

2008 No. 3240

EMPLOYMENT TRIBUNALS

The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2008

<i>Made</i>	- - - -	<i>15th December 2008</i>
<i>Laid before Parliament</i>		<i>17th December 2008</i>
<i>Coming into force</i>	- -	<i>6th April 2009</i>

The Secretary of State, in exercise of the powers conferred by sections 1(1), 4(6), and (6A), 7(1), (3), (3ZA), (3A), (3AA), (3AB) and (5), 9(1) and (4), 19 and 41(4) of the Employment Tribunals Act 1996(a), and after consultation with the Administrative Justice and Tribunals Council, and that Council having consulted with the Scottish Committee and the Welsh Committee, in accordance with paragraph 24 of Schedule 7 to the Tribunals, Courts and Enforcement Act 2007(b), makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2008 and shall come into force on 6th April 2009.

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

2. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004(c) shall be amended as set out in regulations 3 to 7.

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- (a) 1996 c. 17; by virtue of section 1 of the Employment Rights (Dispute Resolution) Act 1998 (c. 8) industrial tribunals were renamed employment tribunals and references to “industrial tribunal” and “industrial tribunals” in any enactment were substituted with “employment tribunal” and “employment tribunals”. Section 4(6) was amended by paragraph 12(4) of Schedule 1 to the Employment Rights (Dispute Resolution) Act 1998 (c. 8), and section 48(1) and paragraphs 35 and 37 of Schedule 8 to the Tribunals, Courts and Enforcement Act 2007 (c. 15). Section 4(6A) was inserted by section 3(6) of the Employment Rights (Dispute Resolution) Act 1998, and was then amended by section 48(1) and paragraphs 35 and 37 of Schedule 8 to the Tribunals, Courts and Enforcement Act 2007. Section 7 was interpreted by section 239(4) of the Trade Union and Labour Relations (Consolidation) Act 1992 (c. 52), as inserted by paragraph 1 of Schedule 5 to the Employment Relations Act 1999 (c. 26). Section 7(3ZA) was inserted by section 25 of the Employment Act 2002 (c. 22). Section 7(3A) was inserted by section 2 of the Employment Rights (Dispute Resolution) Act 1998 and section 7(3A) was then substituted by section 26 of the Employment Act 2002. Section 7(3AA) and (3AB) were inserted by section 4 of the Employment Act 2008 (c. 24). Section 9(4) was amended by paragraph 15 of Schedule 1 to the Employment Rights (Dispute Resolution) Act 1998.
- (b) 2007 c. 15.
- (c) SI 2004/1861, as amended by the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004 (SI 2004/2351), the Employment Tribunals (Constitution and Rules of Procedure (Amendment) Regulations 2005 (SI 2005/435), the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) (No. 2) Regulations 2005 (SI 2005/1865) and the Tribunals, Courts and Enforcement Act 2007 (Transitional and Consequential Provisions) Order 2008 (SI 2008/2683).

Amendment of Regulations

3.—(1) In regulation 4(6) after “Lord Chief Justice” delete “after consulting the Lord Chancellor” and after “[.]” insert “The Lord President or Lord Chief Justice may only make a nomination after consulting the Senior President of Tribunals.”.

(2) In regulation 8(3)(b), (3)(c) and (4), and regulation 9(2), for “Secretary of State” substitute “Lord Chancellor”.

Amendment of Schedule 1

4.—(1) Schedule 1 is amended as follows.

(2) In rule 1—

- (a) in paragraph (1) delete “paragraph 5 of this rule and to”;
- (b) in paragraph (4) delete “paragraph (5) and to”;
- (c) delete sub-paragraphs (4)(f), (g), (h) and (i); and
- (d) delete paragraphs (5), (6) and (8).

(3) In rule 2—

- (a) in sub-paragraph (2)(d) for “are” substitute “may be” and insert “and” at the end; and
- (b) delete sub-paragraph (2)(e).

