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STATUTORY INSTRUMENTS

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**2004 No. 2351**

**The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004**

**Amendment**

2.—(1) The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004(1) shall be amended as follows.

(2) Regulation 1(1) shall be replaced with the following:

“1.—(1) These Regulations may be cited as the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 and the Rules of Procedure contained in Schedules 1, 2, 3, 4, 5 and 6 to these Regulations may be referred to, respectively, as:—

- (a) the Employment Tribunals Rules of Procedure;
- (b) the Employment Tribunals (National Security) Rules of Procedure;
- (c) the Employment Tribunals (Levy Appeals) Rules of Procedure;
- (d) the Employment Tribunals (Health and Safety – Appeals against Improvement and Prohibition Notices) Rules of Procedure;
- (e) the Employment Tribunals (Non-Discrimination Notices Appeals) Rules of Procedure; and
- (f) the Employment Tribunals (Equal Value) Rules of Procedure.”.

(3) The first line of regulation 2 shall be replaced with the following:

“2.—(1) In these Regulations and in Schedules 1, 2, 3, 4, 5 and 6 - .”

(4) Regulation 3(1) shall be replaced with the following:

“3.—(1) The overriding objective of these Regulations and the rules in Schedules 1, 2, 3, 4, 5 and 6 is to enable tribunals and chairmen to deal with cases justly.”.

(5) Regulation 3(3) shall be replaced with the following:

“(3) A tribunal or chairman shall seek to give effect to the overriding objective when it or he:

- (a) exercises any power given to it or him by these Regulations or the rules in Schedules 1, 2, 3, 4, 5 and 6; or
- (b) interprets these Regulations or any rule in Schedules 1, 2, 3, 4, 5 and 6.”.

(6) In regulation 15:—

(a) paragraph (1) shall be replaced with the following:—

- “15.—(1) Any period of time for doing any act required or permitted to be done under any of the rules in Schedules 1, 2, 3, 4, 5 and 6, or under any decision, order or judgment of a tribunal or a chairman, shall be calculated in accordance with paragraphs (2) to (6).”; and
- (b) in paragraph (6) the words “within 28 days on the date of which” shall be replaced with “within 28 days of the date on which”.
- (7) In regulation 16:
- (a) in paragraph (1) the words “Subject to paragraphs (2) and (3)” shall be replaced with “Subject to paragraphs (2), (3) and (4)”;
- (b) after paragraph (3) the following new paragraph shall be inserted:
- “4) In proceedings which involve an equal value claim (as defined in rule 2 of Schedule 6), Schedule 1 shall be modified in accordance with Schedule 6.”.
- (8) In regulation 20:
- (a) in paragraph (1) the words “These Regulations and Schedules 1 to 5” shall be replaced with “These Regulations and Schedules 1 to 6”;
- (b) after paragraph (6) insert the following:
- “(7) In relation to proceedings:—
- (i) which were commenced prior to 1 October 2004;
- (ii) to which Schedule 3 to either the old (England & Wales) regulations or the old (Scotland) regulations applied; and
- (iii) in which the tribunal has not, prior to 1 October 2004, required a member of the panel of independent experts to prepare a report under section 2A(1)(b) of the Equal Pay Act;
- these Regulations and rules 1 to 13 of Schedule 6, with the exception of rule 4(3)(a), shall apply.
- (8) In relation to proceedings:—
- (i) which were commenced prior to 1 October 2004;
- (ii) to which Schedule 3 to either the old (England & Wales) regulations or the old (Scotland) regulations applied; and
- (iii) in which the tribunal has, prior to 1 October 2004, required a member of the panel of independent experts to prepare a report under section 2A(1)(b) of the Equal Pay Act;
- Schedule 3 to either the old (England & Wales) regulations or the old (Scotland) regulations (as the case may be) shall continue to apply.
- (9) In relation to proceedings described in paragraph (8), the following rules of Schedule 6 shall also apply and shall take precedence over any conflicting provision in Schedule 3 to either the old (England & Wales) regulations or the old (Scotland) regulations, namely:
- rules 3, 11(2), 11(4), 12, 13(1) and 13(3).
- (10) Rule 14 of Schedule 6 shall apply to all proceedings to which, in accordance with this regulation, rule 10 of Schedule 2 applies.”.
- (9) In Schedule 1:—
- (a) rule 8(2) shall be replaced with the following:—
- “(2) Those circumstances are when either —

