

Vulnerable parties and witnesses in employment tribunal proceedings

First published in ELA Briefing (June).

The first Presidential Guidance on vulnerable parties and witnesses in employment tribunal proceedings was issued this April. Key parts of the guidance deal with (i) identifying when a participant is vulnerable, and (ii) case management: directions and orders.

Background

The principal purpose of the Presidential Guidance is 'to focus the attention of all employment tribunal judges and members, parties, witnesses and representatives on the issue of vulnerability, however that issue might arise or appear' (para 4).

The requirement to deal with a case justly is set out in the overriding objective (Rule 2, First Schedule). This includes the tribunal and all parties ensuring that all parties can effectively participate in proceedings and that all witnesses can give their best evidence.

Identifying when a participant is vulnerable

It is helpful to frame this part of the discussion with a working definition of vulnerability. The guidance says: 'A good test of vulnerability might be whether the person is likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case.'

The guidance explains that vulnerable parties and witnesses are 'not a homogenous group', that mental or physical disability and intellectual or social disadvantage can be obvious barriers to access to justice in employment litigation. Vulnerability may result from disadvantages or difficulties arising from conditions which do not necessarily meet the legal definition of disability or which have not been assessed or diagnosed as such (paras 9, 26-34).

The guidance helpfully lists 19 factors that may be relevant when making appropriate directions or orders (para 14). The factors which relate to whether a participant is vulnerable, include the 'impact of any actual or perceived or potential intimidation of a party or witness', 'the social and cultural background', the 'domestic circumstances' of the party or witness and the ethnic origins or religious beliefs 'of the party or witness (so far as might be relevant)'.

When the issue arises, all parties 'should consider' whether:

- a vulnerable person's participation in the proceedings is likely to be diminished; and/or
- the quality of the evidence is likely to be diminished by reason of their vulnerability.

Either of the above scenarios triggers the need to consider whether it is necessary to make directions or orders as a result (para 6).

Case management: directions or orders

Ground rules

If the need to consider directions or orders is triggered, that 'can include considering the setting of "ground rules" before a vulnerable witness gives evidence'. ET Rules do not provide for 'ground rules' hearings. However, the guidance makes it clear that ground rules may be considered at any appropriate hearing that may be a preliminary hearing 'listed for that purpose' or at a case management hearing generally, or whenever the tribunal is exercising any of its case management powers (at a hearing or on paper, para 20).

There is a need to identify any participant who is vulnerable at the earliest stage possible; this may be done in the ET1 or ET3, 'or separately by any reasonable method of communication with the tribunal'.

Ground rules before a vulnerable witness gives evidence may include:

- directions and orders – in relation to the nature and extent of the evidence;
- conduct of the representatives and/or the parties in respect of the evidence; and
- necessary support for the vulnerable person.

As well as the factors relating specifically to whether a participant is vulnerable, other relevant considerations when making directions and orders include the 'nature and extent of the information' before the tribunal; for example, sensitive medical evidence. Further, it is important to consider 'the issues arising' and 'whether a matter is contentious'. And, consideration should also be had as to the 'views of the vulnerable party or witness' and 'any other relevant matter'. Ground rules should also be kept under review.

Practical measures

In terms of more practical matters, the tribunal should also consider any available 'measures' available and their associated 'costs'. Ultimately, it is a matter for judicial discretion whether any adjustments are appropriate. The guidance points out that 'it may then be necessary for HM Courts and Tribunals Service to be advised by the tribunal of what may be required', but that a tribunal 'may not direct or order that

public funding must be available to provide such a measure' (paras 16 and 18).

Consideration of the following may be appropriate:

- facilities;
- evidence – the method of giving evidence (may vary depending on whether it is in chief or cross-examination), whether screening is required, extent of evidence;
- intermediary – such as a communication specialist or BSL interpreter. It may be appropriate for examination in chief/ cross-examination to be through an intermediary;
- aids – provision of aids to communication;
- reporting restrictions – whether an application under rule 50 of the procedural rules (privacy and restrictions on disclosure) may assist (Privacy and vulnerability, paras 4454);
- timetabling;
- capacity to litigate – the EAT provided guidance on the case management power to appoint a litigation friend in *Jhuti*;
- language – use of appropriate language, avoiding jargon and idiom; and
- questioning – control of irrelevant or repetitive, oppressive or intimidating questioning. If an intermediary is used, the tribunal is likely to require that questions for examination in chief and cross-examination are approved in advance.

Conclusion

The Criminal and Family Procedure Rules make specific provision for vulnerable participants and consideration is being given to amending the Civil Procedure Rules to similar effect. The guidance states: 'There is no obvious need to reinvent the wheel if the excellent work done in the criminal and family and civil jurisdictions can be adapted for use in the employment tribunal.'

Hopefully this will turn out to be correct, however, there may be an argument for making specific provision in the ET Rules, not least to increase awareness of the issue of vulnerability among representatives and parties. It remains to be seen whether the guidance will lead to an increase in preliminary hearings listed for the purpose of setting ground rules. The guidance does highlight that while the coronavirus pandemic continues to affect society and legal proceedings in particular, appropriate regard shall be had to its effect on vulnerable persons and their participation in tribunal proceedings.

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