



**EMPLOYMENT TRIBUNALS
(CONSTITUTION AND RULES OF
PROCEDURE) REGULATIONS
2004**

Guidance on the
Regulations and Rules

2004

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INTRODUCTION

1. The draft Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 ('the draft Regulations') will be laid before Parliament under the Employment Tribunals Act 1996 ("the Act"). Subject to Parliamentary approval, they are due to come into effect on 1 October 2004.
2. These guidance notes relate to the draft Regulations. They have been prepared by the Department of Trade and Industry in order to assist the reader in understanding the Regulations. They do not purport to be a complete or definitive statement of the law.
3. The primary purpose of the changes that have been made in these new Regulations, and the associated Rules of Procedure set out in the schedules to them, is to implement the tribunal reform provisions of the Act as inserted by the Employment Act 2002. They also implement some recommendations of the Employment Tribunal System Taskforce. In addition, the opportunity has been taken to improve the structure of the legislation and recast it in more "plain English" terms to improve its user-friendliness.

Background

4. Section 13 of the Act gives the Secretary of State power by regulations to authorise tribunals to make awards of costs directly against a party's representative, where warranted by virtue of the way the representative has conducted the proceedings. The draft Regulations include safeguards to allow the representative the opportunity to put his/her case on any proposed award. They also define "representative" so as to exclude those not acting in pursuit of profit. The new section 13A of the Act empowers the Secretary of State by regulations to authorise tribunals to order that one party make a payment to the other in respect of the time spent in preparing the other party's case. Under this provision, such awards may be made only in the same circumstances as costs awards have been made in the past; that is, where the party's case is misconceived, or they or their representative have behaved vexatiously, abusively, disruptively or otherwise unreasonably. This new section (13A) provides that the regulations on costs and preparation time must include a provision that the tribunal may not make an award of both costs and preparation time in favour of the same person in the same proceedings. There must also be a provision authorising a tribunal to take into account a party's ability to pay when making a costs or preparation time award.
5. Section 34 of the Act as amended aligns the provisions in the Employment Appeal Tribunal with the power to make costs rules for the employment tribunals; there is provision for wasted costs orders against representatives and specific provision for taxation or detailed assessment of costs. The Act will allow new Employment Appeal Tribunal Rules to disallow the costs or expenses of a representative on account of that representative's own conduct of the proceedings. New Employment Appeal Tribunal rules will be placed before Parliament in due course, with the intention that they should also come into effect on 1 October 2004.

6. Section 7(3)(f)(ia) of the Act provides a power for the draft Regulations to introduce a fixed period of Acas conciliation. The intention behind this is to focus parties' minds on the desirability of reaching an early settlement, rather than one at the last minute. It allows for regulations to be made enabling the postponement of the fixing of a time and place for a hearing in order for the proceedings to be settled through conciliation. The draft Regulations set out where the fixed period will apply and how long it will be in specified cases, and provide for it to be extended in one category of cases, where the conciliator believes a settlement in a short additional timeframe is likely. Section 24 also provides that Acas's duty to conciliate becomes a power after the fixed period has ended.

7. Section 7(3ZA) of the 1996 Act provides a power for the Tribunal Rules to delegate to the Secretary of State the authority to prescribe new forms, which will be required to be used either to institute proceedings in an employment tribunal, or to respond to such proceedings. The intention of the provision is that, through the use of the new mandatory forms, more information will be provided to the tribunal, and to the other party, at an earlier stage, facilitating the efficient handling of the case.

8. Section 7A of the Act gives a power to amend the Regulations so that Employment Tribunal Presidents can issue practice directions. It also contains provisions about securing compliance with practice directions and their publication. The objective here is to ensure that the tribunals adopt a consistent approach to procedural issues and to the interpretation of their powers under the Rules.

9. Section 9 of the Act clarifies that the Rules may permit tribunals to strike out a case at a pre-hearing review, on the same grounds as it may do so at other stages of proceedings. Such grounds include when the originating application or response (or anything in it) is scandalous, misconceived or vexatious. The aim of this section is to improve the efficiency of case handling and restrict the amount of time that tribunals spend on considering cases that are obviously misconceived. The implication that pre-hearing reviews are "preliminary" hearings and therefore necessarily followed by a full hearing was removed from s.9 by the Employment Act 2002.

10. These draft Regulations apply to England, Wales and Scotland only.

THE REGULATIONS

Regulation 1 - Citation and commencement

1. Regulation 1 provides for the Regulations and accompanying Schedules containing Rules of Procedure (abbreviated to "Rules" below) to come into force on 1 October 2004. This is the date that all parts of the Government's new dispute resolution package are intended to come into force. Other components of the package are new workplace dispute resolution regulations, a revised ACAS Code of Practice on Disciplinary and Grievance Procedures and a set of amended Employment Appeal Tribunal Rules. New employment tribunal forms are also being introduced, though it will not be mandatory to use these until April 2005.

2. There are five Schedules accompanying the draft Regulations. Schedule 1 sets out the “principal” employment tribunal Rules of Procedure. The other four schedules cover national security, levy appeals, appeals against health and safety improvement and prohibition notices, and appeals against non-discrimination notices.

3. Regulation 1(3) revokes the two previous sets of employment tribunal Regulations and Rules of Procedure 2001 (for England & Wales, and for Scotland). They are replaced by a single set of GB-wide draft Regulations covering both jurisdictions. The draft Regulations do not cover Northern Ireland.

Regulation 2 - Interpretation

4. Regulation 2 defines various terms that are used throughout the Regulations and in the accompanying Schedules described in paragraph 3 above.

Regulation 3 - Overriding objective

5. This regulation sets out the overriding objective of the Regulations and Rules, which is to enable tribunals and chairmen to deal with cases justly. This is defined as ensuring that, as far as is practicable, parties to cases are on an equal footing; cases should be dealt with expeditiously and fairly and in ways which are proportionate to the complexity of the issues. Dealing with cases justly also means, as far as possible, saving expense. Regulation 3 charges tribunals or chairmen to give effect to the overriding objective when exercising power under the Regulations and/or Rules, or when interpreting them. In turn, parties to cases are also expected to assist the tribunal or chairmen to further the overriding objective of the Regulations, as outlined above.

Regulation 4 - President of the Employment Tribunals

6. This regulation is concerned with the appointment and requisite qualifications of the two Presidents of the Employment Tribunals (for England & Wales, and for Scotland). It also sets out the procedure for a President’s resignation, the circumstances in which a President’s appointment can be revoked, and the exercise of the President’s functions where there is a vacancy or where the President is unable to exercise those functions himself or herself. In such circumstances, the functions of the President are to be discharged by a person nominated by the appointing office holder.

Regulation 5 - Establishment of employment tribunals

7. Regulation 5 gives to the President in England & Wales, and the President in Scotland, the responsibility to decide the number of employment tribunals within that jurisdiction that are necessary to hear cases and thereby determine proceedings. It further gives the President, a Regional Chairman or (in Scotland) the Vice-President within their respective jurisdiction the power to decide when and where their employment tribunals and chairmen should hear cases.

Regulation 6 - Regional Chairmen

8. Regulation 6 deals with the appointment of employment tribunal Regional Chairmen in England & Wales. Regulation 6(1) makes clear that these appointments are to be made by the Lord Chancellor from the panel of full-time chairmen. The Regional Chairmen have responsibility for the tribunals and chairmen in their designated area, and are answerable to the President (England & Wales). Regulation 6(2) provides for deputising arrangements should these be necessary. In these circumstances the President (England & Wales), or the appointed Regional Chairman, can nominate a full-time Chairman to discharge the functions of the Regional Chairman.

Regulation 7 - Vice President

9. Regulation 7 applies to Scotland only. Regulation 7(1) provides for the appointment of a Vice President from the panel of full-time Chairmen in Scotland. The Vice President, who is appointed by the Lord President of the Court of Session, is responsible for the administration of justice by the employment tribunals and chairmen in Scotland. Regulation 7(2) empowers either the President (Scotland) or the Vice President to nominate a full-time chairman in Scotland to carry out the duties of the Vice President on a temporary basis.

Regulation 8 - Panels of members of tribunals – general

10. This regulation is concerned with the panels of employment tribunal members from which the members of individual employment tribunals are drawn. It specifies three panels of members for the employment tribunals in both England & Wales (Regulation 8(1)) and Scotland (Regulation 8(2)). Regulation 8(3)(a) makes provision for the appointment of a panel of chairmen in each jurisdiction, specifying the qualification requirement for such an appointment, and the appointing office holder in each case: namely, the Lord Chancellor in England & Wales and the Lord President in Scotland. Regulations 8(3)(b) and (c) provide for the appointment of the “lay” members of the employment tribunals. These appointments are made by the Secretary of State following consultation with organisations representative of employees (for the employee panel) and of employers (for the employer panel). Under Regulation 8(4), it is provided that the members of these three panels shall hold or vacate their office under the terms of their respective instrument of appointment. This means that should they wish to resign, they should do so by notice in writing to either the Lord Chancellor, the Lord President or the Secretary of State, as appropriate. It also specifies that employment tribunal members ceasing to hold office shall be eligible for re-appointment. Provision is also made in Regulation 8(5) empowering the President to establish additional specialist panels of chairmen, and employer and employee representatives. The President may further select members from these three specialist panels to hear proceedings where a specialist knowledge would be beneficial in determining the case.

