Hearings by use of electronic communication: What can be achieved within the 2013 ET Rules?

Updated to reflect the 8 October 2020 changes to the rules

Andrew Allen QC, *Outer Temple Chambers*

This article is primarily focused on the practical issues faced by Employment Judges in considering, within the parameters of the 2013 ET Rules, whether to list hearings to be conducted by electronic communications. It does not address the question of whether, in each individual case and by reference to each witness, the fairness of the proceedings is unacceptably compromised if the tribunal's ability to assess the credibility of the person giving evidence is diminished by the inability of the tribunal to see the witness give evidence in person. There are undoubtedly cases which are more suitable and cases which are less suitable for hearing by electronic communication.

The article had been updated on 9 October 2020 to reflect the 8 October 2020 changes to the rules[1]

- **Rule 44 has been amended to provide that, where a hearing is conducted by electronic communication, inspection of witness statements may be otherwise than during the course of a hearing;**
- **Rule 46 has been amended to provide for parties or member of the public attending the hearing to see any witness as seen by the Tribunal so far as practicable.**

The Presidential Practice Direction[2] and Guidance[3] on remote hearings and open justice have been updated since the original version of this article on 8 April 2020, most recently on 14 September 2020, but have not yet been updated to reflect the amendments to the rules.

CONTENTS

[1] Pursuant to the Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020, SI 2020/1003

[2] https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PD-Remote-Hearings-and-Open-Justice.pdf

[3] https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PG-Remote-and-In-Person-Hearings-1.pdf

Types of Hearing in the ET

In the ET, we need to distinguish between 3 main types of hearing:

(a) Case management preliminary hearings (sometimes called 'closed' preliminary hearings);
(b) Preliminary hearings at which a preliminary issue (such as jurisdiction or strike out) is to be determined (sometimes called 'open' preliminary hearings or 'substantive issue' preliminary hearings); and
(c) Final hearings.

Case management preliminary hearings already commonly take place by telephone. This is possible because they usually can take place *in private* pursuant to Rule 56 with reference to Rule 53(1)(a). Deposit orders can also be considered in private, as can judicial mediation and other forms of alternative dispute resolution. The 14 September ET Presidential Guidance on remote hearings and open justice strongly encourages the consideration of electronic means for such hearings during the current crisis.

Substantive issue preliminary hearings at which a preliminary issue will be determined or at which a claim or response may be struck out must take place *in public* pursuant to Rule 56 with reference to Rule 53(1)(b) and (c). This is subject to rules 50 and 94. Rule 50 covers exceptional arrangements for privacy of any aspect of proceedings. Rule 94 covers national security proceedings.

Final hearings are covered by Rule 59 which provides that "Any final hearing shall be in public, subject to rules 50 and 94."

The 14 September 2020 ET Presidential Guidance on remote hearings and open justice at paragraph 3, 4 and 13 states:

> 3. Remote participation in a hearing may, in some cases, enhance access to justice. As a matter of principle, however, where a case before the Employment Tribunals involves disputed evidence and there is a need for parties and their witnesses to be asked questions, a hearing held in person is usually the best way to experience the delivery of justice.
>
> 4. The consequence of the challenges presented by the Covid-19 pandemic is that many cases will experience significant delay in being heard. To minimise that delay, and where it is consistent with fairness and justice to do so, there is a temporary need for the Employment Tribunals to conduct remote hearings in greater numbers, and to do so in respect of cases that, in ordinary circumstances, would have been conducted on a face-to-face basis.
>
> . . .
>
> 13. Many preliminary hearings arranged under rule 53(1)(a) to deal with case management already take place by telephone or other audio platform; indeed, several Employment Tribunal regions in England and Wales list such hearings by default in that format. However, before the Covid-19 pandemic, it was rare for other sorts of hearing to be conducted in that manner; preliminary hearings of the type described at rules 53(1)(b) to 53(1)(e), final hearings of the type described at rule 57 and other hearings contemplated by the Rules all tended to be held in person. As noted at paragraph 4 above, there is currently an increased need to conduct all types of hearing on a wholly or partly remote basis, where consistent with fairness and justice to do so.

Three questions arise – (1) what does 'in public' mean; (2) if a hearing cannot be 'in public' then can an ET continue with an open preliminary hearing or final hearing within the current rules; and (3) if so, what considerations should be taken into account to best comply with the principles of open justice?

