

ESSEX COURT CHAMBERS
BARRISTERS

POST-LOCKDOWN LABOUR LAW LITIGATION ISSUES

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The Government's Plan to Rebuild

Working Safely During Coronavirus

"Covid Security"

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- **Section 2(1) Health and Safety At work Act 1974**
 - *“It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees”.*

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- Management of Health and Safety at Work Regulations 1999
 - Workplace (Health, Safety and Welfare) Regulations 1992
 - Personal Protective Equipment at Work Regulations 1992
 - Control of Substance Hazardous to Health Regulations 2002

HEALTH & SAFETY RIGHTS (DOMESTIC)

S.44(d) and (e) and S.100 (d) and (e) Employment Rights Act 1996 give protection where:

- *“in circumstances of danger which the employee reasonably believed to be serious and imminent and which they could not reasonably have been expected to avert, they left (or proposed to leave) or (while the danger persisted) refused to return to their place of work or any dangerous part of their place of work, or*
- *in circumstances of danger which the employee reasonably believed to be serious and imminent, they took (or proposed to take) appropriate steps to protect themselves or other persons from the danger.”*

HEALTH & SAFETY RIGHTS (EUROPEAN)

- Article 8(4) of **Directive** 89/391/EEC :
- *“Workers who, in the event of **serious, imminent and unavoidable danger**, leave their workstation and/or a dangerous area may not be placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national laws and/or practices.”*
- Article 31(1) of the **Charter of Fundamental Rights of the European Union** also gives workers the right to respect for health and safety. The Charter has the same legal status as the Treaties.

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- Workers not protected under H&S legislation
 - Workers are protected from detriment and dismissal if they blow the whistle: S.47B and S.103A ERA
 - Raising a concern about health and safety is an ingredient of a protected disclosure

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- ACAS
 - Consultation
 - Risk Assessment
 - What are the risks of people working together
 - Can the risks be avoided?

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- Implement systems to reduce risks:
 - (1) Control of infected people
 - (2) Control of aerosol infection
 - (3) Control of contact infection

WHAT IS GOOD PRACTICE?

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- Social distancing
 - Extra care for vulnerable groups
 - Remote meetings
 - Train managers on spotting symptoms
 - Cleanliness
 - Communications with employees
 - Follow Government Guidance

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- Furlough scheme extended until October
 - ...

Guidance documents:

- [Joint Presidential Guidance on COVID-19](#) (18 March 2020)
 - [Direction from the Presidents of the ETs](#) (19 March 2020 - updated 24 March 2020)
 - [FAQs](#) (3 April 2020 - updated 30 April 2020)
 - [Help for Users document](#) (15 April 2020)
- } Legal status?

High Court:

- PD51Y; PD51ZA §4: COVID-19 impact on
(1) extension of time apps; (2) adjournments; (3) CPR 3.9 relief
- [Listing priorities](#) (24 April 2020) includes post-termination injunctions
- <https://essexcourt.com/keep-calm-and-carry-on-how-english-civil-courts-have-adapted-to-lockdown/>

EAT:

- EAT: [“Help for Users”](#) (15 April 2020);
- [Hearing arrangements from 16 April 2020](#): remote hearings in a “limited number” of appeals
- [Provisional arrangements](#) doc (25 March 2020)

CURRENT STATE OF PLAY IN THE EMPLOYMENT TRIBUNAL

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Direction (updated 24 March 2020):

- All *in person* hearings listed to commence on or before 26 June 2020 converted to a CMH, to take place on the first day of the hearing.
- Hearings listed to commence on or after 29 June 2020 will remain listed.

CURRENT STATE OF PLAY IN THE EMPLOYMENT TRIBUNAL

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Review of direction:

"This Direction will be subject to ongoing review and in particular will be reviewed on 29th April 2020 and 29th May 2020 to take into account the circumstances as they then stand in connection with the Covid-19 pandemic"

Another review highly likely?

COMPLIANCE WITH CASE MANAGEMENT ORDERS

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FAQs – Question (3):

Hearings listed on or before 26 June 2020:

- Order made **before** 23 March 2020: no compliance expected
- Order made **on or after** 23 March 2020: compliance expected

Hearings listed on or after 29 June 2020:

- Compliance expected

Non-attendance

- Rule 47 – Tribunal may dismiss claim or proceed in the absence of a party

“the rule does not impose on Employment Tribunals a duty of their own motion to investigate [...] or [...] to be satisfied that, on the merits, the respondent to a case has established a good defence to the claim of the absent applicant.”

Roberts v Skelmersdale College [2004] IRLR 69, [15]

Non-attendance

- Presidential Guidance on COVID-19, [20]:

“Any party who is not able to attend for Covid-19 related reasons, and who does not wish either of these steps to be taken, should do all they can to inform the Tribunal Office of the reason for nonattendance in advance of the hearing so that this information is available to the Employment Judge who is to hear the case”

- Restraint during case management hearings

Postponement applications

- Rule 30A(1): *“as soon as possible after the need for a postponement becomes known”*.
- Note further hurdles where fewer than 7 days before hearing or third postponement.
- ‘exceptional circumstances’ – can include COVID-19 (see Rule 30(4)(b))

Postponement applications - medical reasons

- Medical evidence: inability to attend is genuine, and applicant bears the burden of proof (*Teinaz v Wandsworth* [2002] IRLR 721, [21])
- Presidential Guidance on Postponements:
 - All medical certificates and supporting medical evidence
 - An explanation of the nature of the health condition concerned.
 - A statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease.

Postponement applications - medical reasons

“The Presidents recognise that, with the current pressures on the National Health Service and GP surgeries, it may not be possible to obtain this sort of evidence quickly. In that case, do not delay; please send your email to the tribunal with as much information as you can currently provide. It would be helpful if you could also say when you think you may be well enough to attend a hearing. A judge will then consider the position as soon as circumstances allow.”

FAQs, Question 13

Postponement applications - general

Presidential Guidance on COVID-19, [18]:

- Provide “*whatever evidence is available*” to show that there is a valid COVID-19 related reason for the application.
- Set out any steps taken in an effort to avoid a postponement being necessary

NON-COMPLIANCE AND NON-ATTENDANCE

Non-Compliance

Rule 6 ET Rules 2013:

Failure to comply with Orders of the Tribunal does not render the proceedings or any step taken void. Possible consequences:

- Waiving/varying requirement
- Striking out
- Barring participation in the proceedings
- Costs

COVID-19 AND THE ET: GENERAL POINTS

Extension of time limits?

FAQ Question (18) – ET1s

- Notes the possibility, but no definitive guidance
- (campaigns to extend time limits during the pandemic, and Law Commission report)

FAQ Question (19) – ET3s:

- Recognises difficulties with HR, etc
- Not appropriate to extend the 28-day deadline in Rule 16(1)
- Invite ‘holding’ ET3 responses.
- If late, send ET3s with retroactive extension of time application

COVID-19 AND THE ET: GENERAL POINTS

General points of good order

- Mark applications with “urgent” where genuinely urgent (FAQ, Questions 11, 13)
- Applications for COVID-19 related reasons expected to provide all evidence which shows or tends to show that the reasons put forward is in fact COVID-19 related (Presidential Guidance on COVID-19, [18])
- Communication should be made electronically (Presidential Guidance on COVID-19, [19])

THANK YOU

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- Questions?
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- Feedback form