- (a) no response in those proceedings has been presented to the Employment Tribunal Office within the relevant time limit;
  - (b) a response has been so presented, but a decision has been made not to accept the response either by the Secretary under rule 6(1) or by a chairman under rule 6(3), and the Employment Tribunal Office has not received an application under rule 34 to have that decision reviewed; or
  - (c) a response has been accepted in those proceedings, but the respondent has stated in the response that he does not intend to resist the claim.”
- (b) in rule 9(b) the words “rule 34(a) and (b)” shall be replaced with “rule 34(a), (b) or (e)”;
  - (c) in rule 30(3) the words “Written reasons shall only be provided” shall be replaced with “Subject to paragraph (1), written reasons shall only be provided”.
  - (d) in rule 48(6) the words “The tribunal or chairman shall also have regard to the representative’s ability to pay” shall be replaced with “The tribunal or chairman may also have regard to the representative’s ability to pay”.
- (10) In rule 3 of Schedule 4 and of Schedule 5 the words “two copies of” shall be deleted.
- (11) After Schedule 5 there shall be added the following new Schedule 6:–

“SCHEDULE 6

Regulation 16(4)

THE EMPLOYMENT TRIBUNALS (EQUAL VALUE) RULES OF PROCEDURE

**General**

1. The rules in this Schedule shall only apply in proceedings involving an equal value claim and they modify and supplement the rules in Schedule 1. If there is conflict between Schedule 1 and this Schedule, the provisions of this Schedule shall prevail.

**Interpretation**

2.—(1) In this Schedule and in relation to proceedings to which this Schedule applies:

“comparator” means the person of the opposite sex to the claimant in relation to whom the claimant claims that his work is of equal value as described in section 1(2)(c) of the Equal Pay Act;

“Equal Pay Act” means the Equal Pay Act 1970(2);

“equal value claim” means a claim by a claimant which rests upon entitlement to the benefit of an equality clause by virtue of the operation of section 1(2)(c) of the Equal Pay Act;

“the facts relating to the question” has the meaning in rule 7(3);

“independent expert” means a member of the panel of independent experts mentioned in section 2A(4) of the Equal Pay Act;

“indicative timetable” means the indicative timetable set out in the Annex to this Schedule;

“the question” means whether the claimant’s work is of equal value to that of the comparator as described in section 1(2)(c) of the Equal Pay Act; and

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(2) 1970 c. 41; section 2A was inserted by the Equal Pay (Amendment) Regulations 1983 (S.I. 1983/1794). It has been amended by the Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996 (S.I. 1996/438); the Employment Rights (Dispute Resolution) Act 1998 (c. 8), section 1(2)(a); and the Equal Pay Act 1970 (Amendment) Regulations 2004 (S.I. 2004/2352).

“report” means a report required by a tribunal to be prepared by an independent expert, in accordance with section 2A(1)(b) of the Equal Pay Act.

(2) A reference in this Schedule to a rule, is a reference to a rule in this Schedule unless otherwise provided.

(3) A reference in this Schedule to “these rules” is a reference to the rules in Schedules 1 and 6 unless otherwise provided.

### **General power to manage proceedings**

3.—(1) In addition to the power to make orders described in rule 10 of Schedule 1, the tribunal or chairman shall have power (subject to rules 4(3) and 7(4)) to make the following orders:

- (a) the standard orders set out in rules 5 or 8, with such addition to, omission or variation of those orders (including specifically variations as to the periods within which actions are to be taken by the parties) as the chairman or tribunal considers is appropriate;
- (b) that no new facts shall be admitted in evidence by the tribunal unless they have been disclosed to all other parties in writing before a date specified by the tribunal (unless it was not reasonably practicable for a party to have done so);
- (c) that the parties may be required to send copies of documents or provide information to the other parties and to the independent expert;
- (d) that the respondent is required to grant the independent expert access to his premises during a period specified by the tribunal or chairman in order for the independent expert to conduct interviews with persons identified as relevant by the independent expert;
- (e) when more than one expert is to give evidence in the proceedings, that those experts present to the tribunal a joint statement of matters which are agreed between them and those matters on which they disagree;
- (f) where proceedings have been joined, that lead claimants be identified.