1. What does 'in public' mean?

Rule 46

In the context of hearings by electronic means, Rule 46 as amended now states (amendment in bold):

> **46 Hearings by electronic communication**
> 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, **so far as practicable,** see any witness as seen by the Tribunal.

This rule requires *both* that the ET considers that it would be just and equitable to hold a hearing by use of electronic communication *and* that members of the public *attending the hearing* can hear *and so far as practicable see any witness as seen by the Tribunal*. What must be heard differs from what must be seen.

'in part'
An increasing number of final hearings in the ET are now conducted as 'partly remote' or 'hybrid' which is described in the Practice Direction as being "where at least one participant is physically present in an Employment Tribunal venue and one or more of the other participants joins remotely by using a telephone or by using a personal computer, laptop, tablet or smartphone to log on to an audio or audio-visual platform".

'*attending the hearing*'
This would not appear to permit an ET to say that it had complied with the rules if the proceedings were not broadcast or viewable live but rather recorded and made available at a later date to members of the public. Recording would however be one factor to take into account in relation to proportionality if a decision was taken under Rule 50 to hold a hearing in a way which compromised public access.

'*and so far as practicable see any witness as seen by the Tribunal*'
If the ET does not see the witness (e.g. because that witness is on the telephone) then there is no requirement that the member of the public sees the witness. Therefore an open telephone hearing, which in some way broadcast or permitted live feed of the audio of the proceedings to the public, may be sufficient to comply with this rule. The BT MeetMe service most commonly used by the ET, which permits observers to listen in on a toll free number, meets this criteria. It does however have a number of potential limitations, not least being that there is no way for the judge to mute or exclude a disruptive observer.

A hearing which took place by Skype, Teams, Zoom, CVP or similar video service which was in some way broadcast or viewable live also by video, would appear to meet the requirements of the rules. Until the recent amendment to the rules, it would not have been sufficient (without e.g. additional consideration of the matter under Rule 50) to hold a video hearing which only broadcast or permitted live feed of the audio. That may now be possible – as long as it is not practicable to provide video. Given the ubiquity of CVP in the ET system and the ease with which alternatives such as Zoom can be set up, a lack of practicability might arise as a result of a practical technical failure on the day rather than any deliberate attempt to e.g. hold a hybrid hearing with only audio feed available to the public.

'see any witness'
Strictly speaking the requirement to view the proceedings extends only so far as the giving of witness evidence. The wording of Rule 46 suggests that for a fully remote hearing, the public should *hear* everything heard by the tribunal and need only *see* any witness evidence (unless that is impracticable). The requirement that the public hear everything extends to the whole hearing. For a hybrid hearing where e.g. the parties and / or their representatives are in the tribunal room, which is in theory open to the public, the situation is less clear. Should the CVP equipment be switched on throughout the hearing – including e.g. the parts that involve discussions about such things as case management, witness orders, applications for additional documents to be added to the bundle and submissions? The safest approach and the one most in accordance with the open justice principle would be to do so but Rule 46 may not require this. Another question arises when the parties and tribunal members and any necessary witnesses physically present reach the maximum number of people permitted in the tribunal room under Covid-19 guidance or rules. In that situation, it appears even more necessary that *all* of the hearing is available by live feed.

Rule 44

Rule 44 as amended now states (amendment in bold):

> **44 Inspection of witness statements**
> Subject to rules 50 and 94, any witness statement which stands as evidence in chief shall be available for inspection during the course of the hearing by members of the public attending the hearing unless the Tribunal decides that all or any part of the statement is not to be admitted as evidence, in which case the statement or that part shall not be available for inspection. **Where a hearing is conducted by electronic communication under rule 46, inspection of the witness statement may be otherwise than during the course of a hearing.**

Note that prior to the amendment, this requirement was to make witness statements available *during the course of the hearing*. This would appear to be another barrier to the potential solution of recording hearings and making them available at a later date. It also raised a practical difficulty in relation to e.g. CVP hearings which are viewable live. The technology struggles to allow examination of witness statements during the

course of the hearing – although a 'share screen' option scrolling slowly through a document at reading speed might be a (clunky) solution. One possible solution was a return to the old practice of reading out witness statements (or at least having them read out) – although this would be onerous and time consuming for very lengthy witness statements.

