response or any part of one may be struck out only on the grounds stated above. Rule 30(8) provides that the Rule does not preclude the Chairperson from deciding under Rule 9(5)(a) or Rule 12(4)(a) that a complaint or response should not be accepted.

Rule 31. Form and content of judgments

This Rule requires that all judgments, whether issued orally or in writing, must be recorded in writing and signed by the Chairperson. Where a judgment has been reserved (i.e. not delivered orally at a hearing), a written judgment will be sent to the parties as soon as possible. It is the duty of the Clerk to provide copies of judgments to the parties and (where appropriate) to the court that referred the case to the Tribunal. Guidance on how to have the judgment reviewed or appealed must be included with the judgment. Where appropriate, the judgment must contain details of any award or the sum required to be paid.

Rule 32. Reasons

Rule 32(1) requires that reasons must be given by the Tribunal or Chairperson for a decision on a disputed issue (including any decision on review or for orders for costs and related matters).

Under Rule 32(2) and (3) written reasons must be given in the case of a written decision. In the case of an oral decision the reasons can be given orally at the time of issuing the judgment or order or else given in writing later. Where given orally, written reasons will not be provided unless requested by any party or the High Court. Written reasons must be signed by the Chairperson.

Under Rule 32(4) the length of reasons must be proportionate to the significance of the particular issue (and for decisions other than judgments may be very short).

Rule 32(5) and (6) list the information that must be contained in a judgment -

- the issues identified as relevant to the complaint;
- any findings of fact relevant to the issues;
- a concise statement of the applicable law;
- how the applicable law has been applied in order to determine the issues; and
- if the judgment includes a financial award a calculation of the amount.

Significant change

The redrafted rule provides greater detail as to the requirement for reasons, their content and how they are to be given.

Rule 33. Privacy and restrictions on disclosure

Rule 33(1) allows the Tribunal or the Chairperson on its, his or her own initiative, or where an application has been made, to make an order to prevent or restrict the public disclosure of any aspect of proceedings in any of the following circumstances -

- in the interests of justice;
- in order to protect the rights of any person under the European Convention on Human Rights;

- in the circumstances specified in paragraph 28 (confidential information) of Schedule 17 to the Equality Act; or
- in the interests of national security.

Under Rule 33(2) the Tribunal of Chairperson must take account of the principle of open justice and the Convention right to freedom of expression when considering whether or not to make an order.

Rule 33(3) sets out some of the different orders which may be made. They include: conducting a hearings in private; the use of anonymisation; measures to prevent witnesses at a public hearing being identifiable by members of the public; and a restricted reporting order, which is an order restricting the reporting in the media of Tribunal proceedings.

Rule 33(4) to (6) deal with restricted reporting orders (RROs). The Tribunal can only make a RRO in proceedings:

- which involve allegations of sexual misconduct,
- to which a person under 17 is a party,
- in which a person under 17 gives evidence, or
- which relate to disability and in which evidence of an intimate and significantly embarrassing nature is likely to be heard.

A RRO must specify which persons must not be identified and the duration of the order. The Clerk must ensure that a notice publicising the existence of a RRO is exhibited on the Tribunal notice board, and is posted on the door of the room where the proceedings involving the RRO are taking place. The Tribunal or the Chairperson may extend the scope of a RRO to other related proceedings.

Under Rule 33(7) any party or other interested person who has not had an opportunity to make representations before the making of an order under Rule 33 may make a written application to the Tribunal for the order to be amended or revoked.

Significant change

The circumstances where a restricted reporting order can be made under the 2008 Rules are extended to include some proceedings which relate to disability.

Rule 34. The Register

The Clerk is required to enter in a public register various documents including details of complaints, a copy of any judgment or order made under Rule 30(1) and a copy of any written reasons provided in accordance with Rule 32 in relation to any judgment.

The Register, or any part of it, may be kept by means of a computer, and all or part of it may be published on a website.

Rule 34(4) provides that reasons are not to be entered in the Register where evidence has been heard in private and the Tribunal or Chairperson (as the case may be) so decides. In such circumstances the Clerk will send the reasons to each of the parties and, if there is an appeal to the High Court, to that court, together with a copy of the entry in the Register of the judgment to which the reasons relate.

Rule 34(5) provides for the omission from the register of any matter which is likely to identify any person affected by or making an allegation of the commission of a sexual offence, or any person under 17 who is a party to, or gave evidence in, the proceedings, or a person with a

disability in respect of which evidence of an intimate and significantly embarrassing nature was heard.