(2) Any reference in Schedule 1 or 2 to an order made under rule 10 of Schedule 1 shall include reference to an order made in accordance with this Schedule.

### **Conduct of stage 1 equal value hearing**

4.—(1) When in an equal value claim there is a dispute as to whether any work is of equal value as mentioned in section 1(2)(c) of the Equal Pay Act, the tribunal shall conduct a “stage 1 equal value hearing” in accordance with both this rule and the rules applicable to pre-hearing reviews in Schedule 1.

(2) Notwithstanding rule 18(1) and (3) of Schedule 1, a stage 1 equal value hearing shall be conducted by a tribunal composed in accordance with section 4(1) of the Employment Tribunals Act.

(3) At the stage 1 equal value hearing the tribunal shall:

- (a) where section 2A(2) of the Equal Pay Act applies, strike out the claim (or the relevant part of it) if, in accordance with section 2A(2A) of that Act, the tribunal must determine that the work of the claimant and the comparator are not of equal value;
- (b) decide, in accordance with section 2A(1) of the Equal Pay Act, either that :
  - (i) the tribunal shall determine the question; or

- (ii) it shall require a member of the panel of independent experts to prepare a report with respect to the question;
- (c) subject to rule 5 and with regard to the indicative timetable, make the standard orders for the stage 1 equal value hearing as set out in rule 5;
- (d) if the tribunal has decided to require an independent expert to prepare a report on the question, require the parties to copy to the independent expert all information which they are required by an order to disclose or agree between each other;
- (e) if the tribunal has decided to require an independent expert to prepare a report on the question, fix a date for the stage 2 equal value hearing, having regard to the indicative timetable;
- (f) if the tribunal has not decided to require an independent expert to prepare a report on the question, fix a date for the Hearing, having regard to the indicative timetable;
- (g) consider whether any further orders are appropriate.

(4) Before a claim or part of one is struck out under paragraph (3)(a), the Secretary shall send notice to the claimant giving him the opportunity to make representations to the tribunal as to whether the evaluation contained in the study in question falls within paragraph (a) or (b) of section 2A(2A) of the Equal Pay Act. The Secretary shall not be required to send a notice under this paragraph if the claimant has been given an opportunity to make such representations orally to the tribunal as to why such a judgment should not be issued.

(5) The tribunal may, on the application of a party, hear evidence upon and permit the parties to address it upon the issue contained in section 1(3) of the Equal Pay Act (defence of a genuine material factor) before determining whether to require an independent expert to prepare a report under paragraph (3)(b)(ii).

(6) When the Secretary gives notice to the parties of the stage 1 equal value hearing under rule 14(4) of Schedule 1, he shall also give the parties notice of the matters which the tribunal may and shall consider at that hearing which are described in paragraphs (3) and (5) of this rule and he shall give the parties notice of the standard orders in rule 5.

(7) The tribunal's power to strike out the claim or part of it under paragraph (3)(a) is in addition to powers to strike out a claim under rule 18(7) of Schedule 1.

### **Standard orders for stage 1 equal value hearing**

**5.—(1)** At a stage 1 equal value hearing a tribunal shall, unless it considers it inappropriate to do so and subject to paragraph (2), order that:—

- (a) before the end of the period of 14 days after the date of the stage 1 equal value hearing the claimant shall:
  - (i) disclose in writing to the respondent the name of any comparator, or, if the claimant is not able to name the comparator he shall instead disclose such information as enables the comparator to be identified by the respondent; and
  - (ii) identify to the respondent in writing the period in relation to which he considers that the claimant's work and that of the comparator are to be compared;
- (b) before the end of the period of 28 days after the date of the stage 1 equal value hearing:
  - (i) where the claimant has not disclosed the name of the comparator to the respondent under sub-paragraph (a), if the respondent has been provided with sufficient detail to be able to identify the comparator, he shall disclose in writing the name of the comparator to the claimant;