Regulation 9 - Composition of tribunals – general

11. Regulation 9 sets out who shall sit on an employment tribunal, and how they are to be selected for each hearing. There are slightly different arrangements for the hearing of cases involving issues of national security, and these are dealt with separately in Regulations 10 and 11 (see below).

12. Regulation 9(1) gives the President, Vice President or the appropriate Regional Chairman the power to select a chairman for each hearing. This can be the President himself or a member of the panel of legally qualified chairmen (See Regulation 8(3)(a)). The Regulation also makes clear that the President, Vice President or appropriate Regional Chairman can select himself to hear a case. Regulation 9(2) sets out how the “lay” members are to be selected to hear cases. These are the members drawn from the panels appointed by the Secretary of State under Regulations 8(3)(b) and (c), and who have either employee representative or employer experience. The Regulation states that where a tribunal is to comprise three people (the chairman and two other members), the President, Regional Chairman or Vice President should select one member from each of the “employee” and “employer” panels. Regulation 9(3) makes clear that in cases to be heard by a three person tribunal, the President, Vice President or appropriate Regional Chairman can direct that the proceedings be heard by the chairman and one of the two “lay” members, in the absence of the other, with the consent of the parties. Regulation 9(4) empowers the President, Vice President or appropriate Regional Chairman to substitute any of the three tribunal members hearing a case by drawing a replacement from whichever is the appropriate panel referred to in Regulation 8(3).

Regulation 10 - Panels of members of tribunals – national security proceedings

13. There are slightly different arrangements set out in the Regulations for national security cases. These are cases where the relevant national security provisions of the Employment Tribunals Act 1996 have been invoked. That is, where a Ministerial direction has been given under section 10(3) of that Act, or where an order has been made by the President or appropriate Regional Chairman under section 10(4).

14. Regulation 10 provides arrangements for the creation of panels of tribunal members to be allowed to hear such cases. These involve the President selecting, from *within each* of the three panels referred to in Regulation 8(3), a further panel of members comprising people deemed in his view suitable to hear national security cases.

Regulation 11 - Composition of tribunals – national security proceedings

15. Regulation 11 sets out the arrangements for selecting from the three special panels established in Regulation 10, the members who are to hear individual national security cases. Under this regulation, the chairman of the tribunal is to be selected by the President, the appropriate Regional Chairman or the Vice President from the panel

set up under Regulation 10(a). In selecting the Chairman, the three above-named officeholders can select themselves. In national security cases, Regulation 11(b) echoes Regulation 9(2); it states that where a tribunal is to comprise three people (the chairman and two other members), the President, Regional Chairman or Vice President is to select one member from each of the “employee” and “employer” panels established under Regulations 10(b)(i) and (ii). There is no provision corresponding to Regulation 9(3) regarding hearing the case without one of the “lay” members (see above).

Regulation 12 - Modification of section 4 of the Employment Tribunals Act (national security cases)

16. This regulation makes four small modifications to section 4 of the Employment Tribunals Act 1996, for the purposes of national security proceedings. The modifications move away from the general formula, “...in accordance with regulations...” and towards a more specific reference in the Act, namely “...in accordance with Regulation [] of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004”.

Regulation 13 - Practice directions

17. Section 27 of the Employment Act 2002 inserted s.7A into the Act which gives a power to amend the Employment Tribunal Regulations so that the Presidents could issue practice directions. Regulation 13 commences that provision. Under this Regulation, the President is given power to issue practice directions relating to tribunal procedure, and to the way tribunals and chairmen exercise those powers contained in the Regulations and Rules. The intention is to enable the President to ensure that the tribunals adopt a consistent, countrywide approach to procedural issues and to the way in which they interpret their powers. This should in turn lead to an increase in confidence among users of the tribunal system that cases are being dealt with in a uniform way, regardless of where they are heard.

18. Regulation 13(2) additionally gives the President the power to vary or revoke practice directions and, if deemed appropriate, to make different provision for different cases or different areas, including for specific types of cases. Regulation 13(3) further requires the President to publish any practice direction, or any variation or revocation of a practice direction, for the purpose of bringing it to the attention of those to whom it is addressed.

Regulation 14 - Power to prescribe

19. Section 25 of the Employment Act 2002 amended s.7 of the Act to enable the Regulations to authorise the Secretary of State to prescribe the forms to be used by a claimant to initiate a claim at an employment tribunal and by the respondent to reply to it. Regulations 14(1) and 14(2) take up this power and allow the Secretary of State to prescribe the Claim and Response forms for use in all proceedings except those specifically identified in Regulation 14(3). The latter are where a case has been referred to an employment tribunal by a court; or brought under Schedule 3 (the Employment Tribunals (Levy Appeals) Rules of Procedure) or Schedule 5 (the

Employment Tribunals (Non-Discrimination Notices Appeals) Rules of Procedure; or brought under sections 19, 20 or 22 of the National Minimum Wage Act 1998 or section 11 of the Employment Rights Act 1996 (where the matter is referred to the tribunal by the employer). The prescribed forms, together with guidance on how to complete them, will be made available to tribunal system users by 1 October 2004. Use of the prescribed forms will be obligatory for both claimants and respondents from 6 April 2005, following a six-month transitional period. From 1 October 2004, the Claim Form will be called the ET1 and the Response Form, the ET3.

20. Under the terms of Regulation 14(1)(c), the Secretary of State may also require that claimants and respondents provide certain information and answer certain questions on the prescribed forms. Again, this applies in all proceedings except those exempted in Regulation 14(3) – see paragraph 20 above. The required information will be need to be provided from 1 October 2004, whether or not a claimant or respondent chooses to use the appropriate prescribed form during the transitional period (between 1 October 2004 and 5 April 2005). From 6 April 2005, except where they relate to cases covered by Regulation 14(3), claims or responses submitted on something other than the appropriate prescribed form will be turned away by the Employment Tribunals Service without being accepted.

21. Regulation 14(2) requires the Secretary of State to publish the prescribed forms and required information in such a manner as he or she considers appropriate to bring them to the attention of all prospective employment tribunal users and their advisers.

Regulation 15 - Calculation of time limits

22. This Regulation seeks to clarify the position with regard to the periods of time specified in the Rules for the carrying out of any act required or permitted under the rules to progress the case. These time limits occur from time to time in the five Schedules attached to the Regulations themselves. The Schedules set out the Rules governing particular types of proceedings brought before an employment tribunal.

23. Regulations 15(2) and (3) provide examples of how time limits are to be calculated. Regulation 15(2) makes clear that where a party is required to do something within a certain period of time following a particular event, the date of the event itself is not to be included in the calculation. Similarly, where a party wishes, or is required, to do something a certain number of days before or after an event, the date of the event itself is not to be included in the calculation.

24. Regulation 15(4) states that where a tribunal or chairman imposes a time limit on a party for the doing of any act, the deadline set should be expressed as a calendar date. Regulation 15(5) makes clear that any notice of a hearing sent to the parties should be posted not less than 14 days before the hearing date.

Regulation 16 - Application of Schedules 1-5 to proceedings

25. This regulation makes certain stipulations concerning the five schedules attached to the Regulations. Regulation 16(1) states that the rules in Schedule 1 shall apply to all employment tribunal cases except where separate rules made under

different legislation are applicable. Regulation 16(2) concerns the rules of procedure that shall apply in national security cases. Regulation 16(3) clarifies the circumstances in which the rules set out in Schedules 3, 4 and 5 shall apply. These Schedules relate, respectively, to proceedings on levy appeals under section 12 of the Industrial Training Act 1982; on appeals against a notice under section 24 of the Health and Safety at Work Act 1974; and on appeals against a non-discrimination notice under anti-discrimination legislation.

Regulation 17 - Register

26. Under Regulation 17, the Secretary is required to maintain a public Register, which can be inspected free of charge, at all reasonable hours. The Register will contain a copy of all judgments and any written reasons issued by any tribunal or chairman, as set in the Rules in Schedules 1 to 5.

Regulation 18 - Proof of decisions of tribunals

27. Regulation 18 states that, unless proved otherwise, the production in court of a document which seems to be certified by the Secretary to be a true copy of an entry of a judgment in the Register, shall be treated as such.

Regulation 19 - Jurisdiction of tribunals in Scotland and in England & Wales

28. Regulation 19 is concerned with the jurisdiction of tribunals in Scotland, England and Wales, and where proceedings may be brought. Proceedings may be brought in England and Wales where: at least one of the respondents lives or carries on business there; if the claim had gone to county court, the claim would have arisen wholly or in part in England and Wales; a matter has been referred by a court in England and Wales; or, in a case of proceedings to which Schedule 3, 4 or 5 applies, the proceedings relate to matters arising in England or Wales. For Scotland, similar but different provisions apply. Proceedings may be brought in Scotland where: at least one of the respondents lives or carries on business there; the proceedings relate to a contract of employment which is performed in Scotland; a matter has been referred by a sheriff; or, in a case of proceedings to which Schedule 3, 4 or 5 applies, the proceedings relate to matters arising in Scotland.