Significant change

There is an explicit power to keep the Register or part of it on a website.

The circumstances where omissions from the Register may take place are extended to include matters which could lead to the identification of some persons with a disability.

Rule 35. National security

Rule 35 sets out the procedure which could be used in respect of cases which may touch on national security and, in particular, enables the Tribunal to sit in private if the Chief Minister considers it to be expedient in the interests of national security.

Significant change

This Rule is new.

Rule 36. Review of certain decisions

Rule 36(1) sets out the circumstances where parties to a case can apply to have certain Tribunal decisions reviewed under Rule 36 to Rule 38. Reviewable decisions are:

- a decision not to accept a complaint or response under Rule 9 or Rule 12;
- a judgment (including an order for costs or wasted costs);
- an order to which Rule 30 applies (in most cases such orders are in the nature of a final judgment).

In other cases, under Rule 36(2), an order under Rule 15 may be varied or revoked by the Chairperson on an application under Rule 16 or on his or her own initiative.

Rule 36(4) sets out the grounds on which decisions can be reviewed:

- administrative error;
- where the decision was based on a mistaken view of the applicable law;
- where a party did not receive notice of the proceedings;
- where a decision was made in the absence of a party;
- where new evidence has emerged since the end of the hearing; or
- where the interests of justice require a review.

The Tribunal or Chairperson can decide to institute a review of a decision on any of these grounds.

The “review” of a decision is a useful mechanism, particularly as the Chairperson has such wide powers to act on his or her own initiative. Although it could protract a case, it may also reduce the need for appeals to the High Court.

Rule 37. Preliminary consideration of application for review

An application for a review under Rule 36 must be made in writing to the Clerk, stating the grounds. The application must be submitted within 14 days of the relevant decision being sent to the parties (or within such further period as the Chairperson considers just and equitable). Alternatively, if the decision was made at a hearing, a review application can be made orally at that hearing. The review application will be rejected if it is considered that

there are no grounds for a review under Rule 36(4), or where there is no reasonable prospect of the decision being varied or revoked. A successful review application will lead to a review under the terms of Rule 38. In the case of a rejection, the Clerk will inform the party of the Chairperson's decision in writing, providing reasons.

Rule 38. The review

Reviews are normally undertaken by the Chairperson or Tribunal that made the original decision.

This will always be the case where the review is undertaken on the Chairperson's or Tribunal's own initiative, and a notice must be sent to the parties no more than 21 days after the original decision explaining why the review is to take place, and giving an opportunity for reasons to be provided as to why there should be no review.

Decisions can be confirmed, varied or revoked at a review. If revoked, the Tribunal or Chairperson must order the decision to be taken again. If the original decision was made at a hearing, the new one must be made at a hearing as well. If the original decision was taken by the Chairperson without a hearing, the new decision can also be made by the Chairperson in the absence of the parties.

Rule 39. Correction of decisions or reasons

Rule 39 sets out the procedures for correcting an order, judgment, decision or reasons.

Clerical mistakes can be corrected by certificate by the Chairperson. In this instance, or where a decision has been revoked or varied under Rule 38 or altered by the High Court, it is the duty of the Clerk to amend any register entry accordingly and send a copy of it to the parties, and (where appropriate) to the court which referred the case to the Tribunal.

Where, under Rule 34, a document is not entered in the register and is then corrected by certificate, the Clerk will send a copy of the corrected document to the parties; and where there are proceedings before the High Court relating to the decision or reasons in question, he or she will send a copy to the Court together with a copy of the entry in the register of the decision, if it has been altered under this rule.

PART 6: COSTS

Rule 40. Costs and preparation time

This rule sets out the circumstances where the Tribunal or the Chairperson can make a "costs order" or a "preparation time order".

A "costs order" is an order requiring a complainant or respondent to make a payment in respect of costs incurred by another party in respect of a legal representative or a lay representative (other than that party's own employee) or a payment to a party or witness to cover their expense of attending the Tribunal.

A "preparation time order" is an order requiring a complainant or respondent to make a payment to another party, who is not legally represented, in respect of their preparation costs.

Rule 40(2) states the general principle that, subject to exceptions set out in Rule 40(3) and (4), a costs order or preparation time order will not normally be made.