- (ii) the parties shall provide each other with written job descriptions for the claimant and any comparator;
  - (iii) the parties shall identify to each other in writing the facts which they consider to be relevant to the question;
  - (c) the respondent is required to grant access to the claimant and his representative (if any) to his premises during a period specified by the tribunal or chairman in order for him or them to interview any comparator;
  - (d) the parties shall before the end of the period of 56 days after the date of the stage 1 equal value hearing present to the tribunal a joint agreed statement in writing of the following matters:
    - (i) job descriptions for the claimant and any comparator;
    - (ii) facts which both parties consider are relevant to the question;
    - (iii) facts on which the parties disagree (as to the fact or as to the relevance to the question) and a summary of their reasons for disagreeing;
  - (e) the parties shall, at least 56 days prior to the Hearing, disclose to each other, to any independent or other expert and to the tribunal written statements of any facts on which they intend to rely in evidence at the Hearing; and
  - (f) the parties shall, at least 28 days prior to the Hearing, present to the tribunal a statement of facts and issues on which the parties are in agreement, a statement of facts and issues on which the parties disagree and a summary of their reasons for disagreeing.
- (2) Any of the standard orders for the stage 1 equal value hearing may be added to, varied or omitted as the tribunal considers appropriate.

### **Involvement of independent expert in fact finding**

**6.—(1)** This rule applies only to proceedings in relation to which the tribunal has decided to require an independent expert to prepare a report on the question.

(2) In proceedings to which this rule applies a tribunal or chairman may if it or he considers it appropriate at any stage of the proceedings order an independent expert to assist the tribunal in establishing the facts on which the independent expert may rely in preparing his report.

(3) Examples of the circumstances in which the tribunal or chairman may make an order described in paragraph (2) may include:

- (a) a party not being legally represented;
- (b) the parties are unable to reach agreement as required by an order of the tribunal or chairman;
- (c) the tribunal or chairman considers that insufficient information may have been disclosed by a party and this may impair the ability of the independent expert to prepare a report on the question;
- (d) the tribunal or chairman considers that the involvement of the independent expert may promote fuller compliance with orders made by the tribunal or a chairman.

(4) A party to proceedings to which this rule applies may make an application under rule 11 of Schedule 1 for an order under paragraph (2).

### **Conduct of stage 2 equal value hearing**

7.—(1) This rule applies only to proceedings in relation to which the tribunal has decided to require an independent expert to prepare a report on the question. In such proceedings the tribunal shall conduct a “stage 2 equal value hearing” in accordance with both this rule and the rules applicable to pre-hearing reviews in Schedule 1.

(2) Notwithstanding rule 18(1) and (3) of Schedule 1, a stage 2 equal value hearing shall be composed in accordance with section 4(1) of the Employment Tribunals Act.

(3) At the stage 2 equal value hearing the tribunal shall make a determination of facts on which the parties cannot agree which relate to the question and shall require the independent expert to prepare his report on the basis of facts which have (at any stage of the proceedings) either been agreed between the parties or determined by the tribunal (referred to as “the facts relating to the question”).

(4) At the stage 2 equal value hearing the tribunal shall:

- (a) Subject to rule 8 and having regard to the indicative timetable, make the standard orders for the stage 2 equal value hearing as set out in rule 8;
- (b) make any orders which it considers appropriate;
- (c) fix a date for the Hearing, having regard to the indicative timetable.

(5) Subject to paragraph (6), the facts relating to the question shall, in relation to the question, be the only facts on which the tribunal shall rely at the Hearing.

(6) At any stage of the proceedings the independent expert may make an application to the tribunal for the some or all of the facts relating to the question to be amended, supplemented or omitted.

(7) When the Secretary gives notice to the parties and to the independent expert of the stage 2 equal value hearing under rule 14(4) of Schedule 1, he shall also give the parties notice of the standard orders in rule 8 and draw the attention of the parties to paragraphs (4) and (5) of this rule.

