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How (not) to lose an employment tribunal claim: Part 3

# Overview

- How ETs are coping in the new normal
  - Types of hearing
  - Practical issues for witnesses
  - Our experience
- 
- How to avoid an ET hearing altogether - judicial assessment and mediation

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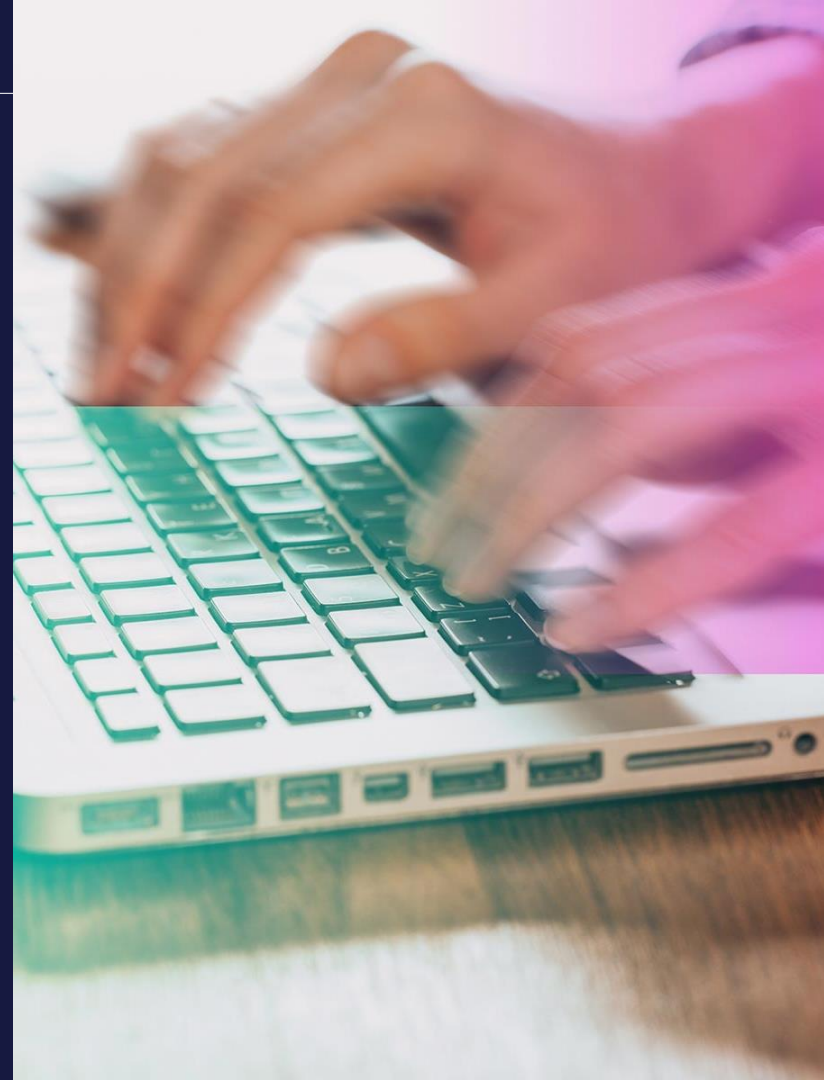
How are they coping?

## Initial response

- National Listing Direction: 23 March to 26 June 2020 – all in person hearings converted to telephone PHs
- Early June – road map published for use of CVP
- By end of June, mixed position across E&W with some ETs running video hearings, and some not
- 150 CVP “rooms” available for ETs across E&W
- ET caseload:
  - Singles
    - March 2018 – 19,000
    - March 2020 – 36,616
    - Forecast to rise by 1% per week.
- Judges
- Detriment or dismissal cases on H&S or protected disclosure grounds were classified as priority claims

## Types of Hearing

- In person
  - Everyone attends as normal
- Wholly remote
  - All attend remotely on CVP
- Partly remote
  - Some attend in person and others remote
  - Increasingly being used
  - Typically Judge and legal reps attend in person and witnesses remote



## Types of Hearing (2)

- Judge decides format of hearing
- Parties may express their views
- Relevant factors:
  - Availability of enough space in safe, clean risk-assessed venues
  - Whether safe travel to venue is possible, especially for those using public transport
  - Availability of suitable hardware and software
  - Availability of sufficient HMCTS staff
  - Length of delay if Hearing is going to be held in person
  - Personal circumstances of any participant
  - Whether parties are legally represented
  - Nature of disputed evidence and whether it would be fairer to be heard in a face-to-face environment