(4) In rule 3—

- (a) at the end of sub-paragraph (2)(a) insert “or”, and in sub-paragraph (2)(b) for “; or” substitute “.”;
- (b) delete sub-paragraph (2)(c);
- (c) delete paragraph (6); and
- (d) in paragraph (7) delete “(6) and”.

(5) In rule 4—

- (a) in paragraph (4) delete “under rule 11”;
- (b) after paragraph (4) insert—

“(4A) When a respondent is legally represented in relation to the application the respondent or the respondent’s representative must, at the same time as the application is sent to the Employment Tribunal Office, provide all other parties with the following information in writing—

- (a) details of the application and the reasons why it is made;
- (b) notification that any objection to the application must be sent to the Employment Tribunal Office within 7 days of receiving the application or, if a hearing of any type is due to take place before the expiry of that 7 day period, before the date of that hearing; and
- (c) that any objection to the application must be copied to both the Employment Tribunal Office and all other parties,

and the respondent or that representative must confirm in writing to the Employment Tribunal Office that this rule has been complied with.

(4B) The time limit described in sub-paragraph (4A)(b) may be amended where the Employment Judge or tribunal considers it in the interests of justice to do so.

(4C) Where a respondent is not legally represented in relation to the application, the Secretary shall send a copy of the application to all other parties and inform them of the matters listed in sub-paragraphs (4A)(b) and (c).

(4D) Where a respondent’s application under paragraph (4) is refused the Secretary shall inform the parties in writing of such refusal unless the application is refused at a hearing.

(4E) This rule is subject to section 12 of the State Immunity Act 1978(a).”.

(6) In rule 6(6) for “should have been” substitute “is to be”.

(7) In rule 8—

(a) for paragraph (1) substitute—

“(1) Subject to paragraphs (2A) and (6), in any proceedings if the relevant time limit for presenting a response has passed, an Employment Judge shall, in the circumstances listed in paragraph (2), issue a default judgment to determine the claim without a hearing.”;

(b) after paragraph (1) insert—

“(1A) If the Employment Judge is not satisfied that he has sufficient information to issue a default judgment, he shall make an order (as described in rule 10(2)(b)) requiring such additional information as he considers appropriate to enable him, subject to paragraphs (2A) and (6), to issue a default judgment.

(1B) Where an order is made as described in paragraph (1A), and the additional information requested has not been received within the specified time limit, a default judgment shall be issued in accordance with paragraph (1).”;

(c) in paragraph (2) for “Those circumstances” substitute “Subject to paragraphs (2A) and (6), those circumstances”;

(d) after paragraph (2) insert—

“(2A) No default judgment need be issued where the Employment Judge—

(a) is not satisfied that the tribunal has jurisdiction to consider the claim, or part of it;
or

(b) has sufficient evidence to conclude that the claim form has not been received by the respondent.”;

(e) in paragraph (4) after “The Secretary shall also inform the parties of their right to” insert “apply to”;

(f) for paragraph (6) substitute—

“(6) A default judgment shall not be issued where the parties have settled the proceedings (either by means of a compromise agreement or through ACAS). If a default judgment is issued in these circumstances it shall have no effect.”.

(8) In rule 9 before subparagraph (a) insert—

“(aa) make a request under rule 30 (written reasons);”.

(9) In rule 10—

(a) in sub-paragraph (2)(d) after the first reference to “party” insert “or”;

(b) delete sub-paragraph (2)(g);

(c) in paragraph (5) insert “sub-” before “paragraph (2)(d)”;

(d) in paragraph (7) insert “sub-” before “paragraph (2)(j)”;

(e) in paragraph (8) between “shall” and “inform” insert “(except where the order is for a witness order described in rule 10(2)(c) only)”.

(10) In rule 11—

(a) in sub-paragraph (4)(a) for “sought” substitute “made”;

(b) for sub-paragraph (4)(b) substitute “notification that any objection to the application must be sent to the Employment Tribunal Office within 7 days of receiving the application or, if a hearing of any type is due to take place before the expiry of that 7 day period, before the date of that hearing”;

(a) 1978 c. 33.