In civil proceedings under the CPRs, the Supreme Court in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 held that the principle of open justice gives courts inherent jurisdiction to allow non-parties access to court documents and the Supreme Court set out guidance about the scope of CPR 5.4C(2). The guiding principle is the need for justice to be done in the open and that courts at all levels have an inherent jurisdiction to allow access in accordance with this open justice principle. Non-parties should be allowed access to all documents which have been placed before the court and referred to during the hearing, and these should not be limited to the documents which judges have been asked to read or have said that they have read, however a non-party applicant will need to explain why they are seeking access and how granting them access will advance the open justice principle, and the court will then carry out a fact-specific balancing exercise. As a result, non-parties will still not always get the access they are seeking.

ETs need a statutory power to allow anything similar (such as that contained in the amendment to Rule 44 at least in so far as this relates to witness statements). The existing January 2018 Presidential Guidance on general case management provides that an extra copy of each witness statement and the hearing bundle should be prepared and made available to members of the public attending an ET hearing. New Presidential Guidance is required to deal with the practicalities of the amendment to Rule 44 in relation to remote hearings. Should the default position still be that there should be an attempt to permit the public or press attending remotely to access witness statements during the hearing? If so, how should this be dealt with? How does a member of the public or press attending a hearing remotely request access to witness statements after the hearing? How would they view them at that stage? How long should ETs keep witness statements (which are not routinely kept on the ET file)? A footnote in the 18 September 2020 Presidential Practice Direction suggests that:

> "Some professional representatives may be able to assist by setting up a link to a website containing the witness statements, which are openly accessible (i.e. not password protected) on the day of the hearing, made available to members of the press and public on a read-only basis and subject to their agreement not to copy, publish or distribute. An alternative, with the consent of the parties, is to go beyond the terms of inspection for which rule 44 provides; for example, by sending electronic copies of witness statements to members of the press or public or by making them available for download."

Boundaries of 'in public'

Is a hearing 'in public' if the parties are at home on a video link but at least the EJ is in an open court (which may not necessarily have to be an ET – it could perhaps be a magistrates court or county court or other HMCTS building or 'Nightingale Court')? In the initial months of the pandemic after March 2020, this may have been particularly problematic, given that members of the public were instructed by the government to 'stay home' (and this could re-occur on a national or local level). Attendance as an observer at an ET is unlikely to be an acceptable reason to leave home. Attendance as a member of the press might however be acceptable. Therefore to class such an arrangement as being a hearing 'in public' may go some way to meet the requirements of the rules but does not overcome all the barriers.

Conclusion

Whilst some mitigating measure may be taken, the only way to allow 'hearings by electronic communication' to be 'in public' is (a) to 'broadcast' the hearing at the same time as the hearing; (b) for that broadcast to be by the same means (audio or video) as that available to the ET unless (in the case of the video only) it is not reasonably practicable to do so and (c) to (somehow) make an arrangement by which witness statements (or the content of those statements) be made available to members of the public attending – perhaps by having them read out or displayed – or failing that to make them available after the hearing.

2. If a hearing cannot be 'in public' then can an ET continue with an open preliminary hearing or final hearing within the current rules

Rule 41 and the Overriding Objective

Rule 41 states:

> The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective.

The overriding objective in Rule 2 states:

> The overriding objective of these 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 -
> (a) ensuring that the parties are on an equal footing;
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Given the EAT's comments in *BBC v Roden* [2015] ICR 985 and *Fallows and ors v News Group Newspapers Ltd* [2016] ICR 801, it appears that a decision to derogate from the principle of open justice is more than a mere case management decision and needs to be considered within the scope of the specific rules applicable to restrictions on public hearings.

Rule 50

Rule 50 permits restrictions on the public disclosure of any aspect of proceedings including that "an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private" (rule 50(3)(a)). It was clearly not written with the current circumstances in mind – however it may be of some use to an EJ confronted with this problem. Rule 50 states:

> **50 Privacy and restrictions on disclosure**
>
> (1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.
>
> (2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
>
> (3) Such orders may include -
> (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;
> (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;
> (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
> (d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.
>
> (4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.
>
> (5) Where an order is made under paragraph (3)(d) above
> (a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;
> (b) it shall specify the duration of the order;
> (c) the Tribunal shall ensure that a notice of the fact that such an order has been made in

relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and

(d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.

