

**EXPLANATORY MEMORANDUM TO**

**THE EMPLOYMENT TRIBUNALS (CONSTITUTION AND RULES OF PROCEDURE) (EARLY CONCILIATION: EXEMPTIONS AND RULES OF PROCEDURE) (AMENDMENT) REGULATIONS 2020**

**2020 No. 1003**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

- 2.1 This instrument amends the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the “2013 Regulations”) and the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 (the “2014 Regulations”) to allow for improved, more proportionate case management of claims. It also intends to provide more flexibility over judicial resources by allowing legal officers to carry out delegated administrative judicial tasks, and for other court and tribunal judges to sit in the employment tribunal should the need arise.

**3. Matters of special interest to Parliament**

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

- 3.1 None.

*Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

**4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is Great Britain.  
4.2 The territorial application of this instrument is Great Britain.

**5. European Convention on Human Rights**

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

**6. Legislative Context**

- 6.1 The Employment Tribunals Rules of Procedure are made under the Employment Tribunals Act 1996 (1996 Act) and are set out in the 2013 Regulations.  
6.2 The Early Conciliation Rules of Procedure are set out in the 2014 Regulations.

- 6.3 Section 4(6B) of the 1996 Act allows employment tribunal procedure regulations to provide for a legal officer to do anything which may be done by an Employment Judge, subject to the limitation in section 4(6C) that a legal officer may not determine proceedings that haven't been withdrawn (unless the determination is by consent), or carry out a pre-hearing review.
- 6.4 Section 5D of the 1996 Act provides for 'Judicial Assistance' in the Employment Tribunal, to allow a 'relevant tribunal judge' or a 'relevant judge' to be able 'by virtue of his office to act' as a member of a panel of Employment Judges (s5D(1) & (2)(e)).

## **7. Policy background**

### *What is being done and why?*

- 7.1 The employment dispute resolution system faces significant pressures from the impact of both Covid-19 and an increase in employment tribunal claims following the abolition of fees in 2017. In addition to this case load, social distancing measures have affected the employment tribunals' ability to manage claims, adding further delays.
- 7.2 The impact of Covid-19 has also highlighted areas of the tribunal rules where there needs to be more flexibility to allow cases to be handled in a proportionate way.
- 7.3 The measures in this instrument are intended to reduce the administrative burden to the system and ensure that workers and businesses can resolve their disputes swiftly, rather than through costly litigation over technical procedural matters.
- 7.4 The changes to rules for early conciliation to allow correcting errors on the early conciliation form are aimed at addressing the current burdens for both users and the dispute resolution system.
- 7.5 The rule change to allow greater flexibility around accepting a claim where there is an error in relation to the claimant or respondent name at the employment tribunal stage is intended to help further the policy objective of enabling tribunals to focus on dispute resolution rather than have parties litigate over technical matters.
- 7.6 The rule changes will also allow tribunals more discretion over handling errors on the claim form relating to early conciliation form details, such as early conciliation certificate numbers (for example, mistyped reference numbers). This change aims to allow employment tribunals to handle errors more efficiently and avoid extra work. It could also reduce the risk of claims being time barred when re-submitted ensuring access to justice for prospective claimants.
- 7.7 This instrument amends the employment tribunal rules to widen the scope of the existing multiple claimant rule to allow two or more claimants to make their claim on the same form, if their claims give rise to related issues of fact or law or if it is otherwise reasonable for their claims to be made on the same form. It also amends the rules to allow a response form to include the response of more than one respondent or the response to more than one claim if the responses or the claims give rise to common or related issues of fact or law or if it is otherwise reasonable for the responses to be made on a single response form. This aims to reduce the administrative burden on the tribunal system and its users by eliminating the need to process separate forms for what is realistically one dispute. It would make the process less stressful and onerous for users, as well as reducing the delay.

- 7.8 This instrument changes the prescribed period for early conciliation from one calendar month to six weeks to remove the previous optional additional 14-day extension period. The intent is to reduce the delay to starting early conciliation discussions, allowing both parties to maximise the prescribed time and increasing the chances of being able to settle before a more time-consuming and costly employment tribunal. Combining the current one calendar month with the discretionary 14 day extension into a simple single period of 6 weeks is intended to make it easier for parties to understand the timing of the process, and capture cases close to settlement without the need to obtain explicit consent and would also preserve the ‘stop the clock’ effect on tribunal time limits.
- 7.9 To meet the challenges of a rising case load, it is essential that tribunals have the power to list claims in a way that provides certainty for parties while still allowing them the time and notice to prepare. Employment Appeal Tribunal case law suggests that the combined effect of current employment tribunal rules on initial consideration of a claim and fixing a preliminary hearing means that tribunals cannot arrange a hearing date before receipt of the response form, and the process of initial consideration which follows afterwards. This means that that it takes longer for cases to be listed, leading to delays for setting hearing dates. This limits the tribunal’s ability to respond to the increased number of claims and their work to resolve the relatively less complex claims entering the system.
- 7.10 This instrument allows employment tribunals to list cases for a hearing on receipt of the claim form to expedite listing for hearing dates. The intent is that changing the rules to allow automatic listing on receipt of a claim form will help ensure maximum flexibility for tribunals to list hearings as quickly as possible.
- 7.11 Under the current rules, employment tribunals can determine a claim (or parts of it) where no response has been received without a hearing. Even where there is no response to a tribunal claim there may be issues that need to be resolved through a preliminary hearing, for example, time limits or eligibility. This instrument addresses confusion over whether employment judges can issue a default judgment without a full hearing where a preliminary hearing has taken place by amending employment tribunal rules to allow a judgment without a hearing to be issued even when a preliminary hearing has taken place. This will allow for faster disposal of cases, reducing costs to parties and tribunals where a response has not been received.
- 7.12 The current rules on reconsideration of the rejection of a response seem to suggest that the same judge must deal with the reconsideration. This can cause practical difficulties, particularly if a fee-paid judge has made the original decision or the case is to be heard at a remote venue. This instrument allows greater flexibility over the reconsideration of a rejected response by clarifying that this can be done by any employment judge.
- 7.13 This instrument amends rules on witness orders to clarify that other parties should be notified in writing that the order has been made and the name of the person required to attend the hearing. This would mean the order itself did not have to be copied, reduce the administrative duplication, and reduce the risks arising from the address of the witness being made known to the other party.
- 7.14 This instrument amends the rules on what type of tribunal judgments are obliged to be kept on a public register to remove judgments for withdrawn and dismissed claims. These judgments often contain little useful information about the claim or its

