

EXPLANATORY MEMORANDUM TO
THE EMPLOYMENT APPEAL TRIBUNAL AMENDMENT RULES 2013

2013 No. 1693

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 The Employment Appeal Tribunal (Amendment) Rules 2013 (“the Amending Rules”) will make consequential changes to the Employment Appeal Tribunal Rules 1993 (S.I. 1993/3864) (“the Principle Rules”) to take account of the introduction of fees when an appeal from a decision of the employment tribunals is made to the Employment Appeal Tribunal. It also makes other minor changes to the Principle Rules in relation to unmeritorious appeals.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 This instrument commences on 29 July 2013 and is therefore laid in breach of the 21 days usually required by Parliament. The Amending Rules arise mainly as a result of the introduction of fees to be charged under the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013, (“the Fees Order”). We believe the Amending Rules to be sufficiently dependent on the Fees Order to require the Fees Order to have successfully passed through Parliament before the Amending Rules could be made.

- 3.2 When the Fees Order was laid the expectation was that the parliamentary process would have been completed with sufficient time to lay the Amending Rules without breaching the 21 day rule. However this has not been the case and we felt that a minor breach of the rule was preferable to pre-empting Parliament’s decision. The Amending Rules have been laid as soon as possible after the Fees Order completed its passage through Parliament. It is necessary for the amendments to come into force on the date they are, rather than delaying the commencement to meet the 21 day limit, so the Employment Appeal Tribunal (EAT) have the rules in place to be able to adequately deal with the introduction of fees.

4. **Legislative Context**

- 4.1 Section 30 of the Employment Tribunals Act 1996 (“the 1996 Act”) provides for rules to be made by the Lord Chancellor governing the practice and procedure to be followed by the EAT. For the first time fees will be charged under the

Employment Tribunals and Employment Appeal Tribunals Fees Order 2013, (“the Fees Order”) which will come into force on the same date as the amending rules (29 July). The Fees Order prescribes the fees to be paid by an appellant who appeals against a decision of the employment tribunals. The Amending Rules make changes which are consequential to the requirement to pay fees, as well as some minor procedural changes to the Principle Rules.

5. Territorial Extent and Application

5.1 This instrument applies to England, Wales and Scotland.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

7.1 The Fees Order requires that the appellant pays two fees when appealing a decision of the employment tribunals, one after an appeal is submitted and one before hearing (should the appeal reach that stage). A fee remission scheme is available for individuals who prove they are unable to pay. The Amending Rules enables the EAT to deal with appeals where there has been non-compliance with the Fees Order, providing for the EAT Registrar to strike out the appeal if a fee is not paid or a remission application has not been presented. The strike out provision will only be exercised when, after notice is given to the appellant that a fee is payable, such fee has not been paid or an application for remission has not been made. On application by the appellant the Registrar may re-instate the appeal and the Registrar’s subsequent decision on the re-instatement application can be appealed to an EAT judge.

7.2 The Amending Rules also provide the EAT with the power to order the respondent to reimburse fees paid by the appellant, if the appeal succeeds. This ensures that the party that ultimately causes the EAT to be used bears the cost of the fees, where a judge considers it appropriate to do so. Existing provisions in the Principle Rules means that this power is subject to notice being given to the parties with the opportunity to make written or oral representations.

7.3 The Amending Rules also make four changes designed to provide the EAT with greater flexibility in managing the very small number of straightforwardly unmeritorious appeals which can consume resources. The changes have been identified by the EAT judiciary as necessary and are designed to bring the EAT in line with the new employment tribunal rules as well as the existing Civil Procedure Rules in England and Wales. In summary the changes are:

Power to strike out for failure to comply with directions

- 7.4 This provides an express strike out provision (where none currently exists) to strike out an appeal for a failure to comply with orders and directions. The parties must be given the opportunity to make representations before any strike out order can be made.

Removal of right to an oral renewal where an appeal or cross appeal is totally without merit

- 7.5 This enables the EAT judge or Registrar, when a decision has been made on the papers, to take no further action on an appeal or cross-appeal where it discloses no reasonable grounds or is an abuse of process, to also declare that the appeal or cross-appeal is totally without merit. In such circumstances a party will no longer have the right to request that decision (ie. that the appeal or cross-appeal discloses no reasonable grounds or is an abuse of process) to be reconsidered at an oral hearing before a judge (also known as oral renewal). The decision taken on the papers as to the appeal or cross-appeal having no reasonable grounds etc, is subject to a further appeal to the Court of Appeal / Court of Session in Scotland.

Removal of the automatic right for an appellant to serve a fresh notice of appeal or documents

- 7.6 This removes the automatic right for an appellant who has had his grounds of appeal rejected to have further time to submit fresh grounds of appeal. This removes the problems of endless loops where new appeals can be instigated irrespective of initial time limits. The equivalent provisions in respect of a respondents answer are being removed for the same reason. The Amending Rules do not affect a party's ability to bring a fresh notice of appeal or cross-appeal where they are still within initial time limits.

