In Osborn, Lord Reed stated that ‘justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions’. Fairness ‘depends on the circumstances’ and it is ‘impossible to lay down rules of universal application’ (para 80). This article considers law and practice on procedural adjustments to ensure fairness in the employment tribunal.

Guidance on procedural adjustments
The Equal Treatment Bench Book 2013 (ETBB) states: ‘Courts and tribunals are expected to adapt normal trial procedure to facilitate the effective participation of witnesses, defendants and litigants: giving effect to s.20 of the Equality Act 2010 by making reasonable adjustments to remove barriers for people with disabilities’ (page 46).

In Fraser, Cox LJ noted that the ETBB ‘provides helpful information for judges about the problems experienced by [litigants with mental disabilities] in accessing the courts or tribunals or participating in the proceedings’ (para 1). The ETBB’s non-binding ‘practical guidance’ (J W Rackham) reflects ‘good practice’ (Butler & Wilson).

The ETBB has many examples of procedural adjustments as applied on particular cases including:

• allocating a female judge and counsel to a trial with a witness who refused to speak to a man about the alleged offence;
• allowing a defendant with autism to have quiet, calming objects to help him to pay attention;
• agreeing that a defendant with mental health issues be given brief pauses during cross examination to manage his emotional state and remain calm enough to respond to questions.

The employment tribunal has a very wide discretion to make procedural adjustments since the ‘overriding objective’ of the tribunal’s procedural rules is to ‘enable employment tribunals to deal with cases fairly and justly’. ‘Dealing with a case fairly and justly includes, so far as practicable … ensuring that the parties are on an equal footing’ and ‘avoiding unnecessary formality and seeking flexibility in the proceedings’ (Rule 2, Schedule 1 The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013).

In addition to the overriding objective, rule 41 emphasises the need to avoid undue formality and that the tribunal is not bound by court rules about the admissibility of evidence: ‘The tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.’

Employment law practitioners will be aware that the tribunal can and does adjust procedures to remove barriers to effective participation of witnesses and parties at oral hearings.

Determination of procedural adjustments
How does the tribunal determine which procedural adjustments are fair in any particular case? The short answer is by holding early case management discussions between the parties and making directions for procedural adjustments at a case management preliminary hearing.

Elsewhere, in the criminal and family courts, such hearings concerned with procedural adjustments are known as ‘ground rules hearings’.
Listening without prejudice? Procedural adjustments in the employment tribunal

‘the “ground rules approach” may be sensible and necessary if a party or witness is fearful or distressed about appearing at the tribunal’

opportunity for discussions and, where necessary, directions for procedural adjustments.

The ‘ground rules’ hearing approach, devised and researched by the first author (Cooper, 2014 and Cooper, Backen & Marchant, 2015) is well established in criminal courts and has been written into the Criminal Procedure Rules (Crim PR 3.9(3)). The Vice President of the Court of Appeal Criminal Division, Hallett LJ, said in Lubemba: ‘We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances. If there are any doubts on how to proceed, guidance should be sought from those who have the responsibility for looking after the witness and or an expert’ (para 42).

‘Vulnerable’ witnesses in criminal proceedings are those who are under 18 or adults with physical or mental incapacity who are eligible for assistance when giving evidence (s.16 Youth Justice and Criminal Evidence Act 1999).

A ‘ground rules hearing’ approach has been endorsed in the EAT. In J W Rackham, the claimant had Asperger’s Syndrome (an autism spectrum condition) and anxiety ‘which could be severe at times’ (para 3). The EAT said: ‘We do not think it could sensibly be disputed that a tribunal has a duty as an organ of the state, as a public body, to make reasonable adjustments to accommodate the disabilities of claimants’ (para 32).

The issue in this case was not whether the tribunal had a duty to make adjustments but whether the adjustments that were made were reasonable. The EAT found that the tribunal had been aware of the Equal Treatment Bench Book, had been proactive in considering adjustments and reasonable adjustments had been made. The EAT then commented on the value of ground rules hearings: ‘[A ground rules hearing to direct adjustments at the hearing] may not be possible if the question of disability is seriously in dispute between the parties, but where it is not it is very often likely to be of advantage … We should add that although the Tribunal in this case did not call what it did a preliminary ground rules hearing, it effectively held one’ (para 60).