circumstances and therefore have little use in providing information or insight that could be used to inform other cases. Recording these judgments carries an administrative cost and delays recording of more valuable judgments. Removing these judgments from the requirement to be entered in the Register is intended to address concerns expressed by parties about withdrawn claims being visible online, improve the quality of the judgment register, and significantly reduce the amount of administrative time that is required to enter the judgment on the Register. This would allow better use of staff time and enable a focus on higher priority work.

- 7.15 This instrument provides greater flexibility for employment tribunals to manage some of the technical challenges posed by online hearings by allowing for more discretion on handling instances where there may be difficulties with the visuals.
- 7.16 The current rules require witness statements to be made available to the public during the hearing. This is difficult during a remote hearing, in part due to the current limitations of the online platform for conducting hearings. This instrument provides greater flexibility to allow tribunals to direct that inspection of witness statements shall be allowed otherwise than during the hearing.
- 7.17 The legal officer role aims to enable judges to spend more time on dispute resolution and more complex case management decisions by reducing the time employment judges spend dealing with straightforward and routine administrative case management tasks. After consultation with the Employment Tribunal Presidents, the Senior President of Tribunals will be able to make Practice Directions to enable the delegation of some administrative functions to legal officers. This instrument sets out a list of functions that can be delegated to legal officers and states the timeframe for reconsideration of a decision made by a legal officer. This instrument will allow, with the appropriate senior judicial consents, relevant judges to act as Employment Judges to provide assistance to Employment Tribunals; and for judges appointed to one panel of Employment Judges to act as a member of the other panel (i.e. an Employment Judge appointed to England and Wales panel to act as a member of the Scotland panel and vice versa). It is an enabling provision that may help to bolster judicial capacity in the Employment Tribunals by deploying existing judges with employment law experience; supplementing the selection of salaried and fee-paid Employment Judges that will continue to be undertaken.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument does not relate to withdrawal from the European Union.

## **9. Consolidation**

- 9.1 None.

## **10. Consultation outcome**

- 10.1 The Minister invited views from a cross-selection of stakeholders representing business, unions, and employment lawyers over a three-week period.
- 10.2 Most respondents welcomed most of these changes as they address many of the criticisms about bureaucracy over process adding cost and distracting from the aim of dispute resolution.

## **11. Guidance**

- 11.1 Information on the new measures will be published on GOV.UK and the new details will be included in the user guidance available online. Details of the new measures will also be communicated to stakeholder groups through use of the national employment tribunal user groups.

## **12. Impact**

- 12.1 There is no, or no significant, impact on businesses, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the estimated familiarisation costs to business, and the ongoing costs and benefits to business from these reforms are expected to be well below the threshold of £5 million a year required for the production of a full impact assessment. The primary impact of these changes is to reduce unnecessary bureaucracy in providing access to justice through the employment tribunal system. Many of the changes are designed to make it easier for Acas and HMCTS to process claims and help progress them more quickly (which would help parties to the case in lessening the emotional burden of having an unfinished claim to deal with). There is expected to be some small impact in reducing the number of employment tribunal claims that are rejected to minor administrative errors, which might add a cost to business of defending the claim of slightly under £0.2m a year. Potentially the move to case workers to help move claims forward by dealing with administrative decisions could lead to additional costs of around £0.1m a year from additional requests for reconsideration of these decisions. There is also a likely small benefit of under £0.1m to businesses from a reduced requirement to have final hearings for default judgment cases.

## **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses.

## **14. Monitoring & review**

- 14.1 The Minister for Small Business, Consumers and Labour Markets has made the following statement: “Having had regard to sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 and the Statutory Review Guidance for Departments published under section 31(3) of that Act, I have decided that it is not appropriate to make provision for review in this instrument. The instrument is concerned solely with the amendment of secondary legislation and as such falls outside the scope of the government’s policy objectives regarding provision for review.”

## **15. Contact**

- 15.1 Richard Boyd at the Department for Business, Energy and Industrial Strategy, telephone: 0207 215 0912 or email: richard.boyd@beis.gov.uk, can be contacted with any queries regarding the instrument.
- 15.2 Emma Waite at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Paul Scully MP at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.