- (c) after paragraph (4) insert—
 - “(4A) The time limit described in sub-paragraph (4)(b) may be amended where the Employment Judge or tribunal considers it in the interests of justice to do so.”;
 - (d) for paragraph (5) substitute “Where a party is not legally represented in relation to the application, the Secretary shall (except where the application is for a witness order described in rule 10(2)(c) only) send a copy of the application to all other parties and inform them of the matters listed in sub-paragraphs (4)(b) and (c).”.
- (11) In rule 12—
- (a) in sub-paragraph (2)(a) insert “sub-” before “paragraph (2)(b)”;
 - (b) in paragraph (3) insert “sub-” before “paragraph (2)(b)”.
- (12) In rule 14, after sub-paragraph (1)(b), insert—
- “(bb) a hearing dealing with interim relief as described in rule 18A;”.
- (13) For rule 15 substitute—
- “(1) A hearing may be conducted (in whole or in part) by use of electronic communications provided that the Employment Judge or tribunal conducting the hearing considers it just and equitable to do so.
 - (2) Where a hearing is required by these rules to be held in public and electronic communications are to be used in accordance with this rule then, subject to rule 16, it must be held in a place to which the public has access and using equipment so that, when oral evidence is given the public is able to see and hear all parties to the communication.
 - (3) Where a hearing is to be held in private, and electronic communications are to be used in accordance with this rule, when oral evidence is given the tribunal or Employment Judge must be able to see and hear all parties to the communication.”.
- (14) In rule 18—
- (a) delete sub-paragraph (2)(e); and
 - (b) in paragraph (3) delete “and (2)”.
- (15) After Rule 18, insert—

“Interim relief

- 18A.**—(1) Hearings dealing with interim relief are interim hearings.
- (2) Subject to the provisions applying to interim relief of TULR(C)A, the Employment Rights Act, and the Employment Tribunals Act, these rules shall apply when dealing with the following applications as they apply to pre-hearing reviews—
- (a) an application made under section 161 of TULR(C)A or section 128 of the Employment Rights Act for interim relief;
 - (b) an application made under section 165 of TULR(C)A or section 131 of the Employment Rights Act to vary or revoke an order.”.
- (16) Delete rules 22 to 24.
- (17) In rule 25—
- (a) in paragraph (4) after “proceedings are dismissed” delete to end and insert “, the claimant may not commence a further claim against the respondent for the same, or substantially the same, cause of action (unless the decision to dismiss is successfully reviewed or appealed).”; and
 - (b) after rule 25 insert—

“Automatic dismissal of proceedings following withdrawal of a claim (or part of a claim) where an ACAS settlement has been reached

- 25A.**—(1) Where—

- (a) the parties settle the whole or part of the proceedings through ACAS;
- (b) the settlement is agreed in writing;
- (c) the parties to the settlement have confirmed in the settlement agreement, or otherwise in writing, their understanding that the proceedings covered by the settlement will, following the withdrawal of the claim (or relevant part of the claim) by the claimant, be dismissed; and
- (d) the claimant withdraws the whole of, or the part of, the claim that is covered by the settlement by informing the Employment Tribunal Office of the withdrawal in accordance with rule 25(2),

the Employment Judge shall dismiss the proceedings covered by the settlement.

(2) The dismissal shall take place no later than 28 days after the date on which the Employment Tribunal Office receives—

- (a) written evidence that the requirement described in sub-paragraph (1)(c) has been satisfied; and
- (b) the written notification of withdrawal described in sub-paragraph (1)(d).

(3) If proceedings are dismissed under paragraph (1), the claimant may not commence a further claim against the respondent for the same, or substantially the same, cause of action (unless the decision to dismiss is successfully reviewed or appealed).”.

(18) In rule 26 after paragraph (3) insert—

“(4) The President, Vice President, or Regional Employment Judge shall fix the date, time and place of the Hearing and the Secretary shall send to each party a notice of the Hearing together with information and guidance as to procedure at the Hearing.”.

(19) In rule 27 delete paragraph (1).