Regulation 20 - Transitional provisions

29. Regulation 20 makes detailed transitional provisions setting out the circumstances in which the “old” Regulations and Rules are to apply, and those in which the “new” Regulations and Rules are to apply.

SCHEDULE 1 - RULES OF PROCEDURE

Introduction

30. As specified in Regulation 16(1) of the draft Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, the Rules in Schedule 1 are

intended to apply to all employment tribunal cases except where separate rules made under different legislation are applicable. The Schedule 1 Rules of Procedure replace those in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. The substantial and significant revision of the old rules of procedure arise out of the provisions of the Employment Act 2002, from recommendations of the Employment Tribunal System Taskforce and from advice offered by the Employment Tribunal Presidents (for England and Wales and for Scotland).

31. The new Rules of Procedure have also been recast so that they follow a more logical structure and are expressed in plain English terms, in order to make the system easier to use. They are complemented by the introduction of standard, prescribed claim and response forms, the use of which becomes mandatory from April 2005. The new forms will seek fuller information from the parties to assist in the understanding and settlement of cases. The other key reforms reflected in the new Rules include: a pre-acceptance procedure to filter out inadmissible claims; a more rigorous, but longer, time limit for employers' submission of response forms; fixed Acas conciliation periods for most cases, to encourage parties to settle at the earliest opportunity rather than just before a hearing; better case management arrangements; new provision for preparation time awards to be made in some circumstances, and provision for *paid* representatives to be able to incur a costs award in specified circumstances on account of their conduct.

32. Like the Regulations themselves, the new Rules of Procedure in Schedule 1 will apply to the whole of Great Britain, replacing the previous (2001), separate, but essentially equivalent, Rules for England & Wales and Scotland.

Rule 1 - Starting a claim

33. Rule 1 sets out how a claimant should bring a claim to an employment tribunal. This must be in writing and contain all the relevant required information, which is listed in Rule 1(4). This required information includes details about the claimant and respondent and other information that will help determine whether the claim can be accepted by the employment tribunal. There are a small number of circumstances in which some aspects of the required information will not need to be provided, and these are listed in Rule 1(5). These include where the claimant is not or was not an employee of the respondent, and where a claim consists only of a complaint that the respondent dismissed the employee or contemplated doing so. Rule 1(7) allows two or more claimant to present their claims in the same document, if the claims derive from the same set of facts.

34. Claims submitted to the employment tribunal office on or after 6 April 2005 have to be provided on a claim form prescribed by the Secretary of State under the terms of Regulation 14. The only exceptions to this, which are set out in Regulation 14(3), are where a case has been referred to an employment tribunal by a court; or brought under Schedule 3 (the Employment Tribunals (Levy Appeals) Rules of Procedure) or Schedule 5 (the Employment Tribunals (Non-Discrimination Notices Appeals) Rules of Procedure; or brought under sections 19, 20 or 22 of the National Minimum Wage Act 1998, or section 11 of the Employment Rights Act (where the matter is referred to the tribunal by the employer).

35. Rule 1(8) makes clear that where the dispute resolution admissibility conditions introduced in section 32 of the Employment Act 2002 apply to a claim, or part of one, and a chairman considers that those conditions have not been met, neither a chairman nor a tribunal shall consider the substance of the claim, or relevant part of it, until this has been rectified – see also paragraph 39 below.

Rule 2 - What the tribunal does after receiving the claim

36. Rule 2 addresses the way in which the tribunal office which has taken receipt of the claim deals with that claim. The Rule requires the Secretary of the Office of the Tribunals, or a tribunal officer acting under the Secretary's direction, to consider – on the basis of the criteria set out in Rule 3 – whether or not the claim, or part of one, should be accepted. If the Secretary considers that the claim, or part of it, should be accepted, Rule 2 sets out the steps the Secretary must take to progress the claim, or the relevant part of it. These include: sending a copy of the claim to each respondent (recording in writing when it was sent); informing the parties of the case number and the address to which all related correspondence should be sent; informing the respondent how to respond to the claim, the deadline, and the consequences of not replying. The tribunal office must also advise the respondent of their right to receive a copy of any judgment of the case. Rule 2 additionally provides that where relevant, the parties are to be made aware of the availability of the services of an Acas conciliation officer. Where the fixed conciliation period applies (see Rule 22) parties must also be advised by the Secretary of the date on which Acas's duty to conciliate ends, and that after that date, the conciliation officer's services will be available only in limited circumstances. (Rule 22(7) specifies what these circumstances would be.)

Rule 3 - When the claim will not be accepted by the Secretary

37. Rule 3 sets out the criteria under which an employment tribunal claim cannot be accepted, and explains the pre-acceptance procedure put in place to ensure that the correct decision (whether to accept or not accept a claim) is taken. .

38. The circumstances in which a claim, or part of one, will not be accepted into the tribunal system include where it is clear that: it has not been submitted on the prescribed form (where required, which will be in the vast majority of cases and the claim is submitted on or after 6 April 2005); it fails to include all the relevant required information; the tribunal does not have power to consider the claim; or, where applicable, the dispute resolution admissibility conditions introduced in section 32 of the Employment Act 2002 have not been met. Section 32 of the Employment Act 2002 contains provisions preventing certain categories of complaint from being presented to tribunals *until* Step 1 of the workplace grievance procedures has been completed and at least 28 days have elapsed thereafter. Failure to comply with these conditions (where they apply) will render a tribunal claim inadmissible under the pre-acceptance procedure set out in Rule 3. Where a claim has not complied with the grievance procedures, rule 3(6) requires the Secretary to notify the claimant of the time limit that applies to his or her particular claim, informing him or her of the consequences of not complying with the section 32 provisions.

39. There will be occasions when the Secretary (or those working under his or her direction) decides that he or she is unable to accept a claim (or part of it), as it is clear to him or her that it does not fulfil the acceptance conditions set out in the Rules. (If it is unclear to him or her whether or not the claim fulfils the acceptance conditions, the claim will be accepted.) If the claim has not been presented on a prescribed form, after 1 April 2005, the Secretary will not accept the claim, but will return it to the claimant with an explanation as to why it has not been accepted, and provide a copy of a prescribed form. In all other instances where it is clear to the Secretary that the conditions have not been met, the Secretary will refer the claim to a chairman, explaining his or her reasons for considering that it should not be accepted. The chairman will then decide whether or not the claim can be accepted into the system, by reference to the same criteria as were applied by the Secretary. Having done so, the chairman shall either inform the Secretary in writing that the claim should be accepted (the Secretary shall then process the claim as if he or she had decided to accept it in the first place); or he or she shall decide that the claim should not be accepted.

40. Where a chairman decides that a claim should not be accepted, he or she will record his or her decision and reasons in writing. The Secretary will then inform the claimant in writing both of the decision and of the reasons for the claim not being accepted. The claimant will also be advised as to how the decision can be reviewed (under Rules 34 to 36) or appealed (at the Employment Appeal Tribunal). The claim itself will be returned to the claimant.

Rule 4 - Responding to the claim

41. Rule 4 sets out the procedure for responding to a claim submitted to and accepted by an employment tribunal. Under this Rule, the respondent must ensure that any response to the claim reaches the tribunal office within 28 days of the date on which he or she was sent a copy of the claim. The response must give the required information specified in Rule 4(3), including an indication of whether or not the respondent intends to resist the claim, and if so, on what grounds. Furthermore, unless the special circumstances identified in Regulation 14(3) apply, the response must be submitted on a form prescribed by the Secretary of State under the terms of Regulation 14. This requirement applies to any responses submitted to the tribunal office on or after 6 April 2005.

42. Rule 4(4) refers to the provision within Rule 11 for a respondent to seek an extension of the 28 day time limit for the submission of the response. Such a request must itself be submitted to the tribunal office within the original 28 day time limit, if it is to be considered. It must also provide an explanation as to why the respondent believes he or she cannot comply with that time limit. If submitted in time, this request for an extension of time to respond will be considered by a chairman. Such an extension will be granted only if the chairman is satisfied that it is “just and equitable” to do so in the circumstances.

43. Rule 4(5) makes clear that a response to more than one claim can be provided on a single form in certain circumstances. This would be when the relief claimed arises out of the same set of facts and where the respondent intends to resist all the claims or, alternatively, none of the claims.

44. Rule 4(6) makes it clear that a single document may include the response from more than one respondent in a single claim, provided that either the respondents intend to resist the claim on the same grounds or they intend not to resist the claim.

Rule 5 - What the tribunal does after receiving the response

45. The Secretary (or those working under his or her direction) will consider whether or not a response to a claim should be accepted. This must be done in accordance with the arrangements for the consideration of responses set out in Rule 6. If the Secretary accepts the response, copies of it will then be sent to the other parties (and a written record kept of when it was sent).

Rule 6 - When the response will not be accepted by the Secretary

46. Rule 6 sets out pre-acceptance arrangements for responses analogous to those that Rule 3 sets out for claims. The circumstances in which a response will not be accepted into the tribunal system, as set out in Rule 6(2), are: where it has not been submitted on the prescribed form (where required, which will be in the vast majority of cases, and the claim is submitted on or after 6 April 2005); where it fails to include all the relevant required information; and where it has not been submitted within the relevant time limit.