### **Standard orders for stage 2 equal value hearing**

8.—(1) At a stage 2 equal value hearing a tribunal shall, unless it considers it inappropriate to do so and subject to paragraph (2), order that:—

- (a) by a date specified by the tribunal (with regard to the indicative timetable) the independent expert shall prepare his report on the question and shall (subject to rule 14) have sent copies of it to the parties and to the tribunal; and
- (b) the independent expert shall prepare his report on the question on the basis of the facts relating to the question and no other facts which may or may not relate to the question.

(2) Any of the standard orders for the stage 2 equal value hearing may be added to, varied or omitted as the tribunal considers appropriate.

### **The Hearing**

9.—(1) In proceedings in relation to which an independent expert has prepared a report, unless the tribunal determines that the report is not based on the facts relating to the question, the report of the independent expert shall be admitted in evidence in those proceedings.

(2) If the tribunal does not admit the report of an independent expert in accordance with paragraph (1), it may determine the question itself or require another independent expert to prepare a report on the question.

(3) The tribunal may refuse to admit evidence of facts or hear argument as to issues which have not been disclosed to the other party as required by these rules or any order made under them, unless it was not reasonably practicable for the party to have so complied.

### **Duties and powers of the independent expert**

**10.**—(1) When a tribunal requires an independent expert to prepare a report with respect to the question or an order is made under rule 6(2), the Secretary shall inform that independent expert of the duties and powers he has under this rule.

(2) The independent expert shall have a duty to the tribunal to:

- (a) assist it in furthering the overriding objective in regulation 3;
- (b) comply with the requirements of these rules and any orders made by the tribunal or a chairman in relation to the proceedings;
- (c) keep the tribunal informed of any delay in complying with any order in the proceedings with the exception of minor or insignificant delays in compliance;
- (d) comply with any timetable imposed by the tribunal or chairman in so far as this is reasonably practicable;
- (e) inform the tribunal or a chairman on request by it or him of progress in the preparation of the independent expert's report;
- (f) prepare a report on the question based on the facts relating to the question and (subject to rule 14) send it to the tribunal and the parties;
- (g) make himself available to attend hearings in the proceedings.

(3) The independent expert may make an application for any order or for a hearing to be held as if he were a party to the proceedings.

(4) At any stage of the proceedings the tribunal may, after giving the independent expert the opportunity to make representations, withdraw the requirement on the independent expert to prepare a report. If it does so, the tribunal may itself determine the question, or it may determine that a different independent expert should be required to prepare the report.

(5) When paragraph (4) applies the independent expert who is no longer required to prepare the report shall provide the tribunal with all documentation and work in progress relating to the proceedings by a date specified by the tribunal. Such documentation and work in progress must be in a form which the tribunal is able to use. Such documentation and work in progress may be used in relation to those proceedings by the tribunal or by another independent expert.

(6) When an independent expert has been required to prepare a report in proceedings the Secretary shall give the independent expert notice of all hearings, orders or judgments in those proceedings as if the independent expert were a party to those proceedings and when these rules require a party to provide information to another party, such information shall also be provided to the independent expert.

### **Use of expert evidence**

**11.**—(1) Expert evidence shall be restricted to that which, in the opinion of the tribunal, is reasonably required to resolve the proceedings.

(2) An expert shall have a duty to assist the tribunal on matters within his expertise. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.



(3) No party may call an expert or put in evidence an expert's report without the permission of the tribunal. No expert report shall be put in evidence unless it has been disclosed to all other parties and any independent expert at least 28 days prior to the Hearing.

(4) In proceedings in which an independent expert has been required to prepare a report on the question, the tribunal shall not admit evidence of another expert on the question unless such evidence is based on the facts relating to the question. Unless the tribunal considers it inappropriate to do so, any such expert report shall be disclosed to all parties and to the tribunal on the same date on which the independent expert is required to send his report to the parties and to the tribunal.