Under Rule 40(3) the Tribunal or the Chairperson may make a costs order or preparation time order and must consider whether to do so where -

- in the Tribunal's or Chairperson's opinion a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or (either personally or through a representative) conducting the proceedings;
- a complaint or response had no real prospect of success; or
- a party had made a false or exaggerated allegation.

Costs may also be awarded -

- against a party who has not complied with an order;
- in respect of costs incurred or time spent where a hearing has been postponed or adjourned at the request of a party; or
- where the Chairperson decided under Rule 9(5) or 12(4) that a complaint or response should not be accepted but the complainant or respondent takes that decision to review under Rule 38 and the original decision is confirmed.

Under Rule 40(5) a costs order can be made against or in favour of a respondent who has not had a response accepted, relating to any part that he or she has taken in the proceedings.

Under Rule 40(6) an application for a costs order can be made at any time during proceedings. It can be made orally at the end of a hearing, or in writing to the Clerk.

Under Rule 40(7) if the application is received later than 21 days from the judgment, it will be considered only if the Tribunal or the Chairperson considers that it is in the interests of justice to do so.

Under Rule 40(8) the date of the judgment is either the date of the relevant hearing, if the judgment was issued orally, or the date on which the written judgment was sent to the parties, if it was reserved.

Under Rule 40(9) a costs order cannot be made unless the party against whom it is to be made is sent notice by the Clerk, giving him or her the opportunity to make representations as to why it should not be made, unless the party has already been given the opportunity to respond orally to the Chairperson or Tribunal.

Rule 40(10) sets out four ways in which a costs order against a party can be determined. A costs order may -

- specify the sum payable, where that sum is no greater than £2,000;
- order the costs to be determined by way of detailed assessment, either in the High Court in accordance with the procedure set out in the rules of court, or by the Chairperson applying the same principles. (This may be appropriate e.g. where misconduct by one party has caused another to incur costs exceeding £2,000.)
- order the paying party to pay another party or a witness an amount in respect of expenses in connection with an individual's attendance as a witness at the Tribunal; or
- be an amount agreed between the parties.

Rule 40(11) and (12) deal with preparation time orders. Where the Tribunal determines to make a preparation time order, it is to do so on the basis of information provided by the relevant party as regards time which may be lawfully claimed together with its own assessment of what it considers to be a reasonable and proportionate amount of time in relation to the particular case. The amount of a preparation time order is the number of hours assessed multiplied by an hourly rate of £25, to a maximum of £2,000.

Under Rule 40(13) the Tribunal or Chairperson may take into account a party's ability to pay when determining whether or not to make a costs order or preparation time order against him or her and in setting the amount.

Rule 40(14) gives the Tribunal a discretion to order that any costs order or preparation time order be paid in instalments.

Rule 40(15) makes it clear that a costs order or preparation time order is payable by the party against whom it is made and not by the party's representative.

Rule 40(16) requires the Tribunal or Chairperson to provide written reasons for making a costs order or preparation time order, if requested to do so.

Significant changes

The Rule makes the following changes.

- Provision is made for preparation time orders.
- The circumstances where a costs order or preparation time order may be made have been widened to include: where a complaint or response has no real prospect of success; where a party has made a false or exaggerated allegation; and where the Chairperson decides that a complaint or response should not be accepted but the complainant or respondent takes that decision to review but is unsuccessful in his or her application.
- The maximum amount of costs that the Tribunal may award without detailed assessment is increased from £500 to £2,000.
- Where costs are to be determined by detailed assessment the Tribunal is given a discretion to undertake this task itself though the High Court may still assess costs if ordered by the Tribunal.
- Provision is made to order a party to pay witness expenses.
- The Tribunal is given a new discretion to order that any costs order or preparation time order be paid in instalments.
- Under the 2008 Rules "the Tribunal or Chairperson *shall* have regard to the paying party's ability to pay" whereas under the 2018 Rules the Tribunal or Chairperson *may* have regard to a party's ability to pay.

Rule 41. Personal liability of representatives for costs

Under Rule 41(1) and (2), in some circumstances, the Tribunal or the Chairperson may make an order (a "wasted costs order") against a party's representative, requiring the representative to pay the costs incurred by any party (including his or her own client) as a result of the representative's misconduct. The order may prevent the representative recovering the costs from his or her client, or require him or her to repay costs already paid by the client, or require him or her to meet the whole or part of any costs incurred by another party.