47. There will be occasions when the Secretary (or those working under his or her direction) decides that he or she is unable to accept a response, because it is clear to him or her that it does not fulfil the acceptance conditions set out in the Rules. (If it is unclear whether or not the response fulfils the acceptance conditions, it will be accepted.) Where it is clear that the response has not been presented on a prescribed form, after 1 April 2005, the Secretary will not accept the response, but will return it to the respondent with an explanation as to why it has not been accepted, and provide a copy of a prescribed form. In all other instances, the Secretary will refer the response to a chairman, explaining his or her reasons for considering that it should not be accepted. The chairman will then decide whether or not the response can be accepted into the system, by reference to the same criteria as were applied by the Secretary. Having done so, the chairman will either inform the Secretary in writing that the response should be accepted (in which case the Secretary will then process the response in the same way as if he or she had accepted it in the first place) or will decide that the response should be rejected.

48. Where a chairman decides that a response cannot be accepted, he or she will record his decision and reasons in writing and the Secretary will then inform the respondent and the claimant both of the decision and of the reasons for rejecting the response. The respondent will also be advised of the consequences of the decision (likely to be a default judgment – see guidance on Rule 8 below) and how the decision can be reviewed (under Rules 34 to 36) or appealed (at the Employment Appeal Tribunal).

Rule 7 - Counterclaims

49. A similar, but simpler, pre-acceptance procedure for counterclaims (which may be made by respondents in certain circumstances in breach of contract cases) is set out in Rule 7. Rule 7(1) sets out the required information when presenting a counterclaim, which includes the respondent's and claimant's name and address and details of the claim. Rules 7(2) and 7(3) provide for further procedures in relation to the handling of counterclaims to be put in place by, respectively, a chairman or (through a practice direction) the President.

Rule 8 - Default judgments

50. Section 7 of the Act provides for Employment Tribunal Regulations to authorise cases to be determined without a hearing in those circumstances prescribed by the Regulations. Rule 8 addresses this provision through the introduction of a system of default judgments, i.e. where a chairman delivers a judgment on a claim, in writing, and without a hearing. Such a judgment, as Rule 8(3) states, can decide either liability alone, or liability and remedy. Any assessment of remedy is to be done by the chairman on the basis of the information in front of him.

51. A chairman will issue a default judgement in circumstances where either no response has been submitted within the time limit, or where a response, though submitted, has been rejected and returned to the respondent because it did not meet the pre-acceptance conditions. If there has been no application to have the decision to reject the response reviewed, provided the claimant has not indicated in writing that he or she does not want a default judgment to be issued, a chairman will proceed to issue such a judgment. This will be done without either the claimant or respondent being present.

52. Rule 8(4) makes clear that a default judgment should be recorded by the chairman in writing and signed by him. The Secretary will send this to the parties (and to Acas informing them of their right to have such a default judgment reviewed under Rule 33. If the parties have come to a settlement of their dispute – through a compromise agreement or through Acas – either before or on the actual day of the default judgment, the judgment will have no effect, and under Rule 8(7) either party can apply under Rule 33 to have it revoked.

Rule 9 - Taking no further part in the proceedings

53. Under this Rule, a respondent who has not responded, or whose response has been rejected, will not be allowed to take any part in the case. The only exceptions to this will be where he or she is seeking to have a judgment reviewed under Rule 33 or Rule 34(3)(a) and (b); where he or she is called as a witness by somebody else; or where the tribunal is sending the respondent a copy of a decision or judgment, or corrected entry.

Rule 10 - General power to manage proceedings

54. Rule 10 deals with the chairman's ability to manage tribunal proceedings, and specifically provides him or her with the power to give directions to the parties with a view to ensuring the smooth and efficient conduct of the case. The chairman can issue directions on any matter he or she thinks fit, having considered the relevant papers, either in the absence of the parties or at a hearing. Rule 10(2) lists examples of directions a chairman might give, although others are open to him or her also. Rule 10(3) deals with issues of time and place with regard to any actions required by an order. An order can impose conditions on the parties and must inform them of the possible consequences of non-compliance. These are set out in Rule 13 and include the issuing of costs or preparation time orders, or the striking out of a claim or response as appropriate. Rule 10(7) states that where a chairman proposes to issue a direction to have different claims considered together, he or she can do so only if all relevant parties have been advised of this intention and have been given the opportunity to explain, either orally or in writing, why they think such a direction should not be made. Under Rule 10(8), directions must be recorded in writing and signed by the chairman. It is the duty of the Secretary to inform the parties of the direction as soon as reasonably practicable.

Rule 11 - Applications in proceedings

55. During a case, parties can make written applications to the tribunal office for particular orders to be issued by a chairman. Such requests can also be made orally at a hearing. Reasons for making the application must be provided. Parties can also apply for orders (including orders under rule 10) to be varied or revoked, or request a case management discussion or pre-hearing review specifying the type of order they are seeking. They must also demonstrate how this would assist the tribunal or chairman in dealing with the case efficiently and fairly. Under Rule 11(4), details of the application (except where it is for a witness order only) have to be provided to all parties, together with the reasons why the direction or order is being sought. Objections to the application must similarly be copied to all other parties. Where a party making such an application is legally represented, either they or their representative is responsible for copying in other parties. In the case of an unrepresented party, the Secretary will inform the other parties of the application. Under Rule 11(6), where a chairman refuses the application for a direction or order, the Secretary will inform the other parties in writing of the refusal.

Rule 12 - Chairman acting on his or her own initiative

56. Tribunal chairmen can undertake a range of actions on their own initiative. These include making an order without reference to the parties, or deciding to hold a case management discussion or pre-hearing review. However, where an order is made in such circumstances, the Secretary has to send a copy of the order to the party affected by it. That party must also be informed of his or her right to apply to have the order varied or set aside. Where a party chooses to exercise this right, he or she must do so before the time period expires within which the order has to be complied with. Any application to vary or set aside must be submitted in writing to the tribunal office.

Rule 13 - Compliance with orders and practice directions

57. This Rule sets out the consequences of non-compliance with an order made under these Rules (i.e. the Rules in Schedule 1), Rule 8 of Schedule 3, Rule 7 of Schedule 4 or a practice direction made by a chairman or tribunal. These include the issuing of costs or preparation time orders under rules 38 to 46, or, subject to Rule 19, the striking out of a claim or response as appropriate. Rule 13(2) also provides that an order can provide that a claim or response be summarily struck out if the order is not complied with.

Rule 14 - Hearings - general

58. Rule 14(1) lists the four different types of hearing open to a chairman or (as the case may be) a tribunal. These are: a case management discussion; a pre-hearing review; a Hearing; and a review hearing. Rules 14(2) - 14(6) set out various general, and self-explanatory, provisions in relation to such hearings.

Rule 15 - Use of electronic communications

59. Rule 15(1) allows a case management discussion or a pre-hearing review to be conducted by use of electronic communications if the chairman believes it just and equitable to do so. However, where a hearing conducted in this way is required to be a public hearing, it must, subject to Rule 16, be held in a place to which the public has access and where facilities are in place to enable the public to observe all the parties involved.

Rule 16 - Hearings which may be held in private

60. In certain circumstances, and where a tribunal or chairman so decides, hearings (or part of them) can be held in private. These circumstances are listed in Rule 16(1)(a) to (c) and include: where the submission of evidence might contravene a statutory prohibition; where the information contained in the evidence was communicated in confidence; or where disclosure would damage the business or organisation in which the person giving evidence works. A tribunal decision to hold a hearing in private must be supported by reasons. Rule 16(2) allows a member of the Council on Tribunals or its Scottish Committee to attend, in that capacity, any Hearing or pre-hearing review being held in private.

Rule 17 - Conduct of case management discussions

61. Case management discussions are intended as a means of ensuring the smooth running of a case through the tribunal system. They can address matters of procedure and case management and can be held in private. They are conducted by a chairman alone, and examples of the types of matters dealt with at case management discussions can be found listed in Rule 10(2) in connection with the issuing of directions. However, these discussions are not the correct forum for determining civil rights or obligations, and types of orders and judgments listed in Rule 18(7) - which include striking out a claim or making a restricted reporting order - cannot be made at a case management discussion.

Rule 18 - Conduct of pre-hearing reviews

62. Pre-hearing reviews are, unless covered by Rule 16, to be held in public, and can take place only where the Secretary has notified the parties, giving them the opportunity to make written submissions or to put their case orally at the review if they wish to do so. Rule 18(2) lists the types of matter a chairman can consider at a pre-hearing review. These include determining interim or preliminary matters; issuing directions (Rule 10); ordering payment of a deposit (Rule 20); or considering any oral or written evidence.

63. Usually, a pre-hearing review will be conducted by a chairman sitting alone. However, a tribunal will conduct a pre-hearing review if the following conditions are satisfied: a) a party has, not less than 10 days before the date the pre-hearing review is due to take place, made a written request for a tribunal to conduct the review; b) the chairman considers that at least one substantive issue of fact is likely to be determined and; c) the chairman has issued an order that the pre-hearing review should be conducted by a tribunal.

64. Rule 18(5) defines the scope of the pre-hearing review and confirms that although its primary purpose is to determine matters of a preliminary nature, the chairman can nevertheless, at this review stage, make judgments or rulings that may result in proceedings being struck out or dismissed, with the result that a full Hearing then becomes unnecessary.