(20) In rule 33—

- (a) in paragraph (2) after “proposed response to the claim” insert “(where that has not been received by the Employment Tribunal Office)”;
- (b) after paragraph (2) insert the following—
 - “(2A) An application under paragraph (1) may be given preliminary consideration (without the need to hold a hearing) by an Employment Judge, who may refuse the application if the requirements of paragraph (2) have not been met.”;
- (c) in paragraph (3) after “Employment Judge in public” insert “unless all the parties to the proceedings consent in writing to the review without a hearing”; and
- (d) after paragraph (7) insert—

“(8) An Employment Judge may on his own initiative review a default judgment on the grounds listed at rule 34(3)(a), (b) and (e).”.

(21) In rule 34, in paragraph (4) insert “sub-” before “paragraphs (3)(a) and (e)”.

(22) In rule 50, in paragraph (5) insert “sub-” before “paragraph (4)(b)”.

(23) In rule 54—

- (a) in paragraph (2)(b)(ii) insert “sub-” before both references to “paragraph (1)(a)” and before “paragraph (2)(a)”;
- (b) in paragraph (2)(b)(iii) insert “sub-” before “paragraph (2)(a)” and before “paragraph (1)(b) or (c)”.

(24) In rule 60, after paragraph (3) insert —

“(4) Where the Attorney-General, or Lord Advocate, makes a request to search for, inspect and take a copy of any relevant documents within a case file (including documents held electronically) for the purpose of preparing an application or considering whether to

make an application under section 42 of the Supreme Court Act 1981(a), (or where the request is made by the Lord Advocate, section 1 of the Vexatious Actions (Scotland) Act 1898(b)) or section 33 of the Employment Tribunals Act 1996(c) (restriction of vexatious proceedings), the Secretary shall send notice of or a copy of any relevant document which relates to any proceedings before the tribunal, or any decision, order or award of the tribunal.”.

(25) In rule 61—

- (a) in sub-paragraph (1)(b), delete “fax or other”;
- (b) in sub-paragraph (2)(b), delete “fax or other”;
- (c) in sub-paragraph (4)(b) substitute “Legal Services Directorate” for “Employment Relations Directorate”; and
- (d) in sub-paragraph (4)(c) delete from “9 Buckingham Gate” to end and insert “20 Victoria Street, London SW1H 0NF;”.

Amendment of Schedule 2

5.—(1) Schedule 2 is amended as follows.

- (2) In rule 3(2) insert “sub-” before “paragraph (1)(b)”.
- (3) In rule 3(3) insert “sub-” before “paragraph (1)(b)”; and before “paragraph (1)(a)”.
- (4) In rule 10(4) insert “sub-” before “paragraph (3)(a)”.
- (5) In rule 10(5) insert “sub-” before each of the two references to “paragraph (3)(a)”.
- (6) In rule 10(6) insert “sub-” before “paragraph (3)(b)”.

Amendment of Schedule 4

6.—(1) Schedule 4 is amended as follows.

- (2) In rule 6(4) and (5) insert “sub-” before “paragraph (3)(d)”.
- (3) In rule 10(5) insert “sub-” before “paragraph (4)(b) or (c)”.

Amendment of Schedule 6

7.—(1) Schedule 6 is amended as follows.

- (2) In rule 4 delete paragraph (2).
- (3) In rule 4(3) insert “Employment Judge or” after “stage 1 equal value hearing the”.
- (4) In rule 4(4) and (7) insert “sub-” before “paragraph (3)(a)”.

Transitional provisions

8. Regulations 4(2) and (4) shall not have effect in relation to proceedings where sections 29 to 33 of and Schedules 2 to 4 to the Employment Act 2002(d) apply.

9. Regulation 4(7) shall not have effect in relation to proceedings where those proceedings were commenced on or before 5th April 2009.

10. Regulation 4(17)(b) shall not have effect where the parties settle the proceedings through ACAS on or before 5th April 2009.

(a) 1981 c. 54.

(b) 1898 c. 35.

(c) 1996 c. 17.