## Open Justice

- Fundamental principle of ET system
- How to ensure public access
- Any member of public or press may email ET and ask to observe hearing remotely
- ET will provide access details for exclusive use of that individual
- Witness statements:
  - Share screen
  - Ask witness to read out statement
- Cause lists – [www.courtserve.net](http://www.courtserve.net)

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Managing bundles and giving  
evidence

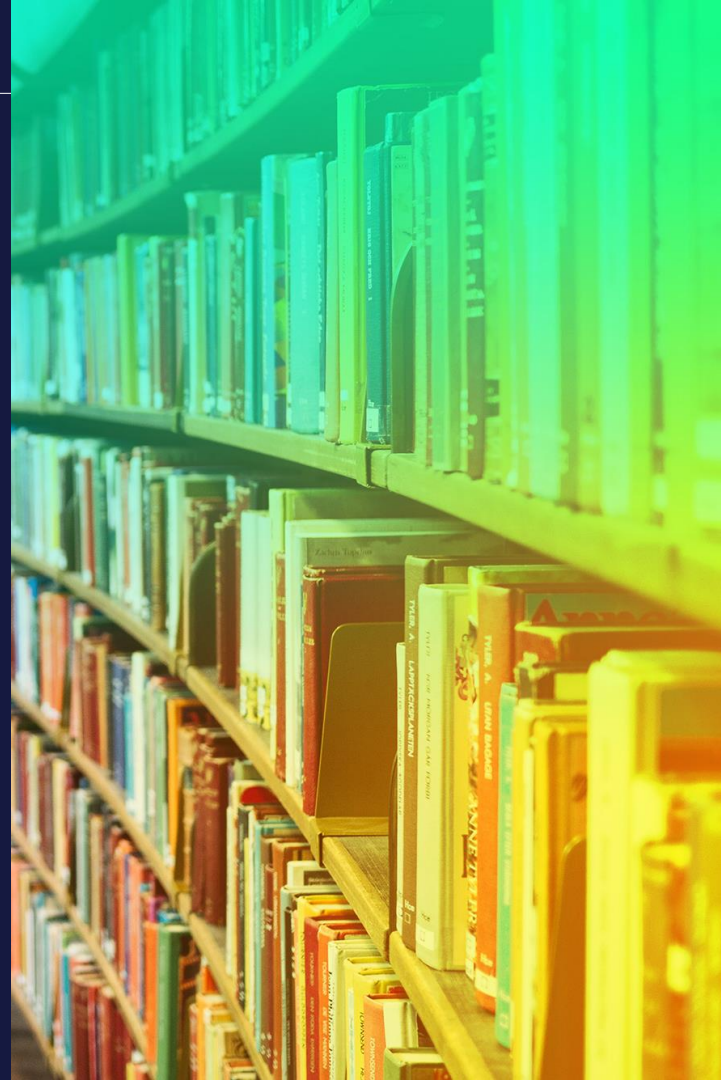


## Bundles

- Electronic documents are preferred, and in many cases required
- Where one legally represented party, witness statements and bundles must be provided in a PDF form with required formatting:
  - Optical character recognition
  - Index/contents preferably with hyperlinks
  - Pages the correct way up in portrait mode
  - Page numberings that correspond to the PDF numbering system
  - Significant documents bookmarked

## Bundles (2)

- If you need to add documents - consult with the tribunal
- Bundle size needs to be considered
- May still be a need to send a hard copy to the tribunal
- Speak to unrepresented parties to assess their facilities
- It is still a public forum – members of the public or press can request permission to inspect the documents



## Paper and printed documents

- Measures in place to reduce infection
  - Separate sets of documents
  - Oath/affirmation cards not shared
  - Handing up of documents only where safe handling arrangements can reasonably be made
  - If documents are to be provided to the other side or witness, allow 24 hours to pass for safe handling
  - Paper documents to be sent to the tribunal one week before

Do you think witness evidence being given remotely will be more or less effective?