65. Rule 18(7) lists the types of judgments or orders that can be made at a pre-hearing review, subject to the notice requirements for orders set out in Rule 19 (see below). These include striking out a claim or response (in whole or in part) in certain circumstances and making a restricted reporting order. Rule 18(7) makes clear the kinds of claim or response that a chairman can strike out at the review stage. These include where it is adjudged that a claim or response is scandalous, vexatious or has no real prospect of success, or where the conduct of the case by one of the parties or their representative has been similarly scandalous, unreasonable or vexatious. Claims can also be struck out where a claim has not been actively pursued, or where a claimant or respondent has failed to comply with a direction or practice direction. Rule 18(9) states that where a deposit under Rule 20 has been considered at a pre-hearing review, that chairman should not be a member of the tribunal at the full Hearing of those proceedings.

Rule 19 - Notice requirements

66. Rule 19 gives a party against whom a chairman or tribunal is about to make a judgment or order an opportunity to provide reasons why the order should not be made – unless that party has already been afforded the opportunity by the chairman or tribunal to give reasons to them orally.

Rule 20 - Requirement to pay a deposit in order to continue with proceedings

67. Rule 20 addresses the circumstances in which a party may be required by the tribunal to pay a deposit in order for his or her case to proceed. By Rule 20(1), a chairman at a pre-hearing review can require such a deposit to be paid where he or she believes the matter before him or her has little reasonable prospect of success at the tribunal. The maximum deposit payable is £500 and, under Rule 20(2), the chairman requiring the deposit must be satisfied that the party concerned can comply with the order. In other words, the party's ability to pay must be taken into account. A deposit order must be recorded and signed by the chairman, who must also give grounds for making the order, which is then sent to all the parties. The party against whom the order has been made (either the claimant or respondent) will also receive a note explaining that, should he or she continue with the case, a costs or preparation time award may be made against him or her, and the deposit could additionally be lost. Under Rule 20(4), the chairman has the power to strike out the claim or response (or the relevant part of it) if the deposit has not been paid within 21 days, or alternatively within an extension of time, not exceeding 14 days, agreed with the chairman. The extension of time must be requested by the party within the original 21-day period. Rule 20(5) allows for the repayment of the deposit in full to the party at the end of the case, except where circumstances in Rule 47 apply (see below).

Rule 21 - Documents to be sent to conciliators

68. In all tribunal cases brought under jurisdictions providing for Acas conciliation, the Secretary is required to send copies of all relevant papers (documents, directions, orders, judgments and notices) to an Acas conciliation officer, unless it has been agreed between the Secretary and Acas that documents of a certain type need not be sent.

Rule 22 - Fixed period for conciliation

69. Section 24 of the 2002 Act provides a power for the Rules (see Rule 22(2)) to introduce a fixed period of conciliation. Acas's *duty* to conciliate becomes a *power* after the conciliation period has ended. This means, in effect, that conciliation will continue beyond the fixed period only at the discretion of ACAS, who will base their decision to use their power on strict criteria.

70. Not all claims accepted into the tribunal system will be subject to the fixed period of conciliation. Rule 22(1) lists particular legislation on which certain claims are based. Claims brought under this legislation will be exempt from the fixed conciliation period and ACAS will have an ongoing *duty* to conciliate, until the case is disposed of. This category will consist of all cases in which the claim (or, in a multi-jurisdiction case, one or more aspects of the claim) is brought under the Sex Discrimination Act, the Equal Pay Act, the Race Relations Act, the Disability Discrimination Act, the 2003 Regulations on equality in relation to sexual orientation or religion or belief, or the provisions of the Employment Rights Act 1996 relating to public interest disclosures (protection for "whistleblowers"). The reason for these

exemptions is that cases brought under these jurisdictions tend to be inherently complex, making a fixed period of conciliation inappropriate.

71. Rule 22(5) introduces the “short conciliation period” of seven weeks, which is to apply in cases brought under the jurisdictions listed at Rule 22(5)(b), (c) and (d). The intention is that claims to which the short conciliation period applies will be listed by the ETS on a “fast track” basis, for a hearing soon after the end of the seven-week period. The reason for this is that, where claims under these jurisdictions are concerned, it is often the case that the facts are not in dispute and the case can be disposed of quickly, ensuring swift access to justice. However Rule 22(8) (see below) allows a chairman to make an order converting a short, seven week fixed period case into a standard, thirteen week fixed period case if this is warranted by the complexity of the proceedings in any particular instance. Where this is done, the Secretary will inform the parties and Acas as soon as reasonably practicable in writing.

72. Rule 22(6) establishes the “standard conciliation period” of thirteen weeks. This applies to all cases that do not fall into either the exempt or short conciliation period categories. Rule 22(7) provides for a two-week extension of the standard conciliation period (only). This, however, can be granted only in certain circumstances, as defined in Rule 22(7)(a) to (c). These circumstances are, in effect, where a serious settlement proposal is under active consideration and is likely to be agreed within the two-week extension, and where (before the end of the thirteen week period) Acas considers that these conditions are met and has notified the Secretary in writing to that effect.

73. Rule 22(3) states that a Hearing cannot take place during the fixed conciliation period. Where a Hearing has previously been arranged for a date that turns out to fall within that period (e.g. where the period is extended), it will be postponed until the conciliation period has ended. However, the actual fixing of a Hearing date can be undertaken by the Employment Tribunals Service during the fixed conciliation period. Case management discussions and pre-hearing reviews can also take place during this period.

74. Rule 22(4) provides that the fixed conciliation period begins when the Secretary sends a copy of the claim to the respondent.

Rule 23 - Early termination of conciliation period

75. Rule 23(1) sets out the circumstances under which either the short or standard conciliation periods will end early, and at what point in the proceedings this should happen. In broad terms, the circumstances allowing early termination of the fixed period are:

- where the claim is withdrawn;
- where the claim or response is struck out; where a case is uncontested, i.e. the respondent puts in no response to the claim and a default judgment is issued under Rule 8 (see above);
- where one or more of the parties has declared in writing to Acas its unwillingness to cooperate with the process (and there is therefore no realistic prospect of conciliation succeeding); or

- where the claim is settled either via Acas or through a compromise agreement. The latter is an agreement to drop proceedings where the agreement meets the conditions in section 203(3) of the Employment Rights Act 1996.

76. Rule 23(2) allows the chairman to order the commencement of a further fixed conciliation period as appropriate, in circumstances where he has re-established a respondent's right to respond to a claim (for example, as a result of revoking a default judgment). In such circumstances, any part-spent previous fixed conciliation period will be deemed not to have taken place. (Rule 23(3)).

Rule 24 - Effect of staying or sisting proceedings on conciliation periods

77. In any instance where a case is stayed (or sisted in Scotland), the "clock will stop" on the fixed conciliation period. It will restart when the stay (or sist) ends and will continue for the duration of the unexpired portion of the conciliation period or for a further two weeks, whichever is greater. Acas will continue to have a duty to conciliate throughout the period of the stay (or sist).

Rule 25 - Right to withdraw proceedings

78. A claimant has the right to withdraw all or part of a claim at any time. This can be done *either* by the claimant doing so orally at a hearing, *or* by informing the tribunal office in writing through a "notice of withdrawal". The notice must make clear whether the whole claim or just part of it is being withdrawn, and also, where there is more than one respondent, against which respondent(s) the case is being withdrawn. The Secretary will then inform all the other parties of the withdrawal. Rule 25(3) makes clear that a withdrawal takes place from the date the tribunal office or (in the case of oral notification) the tribunal receives notice of it, and if the whole claim is withdrawn, proceedings against the respondent end on that date. The withdrawal does not however affect proceedings as far as the provisions on costs, wasted costs and preparation time awards are concerned.

79. If a claim is withdrawn, this does not necessarily mean that the claim cannot be "re-activated". Under Rule 25(4), a respondent can, where a claim has been withdrawn, also apply to have the proceedings dismissed. The respondent has 28 days to do this from the date the withdrawal notice was sent to him or her, unless given an extension of time by the chairman. Once dismissed, a claim cannot be re-activated unless the decision to dismiss it is successfully reviewed or appealed.

Rule 26 - Hearings

80. This Rule defines a full Hearing. This is a Hearing that determines any matter not already disposed of in earlier hearings (e.g. pre-hearing reviews or case management discussions) or disposes of the proceedings altogether. There may be more than one Hearing in any particular proceedings, and there may be different types of Hearing (e.g. on liability, remedies, costs or preparation time). Subject to Rule 16 (when proceedings can be held in private), Hearings must be held in public (Rule 26(3)) and be heard by a tribunal consisting of a chairman and two "lay" members

(one, if the parties agree), or, in certain circumstances, by a chairman sitting alone. Rule 26(2) cross-refers to section 4 of the Employment Tribunals Act 1996 (composition of a tribunal).

Rule 27 - What happens at the Hearing

81. Hearings (including date, time and place) are fixed by the President, Vice President or appropriate Regional Chairman.

82. Parties are entitled to give evidence, to question witnesses and to address the tribunal. Any evidence must be given on oath or affirmation. The tribunal can exclude witnesses from a Hearing until they are required to give evidence, if it considers this in the interests of justice.