Under Rule 41(3) a "wasted costs" means any costs incurred by a party:

- as a result of any improper, unreasonable or negligent act or omission on the part of any representative; or
- where there has been such an act or omission after the costs were incurred and the Tribunal or Chairperson considers it unreasonable for that party to pay them.

Rule 41(4) defines “representative” as excluding anyone who is not acting for profit with regard to the proceedings, but under Rule 41(5) an order cannot be made against a representative who is the employee of a party (in that case a costs order would be made against the party under Rule 40).

Under Rule 41(6) a representative must be given a reasonable opportunity to make oral or written representations before a wasted costs order is made against him or her. The Tribunal or the Chairperson may take into account the representative’s ability to pay.

Rule 41(7) requires a wasted costs order to specify the amount to be disallowed or paid.

Under Rule 41(8) the Clerk must inform the representative’s client in writing of any proceedings under this rule, or of any order made under this rule against the representative.

Rule 41(9) requires the Tribunal or Chairperson to provide written reasons for making a wasted costs order, if requested to do so. A request must be made within 14 days after the costs order is made.

PART 7: SUPPLEMENTAL

Rule 42. Power to rectify error in procedure

Rule 42 provides that where there has been a procedural failure, this does not invalidate any step taken in the proceedings unless the Chairperson or the Tribunal so orders; but the Chairperson or Tribunal may make an order to remedy the error.

An application to set aside an error of procedure cannot be made except within a reasonable time, or where the applicant has acted after becoming aware of the error. The application must specify the procedural error.

Rule 43. Proceedings involving the Manx National Insurance Fund

This rule sets out the right of the Treasury to appear as if it were a party and be heard at any hearing of a case involving payment from the Manx National Insurance Fund.

Rule 44. Notices etc.

This rule sets out the arrangements to be followed by the Tribunal when issuing notices or other documents. Notices can be sent by post, email or other means of electronic communication, or by personal delivery. They are taken as having been received (unless the contrary is proved) either when delivered “in the ordinary course of post”, or on the day of transmission (in the case of electronic communication), or on the day of delivery (in the case of personal delivery).

Rule 44(3) provides a list of offices to which notices or documents relating to Tribunal cases should be sent. If a notice is sent to a party’s representative, it is deemed to have been sent to the party itself.

Rule 44(4) allows a party to advise the Clerk, the other parties and any conciliation officer involved in the proceedings of a change of the address to which notices relating to the case are to be sent.

Rule 44(5) enables the Chairperson to take a decision to vary the way in which notices are served on parties, in order to ensure that documents reach the intended recipient.

In cases where a payment from the Manx National Insurance Fund is likely to be involved, Rule 44(6) requires the Clerk, where appropriate, to send copies of all documents to the Treasury, whether or not it is a party to the proceedings.

Rule 45. Power to prescribe forms

Rule 45(1) requires the Chief Registrar to prescribe Complaint and Response forms which may be used in proceedings, and authorises the prescription of other forms.

Rule 45(2) requires the Chief Registrar to publish any prescribed forms in such a manner as it considers appropriate to bring them to the attention of all prospective Tribunal users and their advisers.

Significant changes

- The Chief Registrar is to issue forms, in place of the Department for Enterprise.
- There is an obligation to prescribe complaint and response forms, in keeping with the new requirement to use these forms (see Rules 8 and 11).

Rule 46. Calculation of time limits

This Rule clarifies the position as regards the periods of time specified in the Rules for the carrying out of any act required or permitted under the Rules to progress the case.

Rule 46(2) and (3) provide examples of how time limits are to be calculated. Rule 46(2) makes clear that where a party is required to do something within a certain period of time following a particular event, the date of the event itself is not to be included in the calculation. Similarly, where a party wishes, or is required, to do something a certain number of days before or after an event, the date of the event itself is not to be included in the calculation.

Rule 46(4) states that where the Tribunal or Chairperson imposes a time limit on a party for the doing of any act, the deadline set should be expressed as a calendar date. Rule 46(5) makes clear that any notice of a hearing sent to the parties should be posted not less than 14 days before the hearing date.

Rule 46(6) states that where any act must or may have been done within a certain number of days of a document being sent to a person by the Clerk, the date when the document was sent shall, unless the contrary is proved, be regarded as the date on the letter from the Clerk which accompanied the document.

Schedule. Employment and Equality Tribunal (equal value) procedure

The Schedule set out the procedure to be used for any work of equal value complaints which are brought before the Tribunal.

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