

EMPLOYMENT ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Tribunal Reform

Miscellaneous Conciliation

Section 28: Pre-hearing reviews

77. Employment tribunals may currently carry out preliminary considerations (pre-hearing reviews) and if it is found at the review that the party's case has no reasonable prospect of success, a deposit of up to £500 can be required as a condition of proceeding to a full hearing. Only on refusal to pay the deposit can the case be struck out. Although rule 4 and 15 of the main Employment Tribunal Rules of Procedure permits the strike out of proceedings in certain circumstances, it is arguable that these do not apply to the pre-hearing review stage.
78. At present the power to strike out is limited and rarely used. This section therefore clarifies that rules may permit tribunals to strike out a case at the pre-hearing review on grounds which do not go beyond those applicable to other stages of proceedings. Such grounds include when the originating application or notice of appearance (or anything in it) is scandalous, misconceived or vexatious. The objective is to limit the number of such cases reaching a full hearing by confirming the tribunals' power to strike cases out at this stage in the process. The aim is to improve the efficiency of case handling and restrict the amount of time that tribunals spend on considering cases which are obviously misconceived etc. However, the power to demand a deposit remains and is likely to continue to be the main sanction used against weak cases at pre-hearing reviews.
79. Examples of cases where it could be appropriate to exercise the strike out power include:
- Cases in which the facts have already been litigated and the applicant has no fresh or different evidence but insists on pursuing the case;
 - Cases where the facts are not in dispute, but the interpretation placed on those facts by one party is clearly wrong;
 - Cases in which a party's application is not itself sufficient to lead to a successful outcome for him, and the party has stated at the pre-hearing review that no further evidence or witnesses would be called.
80. As the sanctions of imposing a deposit or making a costs order are also available, the power to strike out will only be used where it is appropriate. Since evidence is not considered at the pre-hearing review, the strike-out option will only be appropriate in cases where the tribunal is satisfied that there is no need to consider the evidence, or where there is no conflict of evidence.

*These notes refer to the Employment Act 2002
(c.22) which received Royal Assent on 8 July 2002*

81. This section amends section 9 of the Employment Tribunals Act 1996. It works by removing from section 9(1)(a) the implication that pre-hearing reviews are “preliminary” hearings, and therefore necessarily followed by a full hearing. It makes it clear that a pre-hearing review will not necessarily be preliminary, so that the powers which the tribunal can exercise in connection with the pre-hearing review may include a power to strike out the claim. It also provides that a tribunal may not strike out at a pre-hearing review on grounds which do not apply outside such a review