83. Where a party or representative fails to attend the Hearing, the tribunal has the power under Rule 27(5) to dismiss the proceedings in the absence of the party, or to adjourn the Hearing. Where the tribunal wishes to dismiss the case, Rule 27(6) requires it first to consider any information in its possession provided by the parties. Rule 27(7) allows a tribunal to exercise the same powers as are exercised by a chairman, under these Rules.

Rule 28 - Orders and judgments

84. Rule 28(1) defines the two types of decisions that a tribunal can issue. These are a judgment, i.e. a final determination of the proceedings, or of a particular issue within the proceedings (e.g. a compensation award, a declaration or recommendation, or an order for costs, preparation time or wasted costs); and an order, relating to interim matters, that requires somebody to do something, or not to do something.

85. Rule 28(3) deals with the delivery of decisions. These - whether they are an order or judgment - are issued by a chairman or tribunal as appropriate, either orally, or in writing at a later date in circumstances where the decision has been reserved (i.e. is to be considered and issued at a later date).

86. Rule 28(4) addresses the way a tribunal decision is reached. Where a tribunal comprises three members, a decision can be made and issued either unanimously or by a majority of two to one. On a two-member tribunal, the chairman will, if necessary, have a second, casting vote.

Rule 29 - Form and content of judgments

87. This Rule requires that all judgments, whether issued orally or in writing, must be recorded in writing and signed by the chairman. Where a judgment has been reserved (i.e. not delivered orally at a hearing), a written judgment will be sent to the parties at a later date. It is the duty of the Secretary to provide copies of judgments to the parties, and if relevant to the court that referred the case to a tribunal. Guidance on how to have the judgment reviewed or appealed should be included with the judgment. Where appropriate, the judgment should contain details of any award or the sum required to be paid.

Rule 30 - Reasons

88. Rule 30(1) makes clear that reasons must be given by a tribunal or chairman for all judgments and, if requested at or before the hearing where it is made, any order. Reasons can be given orally at the time of issuing the judgment or order, or they can be reserved. If the latter, they must be subsequently signed by the chairman and sent to the parties by the Secretary at a later date.

89. When reasons for a judgment have been issued orally, written reasons will be provided only if requested by one of the parties, either at the hearing or within 14 days of the date on which the judgment was sent to the parties (or within such further period as the chairman considers just and equitable). If requested, the reasons, signed by the chairman, will then be sent by the Secretary to the parties. The Secretary will record the date this is done.

90. Rule 30(5) lists the information that must be contained in written reasons. This is: the issues identified as relevant to the claim; any issues *not* determined (and why); any findings of fact relevant to the issues that have been determined; a concise statement of the applicable law; how the relevant findings of fact and applicable law have been applied in order to determine the issues; and if applicable, a table or description showing how an award or payment ordered by the tribunal was calculated.

Rule 31 - Absence of chairman

91. This Rule provides for a situation where a chairman cannot sign a judgment or reasons due to his death, incapacity or absence. In such circumstances, and where the chairman had dealt with the proceedings alone, Rule 31(a) provides for the document to be signed by the appropriate Regional Chairman, or in Scotland, by the Vice President. Where the proceedings were dealt with by a two- or three- person tribunal, the other person or persons are empowered by Rule 31(b) to sign the document. In both scenarios, the person signing the document must certify that the chairman has been unable to sign.

Rule 32 - The Register

92. Subject to Rule 49 (proceedings involving allegations of the commission of a sexual offence – see below), the Secretary is required to enter in the public Register a copy of any judgment, and a copy of any written reasons provided in accordance with Rule 30 in relation to any judgment.

93. Reasons will not be entered onto the Register where evidence has been heard in private and the tribunal or chairman (as the case may be) so decides. In such circumstances, the Secretary will send the reasons to each of the parties and, if there is an appeal to a higher court, to that court, together with a copy of the entry in the Register of the judgment to which the reasons relate.

Rule 33 - Review of default judgments

94. Rule 33 addresses the mechanism for reviewing default judgments made under Rule 8 (see above). Applications to have default judgments reviewed have to be made, within 14 days of the default judgment being sent to the parties, in writing to the tribunal office. This time limit may be extended by the chairman if he or she considers it just and equitable to do so. The Secretary will then send notice of the application for review to the other parties, giving them the opportunity to make oral or written representations to the chairman, in accordance with rule 14(4). The application itself must provide reasons why the default judgment should be varied or revoked, and, where the respondent is making the application, it must include the proposed response to the claim, together with an application for an extension of time for presenting that response and an explanation of why rules 4(1) and (4) were not complied with. The review will be undertaken by a chairman sitting in public. Rule 33(4) makes clear that the chairman can refuse the application, or vary, revoke or confirm the default judgment.

95. Rule 33(5) describes the circumstance in which a default judgment has to be revoked. This will occur where the claim has been met in full before the judgment is issued or where a settlement has been reached via a compromise agreement or through Acas before or on the date a default judgment is issued (Rule 8(6)). A chairman can, if he or she so decides, revoke or vary a default judgment where a respondent has a reasonable prospect of successfully defending the claim. In these circumstances, the Secretary will accept the response into the system and copy it to all the other parties as required in Rule 5(2).

Rule 34 - Review of other decisions

96. Rule 34(1) sets out the circumstances where parties to a case can apply to have certain tribunal decisions reviewed (see Rules 34 to 36). Reviewable decisions are: a decision not to accept a claim or response under the pre-acceptance procedure rules (Rules 3, 6 and 7); judgments (other than default judgements, but including orders for costs, expenses, preparation time or wasted costs); or a decision made under Rule 6(3) of Schedule 4 in relation to an application for a direction suspending the operation of a prohibition notice.

97. Rule 34(3) describes the grounds on which decisions can be reviewed. These are:

- Administrative error;
- Where a party did not receive notice of the proceedings;
- Where a decision was made in the absence of a party;
- Where new evidence has emerged since the end of the hearing; and
- Where the interests of justice require it.

A Chairman can decide to institute a review of a decision on his or her own initiative, on the basis of any of these grounds.

Rule 35 - Preliminary consideration of application for review

98. An application under Rule 34 must be made in writing to the relevant tribunal office, stating the grounds. The application must be submitted within 14 days of the decision being sent to the parties (or within such further period as a chairman considers just and equitable). Alternatively, if the decision was made at a hearing, a review application can be made orally at that hearing itself. Rule 35(3) explains how a review application should be considered. There will be no requirement for a hearing, and in normal circumstances it will be undertaken by the chairman of the original tribunal. However, the application could instead be considered by the appropriate Regional Chairman or Vice President, or by a chairman nominated by them - or, by the President himself. The review application will be rejected if it is considered that there are no grounds for a review, or where there is no reasonable prospect of the decision being varied or revoked. A successful review application will lead to a review under the terms of Rule 36. In the case of a rejection, the Secretary will inform the party of the chairman's decision, providing reasons.

Rule 36 - The review

99. Reviews are normally undertaken by the chairman or tribunal that made the original decision. If that is not possible, another chairman or tribunal (as the case may be) will be appointed by the appropriate Regional Chairman, the Vice President or the President. However, where a review is conducted on the initiative of a chairman or tribunal (without an application having been made), it must be undertaken by the chairman or tribunal that made the original decision. In these circumstances, Rule 36(2) requires that a notice be sent to the parties explaining why the review is to take place, and giving an opportunity for reasons to be provided as to why this should not be the case. This notice must be sent no more than 14 days after the original decision was sent to the parties.

100. Decisions can be confirmed, varied or revoked at a review. If revoked, the chairman must order the decision to be taken again. If the original decision was made at a hearing, the new one must be made at a hearing as well. If the original decision was made without a hearing, no hearing is required before the new decision can be made.

Rule 37 - Correction of decisions or reasons

101. Rule 37 sets out the procedures for correcting decisions (judgments or orders) or reasons. Clerical mistakes can be corrected by certificate by the chairman, Regional Chairman, or Vice President. In this instance, or where a decision has been revoked or varied under Rules 33 or 36, or altered by a superior court, it is the duty of the Secretary to amend any Register entry accordingly and send a copy of it to the parties, and to any court that has referred the case to the tribunal.

102. Where, under Rules 32 or 49, a document is not entered onto the Register and is then corrected by the certificate, the Secretary will send a copy of the corrected document to the parties.

103. Rule 37(4) makes clear that in Scotland, references in Rules 37(2) and 37(3) to superior courts should be read as referring to appellate courts.

Rule 38 - General powers to make costs and expenses orders

104. Rule 40 sets out the circumstances (listed in Rules 39, 40 and 47) where a tribunal or chairman can make a costs order. A costs order may require a claimant or respondent to make a payment in respect of costs incurred by another party, and to make a payment to the Secretary of State in respect of any allowances paid to anyone in connection with their attendance at the tribunal. This provision excludes allowances paid to members of the tribunal itself.

105. A costs order can be made only where the receiving party has been legally represented, either at the hearing or, if there is no hearing, when the proceedings are determined. Legal representation is defined at Rule 38(5) and includes people who have the right to appear in relation to any class of proceedings in any part of the Supreme Court, or all proceedings in county courts or magistrates' courts, or as an advocate or solicitor in Scotland, member of the Bar of Northern Ireland or a solicitor of the Supreme Court of Northern Ireland.