(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998.

Section 10A of the Employment Tribunals Act 1996 is a specific provision for hearing evidence which meets specific definitions of 'confidential information'. It is not helpful in the current circumstances.

The elements of Rule 50 which might be relevant to the current circumstances are where an ET considers that it is 'necessary in the interests of justice' or 'in order to protect the Convention rights of any person' to do so. There are competing aspects of the right to a fair trial in Article 6 of the European Convention on Human Rights which are worthy of exploration.

Article 6 ECHR

Article 6(1) states:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The right to a public hearing is not an absolute right. Another aspect to the right to a fair trial is that the hearing takes place 'within a reasonable time' – which may be a consideration if the alternative to a matter being heard by electronic means in the immediate future is its postponement for a long time. There is a specific exception 'in special circumstances where publicity would prejudice the interests of justice' – although that would appear to be directed towards the protection of witnesses (e.g. in rape cases or where a police informer is involved). The 'public order' exception appears to be the most likely category for any restriction imposed by necessity on the public nature of ET proceedings. The continuation of a justice system during the pandemic by whatever means available is arguably a necessary aspect of maintaining public order including the confidence of the public that their rights will be determined.

The Guide on Article 6 provided by the European Court of Human Rights[4] helpfully[5] references *Micallef v. Malta* and *RTBF v. Belgium* which establish that as well as determinations at a final hearing, the sort of determinations that would be made at a open preliminary hearing will also engage Article 6. It also states that any limitation applied will not be compatible with Article 6(1) if it does not pursue a "legitimate aim" and if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (*Ashingdane v. the United Kingdom*; *Fayed v. the United Kingdom*).[6]

In principle, litigants have a right to a public hearing because this protects them against the administration of justice in secret with no public scrutiny and therefore constitutes one of the means whereby confidence in the courts can be maintained, contributing to the achievement of the aim of a fair trial (*Malhous v. the Czech Republic*). While a public hearing constitutes a fundamental principle enshrined in Article 6(1), the obligation to hold such a hearing is not absolute (*De Tommaso v. Italy*).[7] The right can be waived where a party consents of his own free will in an unequivocal manner and where this does not run counter to any important public interest.[8]

There is clearly a legitimate aim in attempting to operate a justice system during a pandemic by the means available. The real question for EJs will be

[4] https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf
[5] at paras 53 to 56
[6] para 87
[7] para 370
[8] para 391

whether the manner in which a hearing by electronic means is organised will be considered a proportionate way of achieving that aim.

Open Justice

The HMCTS Guidance on telephone and video hearings during coronavirus outbreak states:[9]

> Open justice is a fundamental principle in our courts and tribunals system, and will continue to be so as we increase the use of audio and video technology. In considering the use of telephony and video technology, the judiciary will have regard to the principles of open justice, as they do now. As now, judges may determine that a hearing should be held in private if this is in the interests of justice. A range of measures will continue to support the principle of open justice:
>
> - Access to open hearings if/where a public gallery is available, or a third party may join the hearing remotely
> - Transcripts for hearings in those jurisdictions where they are available now. Any party or interested person is able request a transcript. Judges may direct that the transcript be made available at public expense where appropriate
> - With the permission of the judge, an audio recording of a hearing can be made available to be listened to in a court building
> - With the permission of the judge, in jurisdictions where this is already done, the notes of the hearing can be made available on request
> - Publication of the outcome of High Court and Court of Appeal hearings, orders or results
> - Publication of court and tribunals lists, in most instance online
> - Access to hearings and information to accredited media, such as the provision of listing and results information in Magistrates' Courts via email
>
> Requests from the media and others to observe a hearing remotely should be made to the court in advance to allow for inclusion during the hearing set-up. Please contact the court. This is not available for criminal jury trials in the Crown Court.
>
> **Media access to proceedings**
> We are committed to promoting media access to the work of courts and tribunals.
>
> For physical hearings, even when many of the participants join remotely, accredited media will continue to have access to dedicated press seats as reflected in current HMCTS media guidance although current arrangements will follow wider public health advice relating to social distancing.
>
> Where accredited journalists wish to report on proceedings remotely then they should put in a request to the relevant court as set out above. There have been some early examples where courts have enabled the media to have remote telephone and video access to hearings. This is not available for criminal jury trials.
>
> Special arrangements are being put in place for criminal jury trials in the Crown Court including the use of a second courtroom linked by closed circuit TV to enable the media and others to watch proceedings while maintaining social distancing.

