

**EXPLANATORY MEMORANDUM TO**  
**THE EMPLOYMENT APPEAL TRIBUNAL (AMENDMENT) RULES 2023**  
**2023 No. 967**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by The Ministry of Justice and is laid before Parliament by Command of His Majesty.

**2. Purpose of the instrument**

- 2.1 These Rules amend the Employment Appeal Tribunal Rules 1993 ("the 1993 Rules"), which govern procedure in the Employment Appeal Tribunal ("the Appeal Tribunal").
- 2.2 These Rules amend Rule 3 of the 1993 Rules to reduce the documents that are required to be submitted with the Notice of Appeal in order for an appeal to be correctly instituted. It also amends Rule 37 of the 1993 Rules to provide a further discretion on the Appeal Tribunal to extend the time limit for the submission of an appeal, where there has been a minor error in the submission of an appeal. It further amends the Appeal Tribunal Forms, including revising the list of documents that must be submitted when lodging an appeal, each of the Forms are amended to clarify the contact information that should be submitted to the Appeal Tribunal and also inserts a statement to each Form to remind parties of the need to comply with the overriding objective. There are some other minor amendments to the Appeal Tribunal Forms including removal of an obsolete legislative reference and to update terminology.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

**4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is England, Wales, and Scotland.
- 4.2 The territorial application of this instrument is England, Wales, and Scotland.

**5. European Convention on Human Rights**

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

**6. Legislative Context**

- 6.1 Section 30 of the Employment Tribunals Act 1996 ("the 1996 Act") provides the Lord Chancellor the power, after consultation with the Lord President of the Court of Session, to make rules with respect to proceedings before the Appeal Tribunal. The power to make rules under section 30 of the 1996 Act is amended by section 34 to, and Schedule 5 of, the Judicial Review and Courts Act 2022. These provisions are not yet in force but will once commenced, transfer the power to make rules in respect to the practice and procedure of the Employment Tribunal and the Appeal Tribunal to the Tribunal Procedure Committee (the "TPC").

- 6.2 Rule 2A of the 1993 Rules provides that, the overriding objectives of the Rules is to enable the Appeal Tribunal to deal with cases justly. Dealing with cases justly includes the Appeal Tribunal, as far as practicable, ensuring that the parties are on equal footing, that cases are dealt with proportionately, expeditiously, fairly and saving expense.
- 6.3 This instrument is made in advance of the transfer of the rule making powers to the TPC in order to address the significant amount of judicial time and resource that is at present, being spent on dealing with applications for an extension of time as a consequence of minor errors in the submission of an appeal, and that is materially adding to the existing outstanding cases with the Appeal Tribunal. The changes to Rule 3 and Rule 37 of the 1993 Rules aims to simplify the documents that are required to be lodged in order to institute an appeal, this will reduce the number of invalid appeals due to minor errors and decrease delays in the Appeal Tribunal dealing with cases.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The Appeal Tribunal is responsible for determining appeals against decisions made by the Employment Tribunal. Rule 3 of the 1993 Rules prescribes the documents that are required to be lodged for an appeal to be properly instituted before the Appeal Tribunal and the statutory time limits for bringing an appeal. Any failure to meet these requirements, including failing to include every single page of a document even a blank page of that document will result in an appeal being deemed ‘not properly instituted’, in other words, it is not a valid appeal. An appellant who wishes to rectify the issue must make an application to the Appeal Tribunal for an extension of time.
- 7.2 Case law has established that the Appeal Tribunal does not have the discretion to allow an appeal to be treated as properly instituted if the putative appellant has not fully complied with the requirements of Rule 3 of the 1993 Rules<sup>1</sup>. The Appeal Tribunal does have the power under Rule 37 of the 1993 Rules to extend the time limit within which an appeal should be properly instituted, but such extensions can only be given in rare and exceptional cases where the Appeal Tribunal is satisfied that there has been a full, honest and acceptable reason for the delay<sup>2</sup>.
- 7.3 This strict application of the rules generates increased workload for the Appeal Tribunal creating inefficiency in the use of judicial and administrative resource as well as increasing delays with cases being dealt with.
- 7.4 The proposed amendments to Rule 3 are designed to make the appeals process less complex and more accessible, supporting access to justice for all individuals. This is particularly important for those who may struggle with the current requirements, such as individuals with disabilities or those whose first language is not English.