106. Rule 38(3) makes it clear that costs mean fees, charges, disbursements or remuneration incurred by or on behalf of a party.

107. Where a respondent has not had a response accepted, he or she may still have a costs order made against or in favour of him or her, relating to any part that he or she has taken in the proceedings.

108. Rule 38(6) makes it clear that costs orders are payable by the party against whom they are made, and not by the party's representative.

109. Under Rule 38(7), applications for a costs order can be made at any time during proceedings. Applications can be made orally at the end of a hearing, or in writing to the tribunal office. If the application is received later than 28 days from the judgment, will be considered only if the tribunal or chair consider it just or equitable to do so. The date of the judgment is either the date of the relevant hearing, if the judgment was issued orally, or the date on which the written judgment was sent to the parties, if it was reserved.

110. A costs order cannot be made unless the party against whom it is to be made is sent notice by the Secretary, giving him or her the opportunity to make representations as to why it should not be made, unless the party has been given the opportunity to respond orally to the chairman or tribunal already.

111. Where a costs order is made, the tribunal or chairman shall provide written reasons, if these are requested within 14 days of the date of the costs order. The Secretary will then send a copy of the written reasons to all parties to the proceedings.

Rule 39 - When a costs or expenses order must be made

112. A tribunal must make costs order against a legally represented respondent where, in an unfair dismissal case, a Hearing has been postponed or adjourned (i.e. delayed) and: a) the claimant informed the respondent not less than 7 days before the hearing that he or she wanted to be reinstated (i.e. return to their job) or re-engaged (i.e. return as an employee, but to a different post); and b) the postponement or adjournment was caused by the respondent failing, without a special reason, to provide evidence as to the availability of the job from which the claimant was dismissed, or of comparable or suitable employment.

Rule 40 - When a costs or expenses order may be made

113. A tribunal or chairman can exercise discretion to make a costs (in Scotland, expenses) order, either in favour of or against a party (as the circumstances may require), where, on the application of that party, a Hearing or a pre-hearing review has been postponed or adjourned.

114. A tribunal or chairman must consider making a costs order against a party who has, in the opinion of the tribunal or chairman (as the case may be), acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or (either personally or through a representative) conducting of the proceedings, or if the bringing or conducting of proceedings by the paying party has been misconceived.

115. A tribunal or chairman may also make a costs order against a paying party who has not complied with a direction or practice direction.

Rule 41 - The amount of a costs or expenses order

116. Rule 41(1) sets out three ways in which a costs order against a party can be set. Firstly, the tribunal may specify the sum payable, where that sum is no greater than £10,000. Secondly, the parties may agree the sum payable between themselves. Thirdly, the tribunal may order the costs to be determined by way of detailed assessment in a County Court in accordance with the procedure set out in the Civil Procedure Rules or, in Scotland, as taxed according to such part of the table of fees prescribed for proceedings in the sheriff court as shall be directed by the order. Rule 41(3) makes clear that if the amount is set this using the two latter methods, the amount can exceed £10,000.

117. The tribunal may take into account ability to pay when determining whether or not to make a costs order and in setting the amount.

Rule 42 - General power to make preparation time orders

118. Rule 42(2) makes it clear that preparation time orders may be made under Rules 43, 44 and 47 against a party only where they have not been legally represented at either the hearing, or if proceedings have been determined without a hearing, they have not been legally represented when proceedings have been determined.

119. A tribunal or a chairman may make a preparation time order that will compel a party to make a payment in respect of costs incurred by another party.

120. Rule 42(3) makes clear that preparation time does not include time spent at any hearing. Preparation time does include any preparation work done which is directly related to the proceedings, and also any time spent by that party's legal or other advisers relating to the conduct of the proceedings.

121. Where a respondent has not had a response accepted, he or she may still have a preparation time order made against or in favour of him or her, relating to any part that he or she has taken in the proceedings.

122. As with costs orders, applications for a preparation time order can be made at any time during proceedings. Applications can be made orally at the end of a hearing, or in writing to the tribunal office. If the application is received later than 28 days from the judgment, it will be considered only in exceptional circumstances. The date of the judgment is either the date of the hearing, if the judgment was issued orally, or the date on which the written judgment was sent to the parties, if it was reserved.

123. A preparation time orders cannot be made unless the party against whom it is to be made is sent notice by the Secretary, giving him or her the opportunity to make representations as to why it should not be made. Notice does not have to be provided if the party has been given the opportunity to respond orally to the chairman or tribunal already.

124. Where a preparation time order is made, the tribunal or chairman shall provide written reasons if requested within 14 days of the date of the order. The Secretary will then send a copy of the written reasons to all parties to the proceedings.

Rule 43 - When a preparation time order must be made

125. Assuming a preparation time order is possible, i.e. the party is not legally represented, a tribunal must award a preparation time order against a respondent in the same circumstances as it must make a costs or expenses order under rule 39, in a case where the party *is* legally represented.

Rule 44 - When a preparation time order may be made

126. The provisions under this Rule, setting out when a preparation time order may be made in favour of a party who is not legally represented, mirror those under Rule 40 for costs and expenses orders for parties who *are* legally represented.

Rule 45 - Calculation of a preparation time award

127. When calculating the number of hours spent on preparation time, the tribunal or chairman (as the case may be) will make an assessment based on information on time spent provided by the party concerned, and on its or his own assessment of what is a reasonable amount of time.

128. When the number of hours has been assessed, this is multiplied by an hourly rate of £25.00, up to a maximum total of £10,000. The hourly rate will be updated each year by £1.00, commencing 6 April 2006.

129. The tribunal may take into account the party's ability to pay when determining whether to make a preparation time order against that party, and in setting the amount.

Rule 46 - Restriction on making costs or expenses orders and preparation time orders

130. A tribunal may not make a preparation time order and a costs order in favour of the same party in the same proceedings. However, where a preparation order is made in favour of one party in proceedings, the tribunal or chairman may make a costs order in favour of another party, or in favour of the Secretary of State under Rule 38(1)(b), in the same proceedings.

131. If a tribunal or chairman wishes to make either a costs order or a preparation time order in proceedings, before the case has been determined, an order can be made that either costs or preparation time are awarded to a party. It can be decided whether the award should be for costs or for preparation time after the case has been determined.

Rule 47 - Costs, expenses or preparation time orders when a deposit has been taken

132. If a party has been ordered to pay a deposit under Rule 20 (see above), and the tribunal (or chairman) find against that party, and no costs or preparation time order has yet been made, the tribunal (or chairman) will consider whether to make either a costs or preparation time order. This is because the party concerned may have been unreasonable in forcing the matter to be determined by a tribunal. However, the tribunal or chairman will not make an order in these circumstances unless it considers that the reason the deposit was made, i.e. the reason it was thought that the party had little reasonable prospect of success, was substantially the same reason as the reason given in the judgment for finding against the party.

133. Rule 47(2) explains that when a costs or preparation time order is made against a party who has paid a deposit, at whatever stage the order was made, the deposit will be used to pay the order (in full or in part). If the order is made in favour of more than one party, the tribunal determines which parties will receive the deposit and in what proportions.

134. If, after payment of the order, there is a remaining part of the deposit, this will be returned to the party who paid the deposit.

Rule 48 - Personal liability of representatives for costs

135. In some circumstances a tribunal or chairman may make a "wasted costs order" against a party's representative. The order may disallow, or force the

representative of a party to meet, the whole or part of any wasted costs, including an order that the representative repay to his client any costs that have already been paid. The representative can also be made to pay to the Secretary of State, in whole or in part, any allowances paid by the Secretary of State in connection with a person's attendance at the tribunal. This excludes any allowances paid to tribunal members themselves.

136. Rule 48(3) defines wasted costs as any costs incurred by a party, which are the result of any improper, unreasonable or negligent act or omission on the part of any representative, or where there have been such acts or omissions after the costs were incurred, the tribunal considers it unreasonable for that party to pay.

137. Rule 48(4) defines representative as excluding anyone who is not acting for profit with regard to the proceedings. A conditional fee arrangement is classified as acting in pursuit of profit.

138. A party will have a reasonable opportunity to make oral or written representations before a wasted costs order is made. The tribunal or chairman will take into account the representative's ability to pay.

139. The wasted costs order must specify the amount to be disallowed or paid.

140. The Secretary shall inform the representative's client in writing of any proceedings under this rule, or of any order made under this rule against the party's representative.

141. Where a wasted costs order is made, the tribunal or chairman shall provide written reasons if they receive a request to do so within 14 days of the date of the costs order. The Secretary will then send a copy of the written reasons to all parties to the proceedings.

Rule 49 - Sexual offences and the Register

142. This Rule addresses privacy issues relating to allegations of a sexual offence raised in tribunal proceedings. It charges the Secretary or the appropriate chairman with omitting or deleting from the Register – or any other type of document relating to the proceedings – any reference that might identify a person affected by or making an allegation of a commission of a sexual offence.