Employment tribunals are mostly not (yet) equipped with the sort of audio and video equipment that would enable recordings or even transcripts of hearings but equipment permitting viewable access via CVP is now widespread.

However, anecdotally, many CVP arrangements are notified, even to the parties themselves very close to the start of the hearing (not infrequently on the evening before the hearing).

Storer v British Gas [2000] ICR 603

In *Storer*, an ET hearing had not been held in public as it had taken place in the regional chairman's office, due to lack of available room, and the presence of a coded security door lock meant that public access was precluded. The ET held that the Claimant's unfair dismissal claim had been brought out of time. The EAT held that the hearing was still in public as no member of the public had been prevented from attending, however the Court of Appeal, allowing the appeal, held that the requirement to sit in public was fundamental to the administration of justice, and, although there were exceptions in the case of ETs, the wording of the 1993 ET Regulations gave rise to an inference that a failure to do so on the part of ET meant that any decision reached was unlawful. An ET hearing conducted in a room protected by a coded security

[9] https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak last updated 30 June 2020

lock was not a hearing in public. Moreover, though no member of the public was actually prevented from entering the room, the real question was whether any member of the public would have been able to enter the room had they wished to do so.

In *R. (O'Connor) v Aldershot Magistrates Court* [2016] EWHC 2792 (Admin) it was held that the principle of open justice is such that where members of the public are unlawfully excluded from the proceedings, the exclusion means that any decisions taken under those conditions would also be invalid.

According to the IDS Handbook on ET Practice and Procedure, the *Storer* decision was distinguished by the EAT in *Redmond v Shortbros (Plant) Ltd* EAT 0542/04[10], where it held that the fact that a hearing was held in a locked room was not enough to render it in private. Although for security reasons entry and access for the public was only possible under supervision, there was a system in place whereby any member of the public who wished to attend could call the attention of a member of the tribunal staff by pressing a clearly advertised bell, and he or she would be given access to the hearing. It was therefore not possible to say that the hearing was not held in a place to which the public had access, and so it did not infringe the rule that hearings must be held in public.[11]

It might be argued that the wording of the 2013 ET Rules – Article 50 in particular – allows for a broader interpretation than the 1993 rules under consideration in *Storer*. However Mrs Justice Simler (as she then was) in *BBC v Roden 2015 ICR 985, EAT* (a case concerning a restricted reporting order under rule 50(3)(d)), considered that the principle of open justice is of such paramount importance that derogations 'can only be justified when strictly necessary as measured to secure the proper administration of justice'.

CPR 39.2

In the civil courts, the applicable rule is CPR 39.2[12] which states:

> **39.2— General rule—hearing to be in public**
> (1) The general rule is that a hearing is to be in public. A hearing may not be held in private, irrespective of the parties' consent, unless and to the extent that the court decides that it must be held in private, applying the provisions of paragraph (3).
>
> (2) In deciding whether to hold a hearing in private, the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected.
>
> (2A) The court shall take reasonable steps to ensure that all hearings are of an open and public character, save when a hearing is held in private.
>
> (3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice-
> (a) publicity would defeat the object of the hearing;
> (b) it involves matters relating to national security;
> (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
> (d) a private hearing is necessary to protect the interests of any child or protected party;
> (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;
> (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or
> (g) the court for any other reason considers this to be necessary to secure the proper administration of justice.
>
> (4) The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness.
>
> (5) Unless and to the extent that the court otherwise directs, where the court acts under paragraph (3) or (4), a copy of the court's order shall be published on the website of the Judiciary of England and Wales (which may be found at www.judiciary.uk). Any person who is not a party to the proceedings may apply to attend the hearing and make submissions, or apply to set aside or vary the order.

[10] I have been unable to find this decision
[11] para 13.79
[12] as amended from April 2019

CPR 39.2(3)(g) does appear to give greater latitude to the civil courts than the 2013 ET Rules allow to the ET. It is noteworthy that the parties' consent alone is insufficient reason to hold a hearing in private.