The ‘ground rules approach’ may also be sensible and necessary if a party or witness feels intimidated, ie fearful or distressed about appearing at the tribunal. In Duffy, an ‘unusual situation arose as a result of the claimant’s decision not to attend to give oral evidence, because she said she was scared of attending a hearing and being subjected to cross examination by the appellant in person. She therefore wanted the [tribunal] to consider her written evidence’ (para 38). Mummery LJ, giving judgment, came to the conclusion that ‘the [tribunal] made a procedural error in not first holding a pre-trial review for directions to consider the options available under the ET Rules for the conduct of a fair and just substantive hearing in the light of the claimant’s resolve not to attend to give oral evidence’ (para 41).

In Galo, the Northern Ireland Court of Appeal sent a case back to the employment tribunal for rehearing because it had not been procedurally fair; no adjustments had been made for the claimant’s Asperger’s Syndrome and mental health issues and there appeared to be no consideration by the tribunal of the Equal Treatment Bench Book. Noting that an ‘early “ground rules hearing” is indicated in the ETBB at Chapter 5’, Gillen LJ gave examples of the matters which an employment tribunal may consider at a ground rules hearing when a person is ‘vulnerable’:

• ‘The approach to questioning of the claimant and to the method of cross-examination by him/her. Adaptions to questioning may be necessary to facilitate the evidence of a vulnerable person.

• How questioning is to be controlled by the tribunal.

• The manner, tenor, tone, language and duration of questioning appropriate to the witness’s problems.

• Whether it is necessary for the tribunal to obtain an expert report to identify what steps are required in order to ensure a fair procedure tailored to the needs of the particular applicant.

• The applicant under a disability, if a personal litigant, must have the procedures of the court fully explained to him and advised as to the availability of pro bono assistance/ McKenzie friends/voluntary sector help available.

• Recognition must be given to the possibility that those with learning disabilities need extra time even if represented to ensure that matters are carefully understood by them.

• Great care should be taken with the language and vocabulary that is utilised to ensure that the directions given at the ground rules hearing are being fully understood.

• As happened in the Rackham case, consideration should be given to the need for respondent’s counsel to offer cross-examination and questions in writing to assist the claimant with the claimant being allowed some time to consult, if represented, with his counsel. These were deemed “reasonable adjustments”.'
• The tribunal must keep these adjustments needed under review’ (para 53(7)).

Procedural adjustments and resources

Requiring advocates to use simple language and a neutral tone will cost nothing. However, others adjustments are not cost-neutral. The Youth Justice and Criminal Evidence Act 1999 created ‘special measures’ for vulnerable and intimidated witnesses in criminal cases. These include:
• screening the witness;
• giving evidence via TV link (accompanied by a supporter if necessary);
• giving evidence in private (the public gallery is cleared);
• video recording evidence in chief, cross examination and re-examination;
• providing an intermediary and/or communication aids to facilitate communication.

The Government is ‘committed to making sure that vulnerable and intimidated victims and witnesses get the support they need and have the confidence to come forward’ and is rolling out recorded pre-trial cross-examination (the most recent special measure to be implemented) in the Crown Courts from next year. There is no equivalent commitment in the employment tribunal.

Conclusion

The employment tribunal is well versed in being flexible and avoiding undue formality. In an appropriate case the tribunal could direct that, for example, the oral evidence of a person suffering from extreme anxiety be given from behind a screen. An unwell person could give evidence via a remote TV link or an intimidated person could have their oral evidence (including cross-examination) pre-recorded and played at the hearing. The use of electronic communication is specifically supported by Rule 46: ‘A hearing may be conducted, in whole or in part, by use of electronic communication (including by telephone) provided that the tribunal considers that it would be just and equitable to do so and provided that the parties and members of the public attending the hearing are able to hear what the Tribunal hears and see any witness as seen by the tribunal’ (Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013).

However, adjustments such as pre-recording evidence or using an intermediary to facilitate communication with a vulnerable person give rise to the question: who will pay? It may be that the most innovative adjustments are theoretically possible but as yet practically out of reach in most cases. What is clear from recent cases is the importance of a ‘ground rules hearing’ in approach, if not by name. For an employment tribunal to do otherwise risks an appeal to the EAT and beyond.

Calling all Guildford employment lawyers

Could you spare a Wednesday evening once every eight weeks or so to help members of our community and provide valuable work experience to law students? If so, the University of Law in Guildford would love to hear from you. The advice you give is covered by the university’s insurance and we take care to avoid any conflicts of interest. Our existing volunteers enjoy meeting our students, networking with other lawyers and perhaps looking at problems from the other side of the fence.

If you would like to receive more information about the Guildford Employment Rights Advice Line Direct, please email liz.burroughs@law.ac.uk or call 01483 216964 to speak to Pro Bono Administrator Liz Burroughs.