Rule 50 - Restricted reporting orders

143. Provision for the restriction of publicity in cases involving sexual misconduct or disability is made in sections 11 and 12 of the Employment Tribunals Act 1996. Rule 50 explains the circumstances in which restricted reporting orders (RROs) can be made in tribunal proceedings. In line with the primary legislation, these are where the case involves sexual misconduct, or where a complaint has been brought under section 17A or 25(8) of the Disability Discrimination Act 1995 and where information of a personal nature is likely to be heard by the tribunal or chairman. Subject to these circumstances, a RRO can be made by a chairman on his or her own initiative, or where a written application has been made to the tribunal office. An application can

also be made orally at a tribunal hearing. RROs can be of two types – temporary or full. A chairman or tribunal can make a temporary RRO without holding a hearing. In these circumstances the Secretary informs all parties of the making of the order as soon as possible, explaining their right to apply to have the RRO revoked, or to have it changed into a full RRO. This latter conversion can be effected only if an application is made within 14 days of the making of the temporary RRO. Where there is no such application, the temporary RRO lapses on the fifteenth day after it is made. Where there is an application, the temporary RRO continues in force until the hearing where the application for a full RRO is considered. This may be at a pre-hearing review or a full Hearing, at which all parties will be allowed to submit their own oral arguments, before a decision is made by the tribunal or chairman whether or not to order a full RRO for the duration of the case.

144. Rule 50(8) relates to the conditions attaching to a RRO. RROs must specify which persons must not be identified. A notice publicising the existence of an RRO must be exhibited on the employment tribunal notice board, and must also be posted on the door of the room where the proceedings involving the RRO are taking place. The Secretary is responsible for ensuring that this is done. Full RROs will remain in force – unless revoked earlier – until both liability and remedy have been decided.

145. Rule 52(9) empowers a tribunal or chairman to extend the scope of an RRO to other related proceedings if that is adjudged appropriate.

146. An RRO can be revoked at any time by a tribunal or chairman.

Rule 51 - Proceedings involving the National Insurance Fund

147. This Rule sets out the right of the Secretary of State to appear as if she was a party and be heard at any hearing of a case involving payment from the National Insurance Fund.

Rule 52 - Collective agreements

148. Rule 52 concerns sex discrimination claims brought to the tribunal, which relate to collective agreement terms. In such claims, the Rule identifies categories of persons, whether or not named in the claim, who should (where the chairman believes it reasonably practicable to identify them) be treated as respondents and who would therefore be liable to provide remedy if the judgment of the tribunal goes against them. These include the claimant's employer (or prospective employer), and any employer or worker organisation (or representative) that might in the future be involved in negotiating a variation of the terms of the collective agreement.

Rule 53 - Employment Agencies Act 1973

149. Rule 53 refers to section 3C of the Employment Agencies Act 1973. That Act provides (in section 3A) for an employment tribunal, on application from the Secretary of State, to prohibit someone from running an employment agency or similar employment business. Section 3C allows that person, in turn, to apply to the employment tribunal requesting a variation or revocation of the earlier prohibition order. The tribunal can do this if it believes that circumstances have changed

significantly since the order was made. Rule 55 makes clear that, in the event of such an application under section 3C, the Secretary of State would be regarded as the respondent in the proceedings. The Rule additionally makes clear that the claim (i.e. to vary or revoke the prohibition order) will not need to include the personal details of those against whom the claim is being made.

Rule 54 - National security proceedings

150. The arrangements set out in Rule 54 are intended for use in tribunal cases where national security considerations are a factor.

151. It provides that a Minister in particular crown employment proceedings (and whether or not he or she is a party to those proceedings) can direct a tribunal or chairman – through the Secretary – to conduct the proceedings in private; to exclude the claimant and/or their representative(s); and to take steps to conceal the identity of particular witnesses. A tribunal or chairman can also – in the interests of national security – take any of the above measures on his own initiative. The Rule allows the tribunal to direct that any document relating to a particular case with national security implications should not be disclosed. It also provides for the tribunal or chairman to keep secret the reasons for the judgment in the case. The Rule makes clear that any order made by the tribunal or chairman under Rule 56(2) should be kept under review.

152. Rule 54(3) offers the opportunity for a Minister of the Crown to address the tribunal or chairman if he or she believes that it would be appropriate for an order to be made as described in Rule 54(2). Rule 54(4) places a duty on any tribunal or chairman to ensure that information in any proceedings is not disclosed which could run counter to national security.

Rule 55 - Dismissals in connection with industrial action

153. Rule 55 gives a tribunal or chairman the power to adjourn tribunal proceedings in cases where a claim has been brought claiming unfair dismissal arising from a claimant's participation in official industrial action. Tribunal proceedings can be adjourned in circumstances where specified civil proceedings have been brought, until the interim proceedings relating to this have been concluded (which would include the expiry of any relevant time-limit for an appeal).

Rule 56 - Devolution issues

154. This Rule is concerned with tribunal cases where Scottish or Welsh devolution issues are raised (as defined in the relevant legislation – either Schedule 6 to the Scotland Act 1998 or Schedule 8 to the Government of Wales Act 1998). In such proceedings the tribunal Secretary is required to inform, as appropriate, either the Advocate General and the Lord Advocate (in Scotland) or the Attorney General and the National Assembly for Wales (in Wales). In each case the Secretary must provide him or her with a copy of the claim and the response forms. A copy of the notice must also be sent to the parties to the proceedings. Furnished with this information, the office-holders can, if they apply within 14 days, exercise their right to take part in the proceedings, but only to address those aspects relating to devolution matters.

155. The only circumstance in which the Secretary does not have to fulfil this obligation to provide information is where the above-named office-holders are themselves party to the proceedings.

Rule 57 - Transfer of proceedings between Scotland and England and Wales

156. Rule 57 provides for the transfer of employment tribunal cases between the separate jurisdictions of England & Wales and Scotland. This can be done only by the mutual consent of the President or Regional Chairman (in England & Wales) and the President or Vice President (in Scotland). The grounds for such a transfer are where, in the opinion of those mentioned above, the proceedings could, and would more conveniently, be determined by a tribunal in the other jurisdiction. A transfer can be agreed and a direction made without an application from either party requesting such a move, but there is also provision under Rule 11 for parties to apply for a transfer themselves. Once a case is transferred to the other jurisdiction, it will be deemed to have been presented to the Secretary by the claimant.

Rule 58 - References to the European Court of Justice

157. This Rule concerns employment tribunal proceedings where the chairman or tribunal makes an order referring a question to the European Court of Justice for a preliminary ruling under Article 234 of the Treaty of Rome. This process is used to determine a matter where a question of Community law arises, the answer to which is necessary for the tribunal or chairman to give judgment. Where such an order is made, the Secretary shall send a copy of the order to the Registrar of the European Court.

Rule 59 - Transfer of proceedings from a court

158. This Rule confirms that in circumstances where a case has been referred to an employment tribunal by a court, the tribunal Rules of Procedure shall apply to the case as if it had been submitted to the tribunal Secretary by the claimant in the usual way.

Rule 60 - Powers

159. This Rule addresses the powers attaching to employment tribunals. It confirms that tribunal chairmen can regulate (effectively decide) their own procedure when conducting proceedings. The tribunal Regulations and Rules of Procedure, and any practice directions issued by the tribunal Presidents, over-ride this individual entitlement to regulate. Rule 61(2) confers on a tribunal the same power to make an order at a Hearing or a pre-hearing review held under Rule 18(3) as a chairman has the power to make, so long as it complies with relevant notices or procedural requirements. Rule 61(3) allows functions of the tribunal Secretary to be undertaken by other Employment Tribunal Service officials, so long as they do so with the approval of the Secretary.

Rule 62 - Notices, etc

160. Rule 62 sets out the arrangements to be followed by the employment tribunals when issuing notices or other documents. Notices can be sent by post, fax or other means of electronic communication, or by personal delivery. They are taken as having been received (unless the contrary is proved) either when delivered “in the ordinary course of post”, or on the day of transmission (in the case of fax or other electronic communication), or on the day of delivery (in the case of personal delivery).

161. Claimants can present their claims at *any* Employment Tribunal Office within the correct jurisdiction (either England & Wales or Scotland). However, Rule 62(3) makes clear where people should present notices and other documents (other than a claim) which are required by the Secretary or an Employment Tribunal Office to the particular Employment Tribunal Office identified to the parties by the Secretary.

162. Rule 62(5) provides a list of addresses to which notices or documents relating to tribunal cases should be sent. The address will vary according to the nature of the notice or document concerned. If a notice is sent to a party’s representative, under this Rule, it is deemed to have been sent to the party itself.

163. Rule 62(5) allows for a party to advise the Employment Tribunal Office, the other parties and any conciliation officer involved in the proceedings, of a change of the address to which notices relating to the case are to be sent.

164. Rule 62(6) entitles the President, Vice President or a Regional Chairman to take a decision to vary the way in which notices are served on parties, in order to ensure that documents reach the intended recipient.

165. In cases where a payment from the National Insurance Fund is likely to be involved, the Secretary is required, where appropriate, to send copies of all documents to the Secretary of State, regardless of whether or not she is a party to the proceedings.

166. Rule 62(8) requires the Secretary to send decisions and written reasons relating to proceedings brought under discrimination legislation to the appropriate, named statutory body. These are identified in the Rule as the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission.