



Law Society
of Scotland

Consultation Response

Employment Appeal Tribunal Rules and Practice
Direction June/July 2023 Consultation

July 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the President of the Employment Appeal Tribunal's consultation: *Employment Appeal Tribunal Rules and Practice Direction June/July 2023 Consultation*. The sub-committee has the following comments to put forward for consideration.

General Comments

The sub-committee is in agreement with the majority of the proposed changes. As set out in the responses to the specific consultation questions, however, there are some areas to which we respectfully suggest further consideration is given.

Consultation Questions

Documents to be lodged to institute an appeal

Q1. Do you agree with these proposed amendments to the EAT Rules relating to the documents that are required to be lodged to institute an appeal?

Yes

Q2. Do you consider that any difficulties might arise from these changes? If so, what?

Yes. There may be circumstances where the Judge conducting the sift requires sight of the ET1 and/or ET3 (e.g. an appeal based on a Chapman v Simon ground).

Q3. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

Upon it becoming apparent that sight of the ET1 and/or ET3 is required for the purposes of the sift, the EAT could contact the appellant and order that the ET1 and/or ET3 is provided. The Practice Direction could also indicate that in such appeals, provision of the ET1 and/or ET3 at the time of filing the appeal would be good practice (albeit not mandatory).

Extensions of time

Q1. Do you agree with this proposed amendment to the EAT Rules?

No.

Q2. Do you consider that any difficulties might arise from this change? If so, what?

Yes. We are concerned that the proposed amendment gives considerable scope for uncertainty, particularly as the term “minor error” is open to interpretation. Strict time limits are consistent with the principle of finality of litigation, and we suggest that it would not be advantageous to potentially dilute the strictness of the EAT’s time limits in the manner proposed.

We are also concerned about the possibility of a “two-tier” system for applications for extensions of time, if the proposed amendment is made. Appeals featuring a “minor error” would be determined using the less strict sub-paragraph (5) test, whilst appeals featuring a non-“minor error” would be determined using the stricter **Abdelghafar** test. A two-tiered approach will bring about additional complexity. Furthermore, we foresee that it could lead to significant disputes (and, potentially, appeals) about whether an error should properly be categorised as a “minor error” or a non-“minor error”.

Further, the proposed language “the time prescribed for the institution of an appeal under rule 3 may be extended if it is considered just to do so having regard to relevant factors”, gives rise to further scope for uncertainty. In relation to “relevant factors”, whilst there are some included, there is an absence of clarity on whether these are the only relevant factors, whether the decision will be weighted more so on these factors, and the weighting of each of these individual factors.

Particularly if the proposed removal of the requirement for the appellant to lodge certain documents with the notice of appeal is implemented, we do not see the need to change the established wording in rule 37.

Q3. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

We suggest that rule 37 should remain in its present form, with all applications to extend time determined using the test laid down in **Abdelghafar**.

Declaration when lodging an appeal, application or response

Q1. Do you agree with this proposal?

Yes.

Q2. Do you consider that any difficulties might arise from this change? If so, what?

Yes. There is a risk that certain parties and representatives – most likely those who engage in abusive and threatening correspondence with EAT staff – may take exception to the proposed change, leading to them amending / deleting the declaration.

Further, we are not convinced that the inclusion of a declaration, whether it requires a signature or not, will materially deter the behaviour which has been highlighted.

Q3. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Reading and complying with the New PD

Q4. Do you agree that there should be an expectation on all parties that they will read and comply with the New PD insofar as they are able? If not, or you agree subject to some reservation, please explain?

Yes.

Q5. Do you consider that any difficulties might arise from these proposals? If so, what?

Yes. The PD is a relatively lengthy document. On that basis, it may be unduly burdensome to expect parties and representatives (particularly non-professional representatives) to read the entire PD at the start of the proceedings. The expectation could be qualified by referring to “read and comply with all relevant sections of the New PD”.

We are particularly concerned with the disproportionate effect the proposed expectation would have on self-representing parties, who may not fully comprehend that it is of paramount importance for them to read the PD. Such persons may not understand the content of the additional forms and documents. There is an increased likelihood that such persons would not place the required weight on reading the PD, understand its content, and comply with it.

Q6. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

The Overriding Objective and conduct of appeals in the EAT**Q7. Do you agree with this clarification of the Overriding Objective?**

Yes.

Q8. Do you consider that any difficulties might arise from this change? If so, what?

No.

Q9. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Adjustments, including for people with disabilities

Q10. Do you agree with the proposed approach to adjustments?

Yes.

Q11. Do you consider that any difficulties might arise from this change? If so, what?

No.

Q12. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Repeat applications**Q13. Do you agree with the proposed approach to repeat applications?**

Yes.

Q14. Do you consider that any difficulties might arise from this change? If so, what?

Yes. There may be disputes as to whether a “material change of circumstances” has occurred. We do not consider, however, that this potential difficulty undermines the proposed approach (as it would be present in any event).

Q15. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Institution of appeals

Documents to be submitted with the appeal

Q16. Do you agree with the proposed changes?

Yes.

Q17. Do you consider that any difficulties might arise from these changes? If so, what?

No.

Q18. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Access to the employment tribunal case management system

Q19. Do you agree with the proposed approach?

Yes.

Q20. Do you consider that any difficulties might arise from this approach to obtaining additional documents? If so, what?

There is a risk that the Employment Tribunal case management system may be inaccurate or incomplete. This risk, however, is mitigated by the parties being informed of the documents that the Judge considers relevant (and, presumably, being given an opportunity to comment).