(5) If an expert (other than an independent expert) does not comply with these rules or an order made by the tribunal or a chairman, the tribunal may order that the evidence of that expert shall not be admitted.

(6) Where two or more parties wish to submit expert evidence on a particular issue, the tribunal may order that the evidence on that issue is to be given by one joint expert only. When such an order has been made, if the parties wishing to instruct the joint expert cannot agree who should be the expert, the tribunal may select the expert.

### **Written questions to experts**

**12.**—(1) When any expert (including an independent expert) has prepared a report, a party or any other expert (including an independent expert) involved in the proceedings may put written questions about the report to the expert who has prepared the report.

- (2) Unless the tribunal or chairman agrees otherwise, written questions under paragraph (1):
- (a) may be put once only;
  - (b) must be put within 28 days of the date on which the parties were sent the report;
  - (c) must be for the purpose only of clarifying the factual basis of the report;
  - (d) must be copied to all other parties and experts involved in the proceedings at the same time as they are sent to the expert who prepared the report.

(3) When written questions have been put to an expert in accordance with paragraph (2) he shall answer those questions within 28 days of receiving them.

(4) An expert's answers to questions put in accordance with paragraph (2) shall be treated as part of the expert's report.

(5) Where a party has put a written question in accordance with this rule to an expert instructed by another party and the expert does not answer that question, or does not do so within 28 days, the tribunal may order that the party instructing the expert may not rely on the evidence of that expert.

### **Procedural matters**

**13.**—(1) In proceedings in which an independent expert has been required to prepare a report, the Secretary shall send him notices and inform him of any hearing, application, order or judgment in those proceedings as if he were a party to those proceedings.

(2) For the avoidance of doubt, any requirement in this Schedule to hold a stage 1 or a stage 2 equal value hearing does not preclude holding more than one of each of those types of hearing or other hearings from being held in accordance with Schedule 1.

(3) Any power conferred on a chairman in Schedule 1 may (subject to the provisions of this Schedule) be carried out by a tribunal or a chairman in relation to proceedings to which this Schedule applies.

### **National security proceedings**

14.—(1) In equal value cases which are also national security proceedings, if a tribunal has required an independent expert to prepare a report on the question, the independent expert shall send a copy of the report to the tribunal and shall not send it to the parties. In such proceedings if written questions have been put to the independent expert under rule 12, the independent expert shall send any answers to those questions to the tribunal and not to the parties.

(2) Before the Secretary sends to the parties a copy of a report or answers which have been sent to him by the independent expert under paragraph (1), he shall follow the procedure set out in rule 10 of Schedule 2 as if that rule referred to the independent expert's report or answers (as the case may be) instead of written reasons, except that the independent expert's report or answers shall not be entered on the Register.

(3) If the Minister does not give a direction under rule 10(3) of Schedule 2 within the period of 28 days from the date on which the Minister was sent the report or answers to written questions the Secretary shall send a copy of the independent expert's report or answers to written questions (as the case may be) to the parties.

## ANNEX

### The indicative timetable

| Claims <u>not</u> involving<br>an independent expert | Claims involving an<br>independent expert |
|--|---|
| Claim  | Claim                                     |
| ⇓  | ⇓   |
| 28 days  | 28 days                                   |
| ⇓  | ⇓   |
| Response   | Response                                  |
| ⇓  | ⇓   |
| 3 weeks  | 3 weeks                                   |
| ⇓  | ⇓   |
| Stage 1 equal value hearing                          | Stage 1 equal value hearing               |
| ⇓  | ⇓   |
| ⇓  | 10 weeks                                  |
| ⇓  | ⇓   |
| ⇓  | Stage 2 equal value hearing               |
| ⇓  | ⇓   |
| ⇓  | Independent expert's report               |
| 18 weeks   | ⇓   |
| ⇓  | 4 weeks                                   |
| ⇓  | ⇓   |
| ⇓  | written questions                         |
| ⇓  | ⇓   |
| ⇓  | 8 weeks                                   |
| ⇓  | ⇓   |
| Hearing  | Hearing                                   |
| Total 25 weeks                                       | Total 37 weeks.                           |