(d) 2002 c. 22. Sections 29 to 33 and Schedules 2 to 4 of the Employment Act are repealed by section 1 of the Employment Act 2008 (c. 24), subject to the transitional arrangements in the Employment Act 2008 (Commencement No.1 Transitional Provisions and Savings) Order 2008. (S.I. 2008/3232 (C.146)).

11. Regulation 4(20)(d) shall not have effect in relation to proceedings where a default judgment has been issued on or before 5th April 2009.

12. Regulations 7(2) and (3) shall not have effect in relation to proceedings where all the parties have been notified on or before 5th April 2009 that a stage 1 equal value hearing has been listed.

15th December 2008

Pat McFadden
Minister of State for Employment Relations and Postal Affairs
Department for Business, Enterprise and Regulatory Reform

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations come into force on 6th April 2009 and amend the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861) (as amended by SI 2004/2351, SI 2005/435, SI 2005/1865 and SI 2008/2683) (“the main Regulations”).

These Regulations make procedural changes to tribunal practice, including in relation to default judgments, electronic communications, withdrawal of proceedings, and Stage 1 equal value hearings. They also make consequential amendments to the main Regulations arising out of the Employment Act 2008, which repeals the statutory dispute resolution procedures (contained in sections 29 to 33 of and Schedules 2 to 4 to the Employment Act 2002), and makes changes to conciliation by ACAS under sections 18 and 19 of the Employment Tribunals Act 1996.

These Regulations also make minor clarifications to and correct drafting errors in the main Regulations.

Regulation 3 amends regulation 4 of the main Regulations to provide that when the Lord President or Lord Chief Justice appoints someone to discharge the functions of President where that person is unable to act or during any vacancy, the Senior President of Tribunals must be consulted beforehand. Regulation 3 also provides that reference to “Secretary of State” is replaced by “Lord Chancellor” in regulation 8 and 9 of the main Regulations.

Regulation 4(7) amends rule 8 of Schedule 1 to the main Regulations to remove an Employment Judge’s discretion not to issue a default judgment in certain circumstances. Regulation 4(13) amends rule 15, to provide that where electronic communications are used in public hearings and oral evidence is given, the public must be able to see and hear all parties to the communication and where the hearing is to be held in private and oral evidence is given, the tribunal or Employment Judge must be able to see and hear all parties to the communication.

Regulation 4(17) amends rule 25, and adds a new rule 25A, to provide for the automatic dismissal of proceedings where the parties to a settlement have confirmed in writing their understanding that the proceedings covered by the settlement will be dismissed and the claimant has withdrawn the claim in accordance with rule 25(2) of Schedule 1 to the main Regulations.

Regulation 4(20) provides that a preliminary consideration of an application under rule 33 to review a default judgment can take place without a hearing, and that the parties may consent in writing to the review of the application taking place without a hearing.

Regulation 7 amends rule 4 of Schedule 6 to the main Regulations to enable an Employment Judge sitting alone to hear Stage 1 equal value claims.

Regulations 8 to 12 provide for transitional arrangements in relation to these regulations. Regulation 8 provides that the transitional arrangements for the amendments arising out of the repeal of sections 29 to 33 of and Schedules 2 to 4 to the Employment Act 2002 (the statutory dispute resolution procedures) mirror those of the repeal of those sections as provided for in the Employment Act 2008 (Commencement No.1 Transitional Provisions and Savings) Order 2008 (SI 2008/3232 (C.146)). Regulations 9 to 12 provide for transitional arrangements in relation to the changes to the issue of default judgments, the automatic dismissal of proceedings following withdrawal of a claim (or part of a claim) where an ACAS settlement has been reached, the power of an Employment Judge to review a default judgment on his own initiative, and the changes to stage 1 equal value hearings respectively.

A Regulatory Impact Assessment in respect of these Regulations is available and a copy can be obtained from the Department of Business, Enterprise and Regulatory Reform, Employment Relations Directorate, 1 Victoria Street, London SW1H 0ET or on www.berr.gov.uk. Copies have also been placed in the libraries of both Houses of Parliament.

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Procedure) (Amendment) Regulations 2008

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