### *What did any law do before the changes to be made by this instrument?*

- 7.5 Rule 3 of the 1993 Rules prescribes the documents that must be lodged for an appeal to be deemed ‘properly instituted’ and sets a 42-day time limit for submission of an appeal. In an appeal against a judgment of an employment tribunal, an appellant must

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<sup>1</sup> Kanapathiar v London Borough of Harrow [2003] IRLR 571.

<sup>2</sup> United Arab Emirates v Abdelghafar & Anor [1995] ICR 65; Aziz v Bethnal Green City Challenge Co Ltd [2000] IRLR 111 CA.

submit with the notice of appeal the following documents: (1) the notice of appeal, (2) a copy of any claim and response provided in the proceedings before the employment tribunal (or an explanation as to why either is not included), (3) a copy of the written record of the judgement and (4) a copy of the written reasons for the judgement or an explanation as to why the written reasons are not included.

- 7.6 Rule 37 of the 1993 Rules provides the Appeal Tribunal the discretion to extend the time limit within which an appeal should be properly instituted but case law has established that this discretion can only be exercised in rare and exceptional circumstances.

*Why is it being changed?*

- 7.7 The Appeal Tribunal has advised that there has been a noticeable increase to the number of appeals that are lodged invalidly. A significant number of invalid appeals arise due to missing or incomplete documents being submitted, with available data showing that four of the average of 23 new appeals lodged each week with the Appeal Tribunal are invalid. This generates additional work for the Appeal Tribunal and has led to an average delay of 24 weeks for cases to be dealt with.
- 7.8 The Appeal Tribunal believes that the reasons for the high number of invalid appeals are likely due to (a) an increasing number of appellants filing documents from a digital bundle used before the Employment Tribunal, which may itself have included incomplete versions of certain documents, and (b) the higher workload experienced by the administrative staff of the Appeal Tribunal, who have not been able to pick up omissions in the lodging of appeal documents as quickly as they had been able to do in the past, resulting in an appeal remaining invalid at the end of the 42 day time limit.
- 7.9 The Appeal Tribunal has requested that the Lord Chancellor amend Rule 3 and 37 of the 1993 Rules, with consequential amendments to the Appeal Tribunal Forms in order to reduce the number of appeals that are invalidly lodged. It is intended that these rule amendments will ensure that the Appeal Tribunal continues to fulfil the overriding objective to deal with cases justly.

*What will it now do?*

*Amendment to Rule 3*

- 7.10 This instrument amends Rule 3 to remove the requirement for the appellant to submit with the notice of appeal a copy of any claim or response provided in proceedings before the Employment Tribunal. The Appeal Tribunal considers that this change will reduce the likelihood of appellants failing to include the prescribed documents by the statutory deadline for lodging an appeal.

*Amendment to Rule 37*

- 7.11 This instrument amends Rule 37 to make further provision in respect to the Appeal Tribunal's discretion to extend the time limit for the lodgement of an appeal. This discretion applies where the Appeal Tribunal considers that the nature of the error is minor, the error has been rectified and that having regard to all the circumstances, including the manner in which, and the timeliness with which, the error has been rectified, and any potential prejudice to any respondent, that it remains in the interests of justice to grant an extension of time. The term 'minor error' has purposefully not been defined as the Appeal Tribunal anticipate that they will lay down early guidance

in case law with appeals from Registrar's orders being heard before the President of the Appeal Tribunal (with the possibility of onward appeals to the Court of Appeal).