Q21. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Encouraging parties to adopt e-filing

Q22. Do you agree with these proposals?

Yes.

Q23. Do you consider that any difficulties might arise from this approach? If so, what?

No.

Q24. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Explanation for not providing reasons for decision appealed

Q25. Do you agree with the proposal?

Yes.

Q26. Do you consider that any difficulties might arise from this approach? If so, what?

No.

Q27. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Concise grounds of appeal

Q28. Do you agree with the proposal?

Yes.

Q29. Do you consider that any difficulties might arise from this approach? If so, what?

Yes. We anticipate that parties (especially LiPS) may simply ignore – or fail to appreciate – the proposed change.

Q30. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

Yes. There is no information in the consultation as to the consequences of failing to comply with the proposed change.

Identifying the decision appealed against**Q31. Do you agree with the proposal?**

Yes.

Q32. Do you consider that any difficulties might arise from this approach? If so, what?

No.

Q33. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Bias and/or procedural impropriety

Q34. Do you agree with the proposal?

No. Whilst it is accepted that there may be a particularly high demand on the EAT's resources in dealing with such appeals, it is of critical importance that justice be seen to be done.

The suggestion that a failure to provide a witness statement supported by a statement of truth could result in strike out is disproportionate.

In Scotland, witness statements are the exception and not the norm in the Employment Tribunal. There is therefore a heightened risk that parties may lack knowledge and experience of the requirements and constitution of a witness statement. Statements may often cause further backlog and confusion in a party's attempt to justify the appeal, moving away from the sensible aim of keeping appeals concise. This would also likely have a disproportionate impact on layperson stakeholders.

Q35. Do you consider that any difficulties might arise from this approach? If so, what?

As above.

Q36. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Parties to the appeal**Q37. Do you agree with the proposal?**

Yes.

Q38. Do you consider that any difficulties might arise from this approach? If so, what?

Yes. A "co-party" may later change its mind about not taking part in the appeal. We presume, however, that in those circumstances it will be open to the former "co-party" to apply for reinstatement as a party to the appeal.

Q39. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

The sift process

Q40. Do you agree with the proposals?

Yes.

Q41. Do you consider that any difficulties might arise from the adoption of these proposals? If so, what?

No.

Q42. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Preliminary hearings

Q43. Do you agree with the proposals?

Yes.

Q44. Do you consider that any difficulties might arise from these proposals? If so, what?

No.

Q45. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Full Hearing

Q46. Do you agree with the proposals?

Yes.

Q47. Do you consider that any difficulties might arise from these proposals? If so, what?

No.

Q48. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

General

Postponement

Q49. Do you agree with the proposals?

Yes.

Q50. Do you consider that any difficulties might arise from these proposals? If so, what?

No.

Q51. Do you have any other suggestions as to how the problems identified above might otherwise be addressed?

No.

Open Justice

Q52. Do you agree with the proposals?

Yes. This ought to be of paramount importance to the EAT. Given the recent moves by higher courts, such as the Court of Session to live-stream proceedings, it is a welcome initiative.

Q53. Do you consider that any difficulties might arise from these proposals? If so, what?

No.

Q54. Do you have any other suggestions as to how Open Justice issues might otherwise be addressed?

No.

Remote attendance

Q55. Do you agree with the proposals?

Yes.

Q56. Do you consider that any difficulties might arise from these proposals? If so, what?

No.

Q57. Do you have any other suggestions about the appropriate way to deal with remote attendance and/or observation?

No.

Permission to appeal

Q58. Do you agree with the proposal?

No.

Q59. Do you consider that any difficulties might arise from this proposal? If so, what?

Yes, full grounds of appeal may not yet have been formulated at the relevant time.

Q60. Do you have any other suggestions about the appropriate way to deal with applications for permission to appeal?

No.

Costs

Q61. Do you agree with these proposals?

No.

Q62. Do you consider that any difficulties might arise from such proposals? If so, what?

There may be circumstances in which expenses or costs have not been a matter for decision making. For instance, rule 34A specifies that there may be an award of costs for the manner in which proceedings are conducted. Requiring a party seeking costs to make a detailed application if not in contemplation until proceedings are conducted vexatiously or unreasonably, for example on the last day of a hearing, would

place that party at a significant disadvantage. The EAT will not benefit from considered and lucid arguments as it may if an application is made, for example, within 28 days of the conclusion of the hearing.

Q63. Do you have any other suggestions about the appropriate way to deal with applications for costs?

Yes, as above.

Appeals from decision of ET Legal Officer

Q64. Do you agree with this proposal?

Yes.

Q65. Do you consider that any difficulties might arise from this proposal? If so, what?

No.

Q66. Do you have any other suggestions about the appropriate way to deal with such appeals?

No.

Appeals where a claim has been rejected by the ET or where a respondent failed to respond to a claim in the ET

Q67. Do you agree with the proposal?

Yes.

Q68. Do you consider that any difficulties might arise from this proposal? If so, what?

No.

Q69. Do you have any other suggestions as to how such appeals might otherwise be addressed?

No.

Other proposals

Q70. Do you have other suggestions for changes in the New PD that would simplify EAT procedures?

No.

Q71. Do you have other suggestions for changes in the New PD that would increase the efficiency of EAT procedures?

No.

Q72. Do you have other suggestions for changes in the New PD that would improve access to justice in the EAT?

Yes. The New PD containing a link to a “full” bundle of familiar authorities (as opposed to merely a list of the familiar authorities). This could be either as a downloadable file, or a link to publicly-accessible copies of the authorities (e.g. on the BAILII website).

BUSINESS

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