Removal of bar preventing a wasted costs order being made against an unpaid representative.

- 7.7 Currently, the EAT is unable to make a wasted costs order against an unpaid representative. While such orders against any representative are considered on very few occasions, this qualification requires the EAT to establish whether or not the representative was acting in pursuit of profit. The Amending Rules removes the bar and thereby the necessity of the EAT to examine the terms upon which a party may be represented.

- *Consolidation*

- 7.8 There are currently no plans to consolidate the rules. An informal consolidated text is kept on the Employment Appeal Tribunal website for the assistance of the public. That text will be revised to include these amendments when the Amending Rules come into effect at:

<http://www.justice.gov.uk/tribunals/employment-appeals>

8. Consultation outcome

- 8.1 A public consultation on the introduction of fees in ETs and the EAT ran from 14 December 2011 to 6 March 2012. A copy of the consultation paper entitled “*Charging Fees in Employment Tribunals and the Employment Appeal Tribunal*”, summary of responses, and the Government’s official response can be found at: <https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011>
- 8.2 The power to order reimbursement of fees paid was raised in the consultation. Of those who commented generally on the principle of reimbursement of fees, 75% were in favour of a discretionary power exercised by the judiciary. Those who opposed preferred, among other things, a presumption that the order would be made or for the order to be mandatory. After consideration, the Government has decided that the judiciary is best placed to make this decision given that they hear all the issues in the appeal.
- 8.3 The strike out and re-instatement provisions are consequential amendments required to allow the EAT to effectively deal with the new fees regime. Without the strike out provisions the EAT will be unable to deal with an appeal where a fee is not paid.
- 8.4 In respect of the other provisions informal consultation with the EAT User group has been undertaken, which was largely supportive of the amendments. The amendments seek only to give the EAT powers necessary to deal with unmeritorious appeals and largely reflect those already available in other civil jurisdictions in England and Wales.
- 8.5 The Lord President of the Court of Session has been consulted on the draft amendments under the requirements of the Employment Tribunal Act 1996. In addition the Senior President of Tribunals has also been consulted.

9. Guidance

- 9.1 The procedures that govern the Employment Appeal Tribunal are set out in a judicial Practice Direction which will be updated to explain the changes to rules and procedures in time for commencement. Separate guidance on fees due in the Employment Appeal Tribunal will be available to cover what fees are payable, methods by which payment can be made as well as how to apply for a fee remission (fee waiver). Details will be available by the commencement date at the following internet site:

<http://www.justice.gov.uk/tribunals/employment-appeals>

10. Impact

- 10.1 The impact on business, charities or voluntary bodies of the fee amendments is included in the Impact Assessment laid with the Fees Order.
- 10.2 The impact on the public sector of the fee amendments is included in the Impact Assessment laid with the Fees Order.
- 10.3 An Impact Assessment was attached to the Fees Order Explanatory Memorandum and is published on the website www.legislation.gov.uk.
- 10.4 No impact assessment has been carried out in relation to the other changes as the impacts are likely to be very small, given the low volume of appeals dealt with by the EAT annually (circa 2000) and because they only impact on a very small subset of appeals. The main impact is expected to be some savings to the EAT in terms of resources savings as unmeritorious appeals are dealt with more expeditiously.

11. Regulating small business

- 11.1 The legislation applies to small business.
- 11.2 The impact of the requirements on small firms employing up to 20 people will be minimal as businesses will only be subject to strike out if they choose to make an appeal and then fail to pay the fees when required to do so. In terms of the financial liability regarding the fees, where a small business brings the appeal they will be required to pay the fees, but if successful, it is expected the unsuccessful respondent will be ordered to reimburse the small business those fees. Where the small business is the respondent they may only be required to reimburse the fees where the appeal succeeds. This approach ensures that the party who seeks the appeal initially pays the fees, but that the party that ultimately caused the EAT to be used will ultimately bear the cost. Fee orders will be in addition to any other financial or non-financial awards ordered by the tribunal.
- 11.3 For the other amendments the impacts are likely to be negligible but will apply equally to all types of appellants or respondents.

12. Monitoring & review

- 12.1 The Government has committed to monitoring fee levels and the impact of the implementation of fees, so that the rule amendments and its impacts can be reviewed and amended as appropriate. We will monitor the impacts of these changes as part of the wider fees review and general ongoing reviews of the effectiveness of the EAT. We remain aware that the impact of any proposed policy changes from MoJ or other departments will need to be considered when conducting any review.

13. Contact

Ms Liz Catherall at the Ministry of Justice Tel: 020 3334 4406 or email: liz.catherall@justice.gsi.gov.uk can answer any queries regarding the instrument.