*Amendments to Appeal Tribunal Forms*

- 7.12 This instrument makes amendments to each of the Appeal Tribunal Forms that are contained in the Schedule to the 1993 Rules. Form 1 is amended to reflect the changes made to Rule 3, so that the list of documents that must be included with the notice of appeal no longer includes the requirement to provide the copy of the claim or reply submitted in the employment tribunal proceedings. Paragraph 5(a) of Form 1 repeats the requirements of Rule 3 (as amended by this instrument), to confirm that in the case of an appeal from a judgment of an employment tribunal, an appellant must submit to the Appeal Tribunal, (1) a copy of the written record of the judgment of the employment tribunal, and (2) a copy of the written reasons for the judgment of the employment tribunal or if this is not provided an explanation as to why written reasons have not been included. Paragraph 5(b) clarifies that in the case of an appeal from an order or any other decision of the Employment Tribunal, which includes decisions or orders made in relation to the conduct of proceedings, when lodging an appeal the appellant must submit, (1) a copy of the written record of the order or decision of the employment tribunal under challenge and (2) if it is available, the written reasons for that order or decision. Form 1 is also amended to replace references to 'review' with 'reconsideration' as the term used for the procedure that applies in the Employment Tribunal is now referred to as 'reconsideration', and to clarify that if documents listed in paragraph 6 of Form 1, cannot be included with the notice of appeal an explanation should be given, but this is not mandatory.
- 7.13 In addition, each of the Appeal Tribunal Forms (including Form 1), are amended to clarify the contact information that should be provided to the Appeal Tribunal, and includes a statement as a reminder to appellant's and respondents in proceedings that they are required to comply with the overriding objective, to read and comply with any practice direction, and that they must communicate with the Appeal Tribunal and with the other parties in the proceedings in a respectful and appropriate manner.
- 7.14 A further minor amendment is made to Form 5A to remove references to the Companies (Cross-Border Mergers) Regulations 2007 (S.I. 2007/2974). This instrument was revoked in its entirety by regulation 5(a) of the Companies, Limited Liability Partnerships and Partnerships (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/348)

**8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument does not relate to withdrawal from the European Union nor does it trigger the statement requirements under the European Union (Withdrawal) Act.

**9. Consolidation**

- 9.1 No consolidation is taking place.

**10. Consultation outcome**

- 10.1 In accordance with section 30 of the Employment Tribunals Act 1996, the Lord Chancellor has consulted the Lord President of the Court of Session before making this statutory instrument.

- 10.2 In addition, to the statutory duty to consult the Lord President, the President of the Appeal Tribunal undertook an informal consultation with the Appeal Tribunal National User Group on the proposed changes to Rule 3 and 37 of the 1993 Rules and the consequential and minor amendments to the Appeal Tribunal Forms. The consultation ran from 19 June 2023 to 19 July 2023 and there were 15 responses. A copy of the consultation and response may be obtained through the Judiciary's website at <https://www.judiciary.uk/courts-and-tribunals/tribunals/employment-appeal-tribunal/>. Should you prefer an alternative method, you may also request a copy by sending an email to [londoneat@justice.gov.uk](mailto:londoneat@justice.gov.uk); mark any such request for the attention of the Registrar.
- 10.3 The majority of respondents (11 respondents) agreed with the proposed change to Rule 3. However, there were some concerns about the potential negative implications of increased flexibility and the potential for a rise in workloads. Several solutions were put forward, including modifying forms and providing clearer document submission instructions.
- 10.4 The majority of respondents (9 respondents agreed, 4 respondents were neutral) also agreed with the proposed amend to Rule 37. Respondents did express some reservations about the potential weakening of the Appeal Tribunal time limits for lodging appeals. Respondents also emphasised the need for a clear definition of 'minor error' providing examples as well as ensuring timely rectifications and the need for judicial guidance to be provided through test cases.
- 10.5 The Appeal Tribunal proposed including a declaration to each of the Appeal Tribunal Forms, requiring the appellant, applicant or respondent to declare that they have read and complied with the Appeal Tribunal Practice Direction, that they accept that they must co-operate with other parties and the Appeal Tribunal and to continue to comply with the overriding objective. This proposal was not favoured by respondents as concerns were raised about its fairness, in particular to parties who are litigants in person. In light of the responses received this amendment has not been taken forward.

## **11. Guidance**

- 11.1 The President of the Appeal Tribunal is intending to publish a revised Practice Direction, which will include consequential provisions necessitated by the amendments made by this instrument, but will also include more substantial changes to better enable the Appeal Tribunal to deal with appeals efficiently and justly. General information about tribunals can be found on the Ministry of Justice website at: <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about>.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because the impact is expected to be minimal and well below the threshold of £5 million per annum at which an assessment must be prepared.

**13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses. However, the impact will be low.

**14. Monitoring & review**

- 14.1 The Ministry of Justice will keep these Rules under review. It should be noted that the transfer of the rule making powers to the TPC is intended to be commenced later this year, following which the TPC will become responsible for monitoring and reviewing these rules.

**15. Contact**

- 15.1 Hasan Khan at the Ministry of Justice Telephone: 07563379261 or email: [hasan.khan1@justice.gov.uk](mailto:hasan.khan1@justice.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Cathryn Hannah, Deputy Director for Courts, Tribunals and Transparency can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Parliamentary Under Secretary of State Lord Bellamy KC can confirm that this Explanatory Memorandum meets the required standard.