

# **Employment Law - Practice and Procedure**

## **(3) The Rules of Procedure**

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# Agenda

- The rules of procedure
- Seeking additional information
- Applying for an order
- Disclosure and inspection
- Witness orders
- Privilege
- “Without prejudice”

# Rules of procedure

- They are contained in Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013
- The rules are in Schedule 1
- This is the link <https://www.legislation.gov.uk/uksi/2013/1237/schedule/1>
- Remember the overriding objective in Rule 2:

# The overriding objective

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

# Additional information

- What if the case presented in the ET3 is unclear?
- You should **promptly** seek additional information from the employer to prepare your case
- It can relate to matters mentioned in the ET3 eg “we warned him on many occasions” - Ask: “when, by whom and what did the warnings say?”
- Or to matters likely to arise for determination in the hearing eg “what action was taken in respect of anyone else involved in the fight?”
- Stick to a few important questions in a standard unfair dismissal case
- In discrimination cases substantial information is often needed but the right to use an official questionnaire was abolished in 2014
- See now the Acas Guide <https://www.acas.org.uk/asking-and-answering-questions-about-discrimination>
- Set a fairly short deadline eg 14 days

# Applying for an order

- Seeking additional information is one example of applying for an order - there are numerous others
- The ET will expect you to have sought the agreement of the respondent before approaching it, unless close to a hearing
- Don't leave the application too late - the ET is likely to say "we will decide at hearing"
- For additional information, the application will be under the general powers of the ET: Rules 29 and 30
- Unless obvious, you may need to explain why the answers are important for case preparation
- Quote the overriding objective where applicable
- Copy to the employer, confirming that you have done so to the ET eg "cc (name of respondent)"
- Difficult to challenge the ET's decision so put the right arguments in the application

# Disclosure and inspection

- Disclosure is a list of documents; inspection is to look at the documents - ET usually combines the two (provide list and copies)
- Documents are very important especially if contemporaneous - they may be said to win cases (while witnesses are said to lose cases!)
- Each party has a duty to disclose relevant documents in its possession - standard disclosure
- Relevant emails and texts must be disclosed
- Ask for any important documents which are not disclosed - specific disclosure
- The test: are they “necessary for the fair disposal of the case”?
- Ask also for “any other documents in the respondent’s possession or control which are relevant to the case, whether helpful to the respondent or not”
- Claimant is also bound to make disclosure of relevant documents (often not much!)
- The duty includes documents relevant to remedy eg efforts to find work
- Responding to disclosure requests for confidential material

# Witness orders

- What if there is a witness who will help your case but they are reluctant to attend?
- Will they really help your case? Remember you cannot normally cross-examine your own witness
- If you are sure, apply **early** for a witness order under Rule 32 - don't leave to last minute
- Set out the name and address (home or work) of the individual and whether they must produce documents
- State what evidence they will produce, why it is relevant and necessary and that they will not attend voluntarily
- No need to copy this application to R, but ET may (rarely) seek their view
- If order is granted, R will be informed
- Need for a witness statement in advance to be sure their evidence is helpful
- If you cannot get one, you will have to explain to the ET why not
- What about absent witnesses? May be admitted with reduced weight



# Privilege

- Some documents (and evidence) are privileged and cannot be disclosed to the other side or the ET
- One common form of privilege is any communication between a party and their lawyer (legal advice privilege) - does not apply to non-lawyers
- Litigation privilege protects confidential communications between client, their legal adviser and a third party eg witness/medical expert
- For litigation privilege to apply, communication must have been for dominant purpose of litigation
- Watch out for waiver! If part of the advice is disclosed, the remainder may be admissible

# Without prejudice

- Any negotiations between the parties with the aim of settling an existing dispute may not be put before the ET
- Documents and conversations with this aim are “without prejudice” even if that is not expressly stated (better if it is)
- There is an exception for “unambiguous impropriety” eg an unambiguously racist remark
- Settlement negotiations with Acas are similarly kept private from the ET
- Note also the exclusion of “protected conversations” (s 111A ERA 1996)
- It means that evidence of pre-termination negotiations cannot be referred to in ordinary unfair dismissal claims unless there was improper behaviour (eg bullying/intimidation/discrimination)
- See the Acas Guide which deals with this <https://www.acas.org.uk/code-of-practice-settlement-agreements/html> also <https://www.acas.org.uk/settlement-agreements>

**Questions?**