Application of Rule 50

Each case requires specific judicial consideration as to whether in that case it is necessary in the interests of justice and / or to protect the Convention rights of any person (e.g. to a hearing within a reasonable time) to place some restriction on the public nature of the hearing.

Rule 50(2) requires full weight to be given by the ET to the principle of open justice and to the Convention right to freedom of expression (including the freedom of the press to report on judicial proceedings). Rule 50(4) provides that any person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing. This suggests (a) that when a future listing by electronic means is to be discussed at a case management hearing, that is made clear prior to the case management hearing (this may have been achieved by the Presidential Direction of 19 March 2020 – as subsequently amended[13] which is now sent out with the notice of case management preliminary hearing) and (b) that that when a hearing is listed to be heard by electronic means in a manner that encroaches on the public nature of the hearing, the nature of that listing needs to be made known to the public in advance.

3. What considerations should be taken into account to best comply with the principles of open justice?

The 18 September 2020 Presidential Guidance states as follows:

> **Format of hearing – relevant factors**
>
> 16. Certain general factors influence the judicial decision on the format of the hearing because they relate to the *feasibility* of holding a remote hearing. Such factors will vary between Employment Tribunal regions in England and Wales, depending on their location and resources. They include:
>
> 16.1 The availability of enough space in safe, clean and risk-assessed venues, having regard to distancing measures required to ensure public safety;
>
> 16.2 Whether safe travel to the Employment Tribunal venue is possible, especially for those using public transport;
>
> 16.3 The availability of suitable hardware and software for use by the tribunal in the conduct of remote hearings; and
>
> 16.4 The availability of HMCTS staff to support remote hearings.
>
> 17. Other, more specific, factors will vary from case to case. They need not lead to an inevitable conclusion one way of the other, but they are for the tribunal to weigh in the balance when deciding the format of the hearing. They include:
>
> 17.1 The length of the delay that will likely result if the hearing of the case is to be held in person rather than remotely;
>
> 17.2 The personal circumstances, disability or vulnerability of any participant, including whether a litigation friend or interpreter is required. In some cases, they will mean that an in-person hearing (or a partly remote hearing with this participant in attendance at the venue) may be fairer because it allows for more effective participation. In other cases, for example because of clinical vulnerability or shielding, or because of the risk associated with using public transport to travel to the venue, remote participation may be fairer;
>
> 17.3 Whether the parties are legally represented, which may favour holding the hearing remotely;
>
> 17.4 The ability of any participant to engage meaningfully with a remote hearing, which includes access to and familiarity with the necessary technology; and
>
> 17.5 Whether the nature of the disputed evidence is such that fairness and justice require it to be evaluated by the tribunal in a face-to-face environment.
>
> 18. Further guidance and assistance can be found in the Judicial College document "Good practice for remote hearings", produced by the editors of the Equal Treatment Bench Book.[14]

[13] https://www.judiciary.uk/wp-content/uploads/2013/08/ET-Covid-19-Direction-Amendment-23.3.20.doc

[14] https://www.judiciary.uk/wp-content/uploads/2020/03/Good-Practice-for-Remote-Hearings-May-2020-1.pdf

To that list, I would add: whether the public (including the press) have been alerted sufficiently in advance to the fact that the issue of the format of the hearing is being determined at a case management hearing and have been given the opportunity to make representations and / or whether the listing of the hearing by electronic means has been clearly indicated to the public (and the press) in sufficient time for remote attendance to be arranged and / or for any representations to be made, including under Rule 50(4).

Reasons

If the issue is not disputed, Rule 62 does not require an ET to give reasons for a decision to hold a hearing by electronic means, however it is suggested that it would be good practice to give reasons for any decision to hold a hearing by electronic means where that placed any potential restriction on the open justice principle.

ANDREW ALLEN QC
Outer Temple Chambers

8 April 2020
updated 9 October 2020

Postscript: The material in this paper is for general information only, and is not intended to provide legal advice.

HMCTS have a guidance page on telephone and video hearings: https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak

HMCTS also have a page relating to courts and tribunals planning and preparation which contains an updated list of the status of many courts and tribunals: https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation

The Presidents of the ETs have provided Practice Directions and Presidential Guidance and FAQs: https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/