Poll

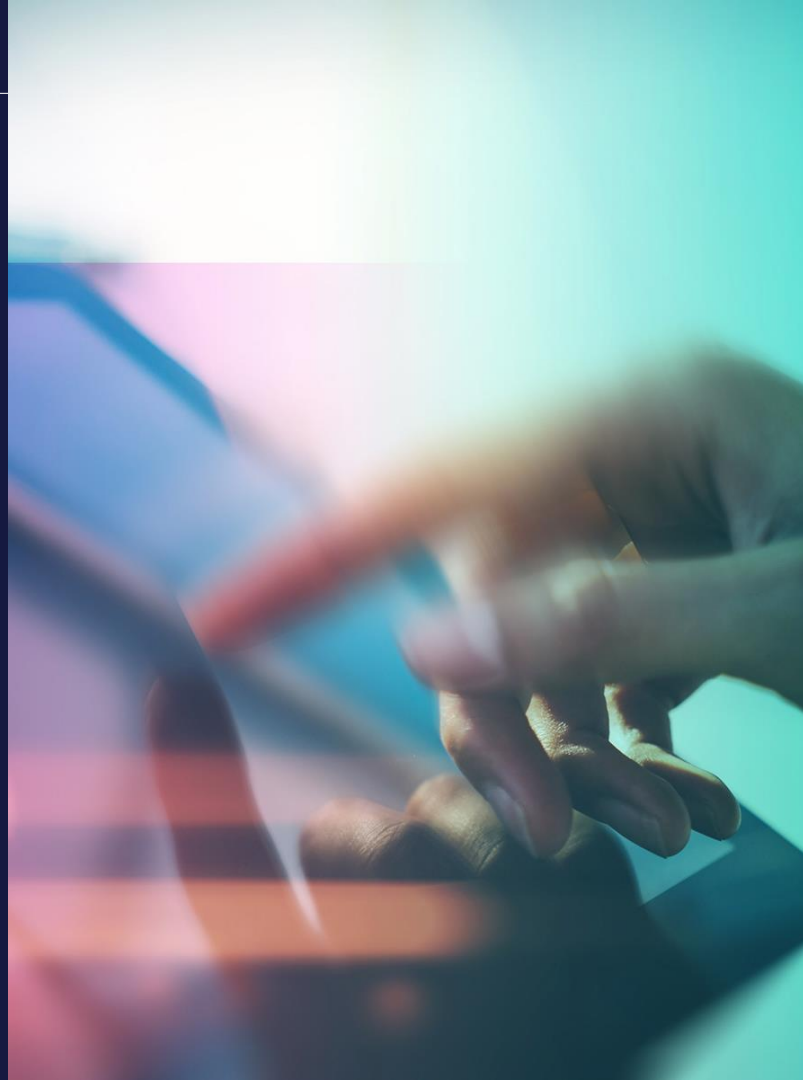


## Giving evidence

- Ensure the correct environment
  - Suitable device – how many?
  - Stable internet connection
  - Professional attire
  - An uninterrupted space suitable for giving evidence
    - Location
    - Lighting
    - Background
- Must not have anyone guiding or influencing evidence
- Bundles and statements must be unmarked
- Remain under oath during any adjournment
- Criminal offence to record

## Giving evidence (2)

- Cross examination
  - Less intimidating?
  - Don't fall into the trap of informality
  - You will appear closer to the judge



## Giving evidence (3)

- Plan your communication channels
- Switch off camera and mute self after any preliminary issues
- Speak slowly and if confused, ask
- If you need a break, request one

## Our experience

- Correspondence
  - Can be six-eight week delay in reviewing papers
  - Mark “urgent” if Hearing in next few days
- Listing delays
  - Mixed picture across UK depending on:
    - Type of hearing
    - Claims being brought
    - Length of hearing
- Last-minute conversion to video



Questions?

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How to avoid an ET hearing  
altogether

## Alternatives

- Judicial assessment
- Private mediation
- Judicial mediation



## Judicial assessment

- Past practice of Tribunals 'giving an indication'
- Unsatisfactory and undermined appearance of a fair hearing
- Presidential Guidance
- When is it available?
- Necessary conditions

## Judicial assessment (2)

- When might it be helpful
- When won't it be suitable
- Tactical considerations
- Practical issues – ACAS or another lawyer's involvement

## Mediation options

- Workplace mediation
- Judicial mediation
- Private (usually post employment) mediation

## Mediation – key features

- Voluntary
- ‘Without prejudice’
- Private
- Flexible
- Dress rehearsal
- Cost and time



## Private mediation

- Finding an appropriate mediator
- Seeking to agree them with the employee
- Venue
- Costs
- Process
- How to conclude a binding settlement
- Currently rare in mainstream employment situations but may become more prevalent



## Judicial mediation

- Presidential Guidance 2018
- Clear process
- Judicial discretion
- Available across all ET jurisdictions, but not all cases will be considered suitable

## Judicial mediation (2)

- Case management meeting
- Venue and date
- Timing considerations
- Additional preparation
- Separate bundle
- Positioning statements

## Judicial mediation (3)

- Benefits and suitability
- Relative formality of the process
- Sense of investment
- 'Day (or two) in court'
- Mechanics of agreement

Questions?

## Speakers



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