EXPLANATORY MEMORANDUM TO

THE EMPLOYMENT APPEAL TRIBUNAL (AMENDMENT) RULES 2024

2024 No. 1044

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. Declaration

2.1 Heidi Alexander, Minister of State at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

2.2 Laura Beaumont, Deputy Director, Civil, Tribunals, and Administration of Justice Directorate, at the Ministry of Justice confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Shenel Mushtaq at The Ministry of Justice Telephone: 07743178586 or email: shenel.mushtaq@justice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument amends the Employment Appeal Tribunal Rules 1993 (S.I. 1993/2854) ("the 1993 Rules"), which govern procedure in the Employment Appeal Tribunal ("the Appeal Tribunal").

4.2 This instrument amends Rule 35 of the 1993 Rules to mandate the use of CE-File for legally represented parties in the Appeal Tribunal. CE-File is an online system for filing documents electronically and its use has been voluntary for users of the Appeal Tribunal since April 2021. Mandating the use of CE-File for legally represented parties in the Appeal Tribunal is intended to reduce the administrative burden on staff and increase efficiency.

4.3 This instrument also updates the definition of "legal representative", includes a definition for "practice direction", and makes minor consequential amendments to the 1993 Rules.

Where does the legislation extend to, and apply?

4.4 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, and Scotland.

4.5 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, and Scotland.

5. Policy Context

What is being done and why?

5.1 In April 2021, the Appeal Tribunal began using CE-File – an online system used for case management by His Majesty's Courts and Tribunals Service ("HMCTS") staff. CE-File is also an e-filing system that allows parties to electronically deliver documents to the Appeal Tribunal. The use of CE-File to deliver documents has since been voluntary for users of the Appeal Tribunal and documents could alternatively be delivered by email, by post or by hand.

5.2 Uptake of CE-Filing by users in the Appeal Tribunal has remained extremely low, with the vast majority of documents being delivered through alternative methods. This has presented a significant administrative burden to the Appeal Tribunal staff who must upload the documents to CE-File themselves. This often requires staff to check through a number of attachments to emails to extract the relevant documents or to extract the documents from large paper bundles before scanning and uploading to CE-File.

5.3 CE-File is also used in the Upper Tribunal and, in June 2022, the Tribunal Procedure Committee ("the TPC") published a consultation seeking views on possible changes to the Upper Tribunal procedure rules in relation to CE-Filing. The consultation ultimately concluded that CE-Filing improves the speed and efficiency of handling cases and that mandating its use would reduce administrative burdens and support the Upper Tribunal's modernisation and drive for efficiency (see section 7). The use of CE-File to deliver documents to the Upper Tribunal was subsequently mandated for legally represented parties in late 2023.

5.4 The Appeal Tribunal wishes to adopt the same approach taken to CE-Filing in the Upper Tribunal. Therefore, this instrument mandates the use of CE-File for legally represented parties in the Appeal Tribunal. This is intended to reduce the current administrative burden and increase efficiency.

5.5 In addition to a number of other minor consequential amendments to the 1993 Rules, this instrument also updates the definition of "legal representative" in the 1993 Rules, referencing the Legal Services Act 2007 and Solicitors (Scotland) Act 1980, and includes a definition for "practice direction".

What was the previous policy, how is this different?

5.6 Rule 35 of the 1993 Rules previously provided that documents may be sent by post or delivered to the Appeal Tribunal, without mandating a particular method of delivery.

5.7 Rule 2(4)(a) of this instrument amends Rule 35 of the 1993 Rules to set out that documents may be sent or delivered to the Appeal Tribunal through CE-File in such manner specified by any practice direction.

5.8 Rule 2(4)(b) of this instrument inserts a new rule in the 1993 Rules to mandate the use of CE-File for legally represented parties to deliver documents to the Appeal Tribunal.

5.9 In cases where legally represented parties fail to, or are unable to, upload documents through CE-File, this will not of itself void the proceedings. The Appeal Tribunal will be able to take such action as it considers just in such cases, and the Appeal Tribunal will provide users with relevant guidance through a practice direction (see section 8).

6. Legislative and Legal Context

How has the law changed?

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.

6.2 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. The provisions relating to the Appeal Tribunal are not yet in force but will, once commenced, transfer the power to make rules in respect to the practice and procedure of the Appeal Tribunal to the TPC.

Why was this approach taken to change the law?

6.3 The President of the Appeal Tribunal does not have the power to mandate the use of CE-File by practice direction or any other means. Therefore, this is the only possible approach to make the necessary changes.

7. Consultation

Summary of consultation outcome and methodology

7.1 In accordance with section 30(1) of the 1996 Act, the Lord Chancellor has consulted with the Lord President of the Court of Session in order to make these rules.

7.2 The Appeal Tribunal judiciary have also been consulted and are supportive of the amendments made by this instrument.

7.3 A public consultation was not conducted as this instrument was informed by the outcome of the TPC's 2022 public consultation on the use of CE-Filing in the Upper Tribunal.[1]

7.4 The TPC consultation ran over the period 21 June 2022 to 16 August 2022. In accordance with paragraph 28(1)(a) of Schedule 5 to the Tribunals, Courts and Enforcement Act 2007, the TPC consulted such persons as it considered appropriate, including relevant government departments and stakeholders. This included the Tribunal Chamber Presidents, senior judiciary, the Ministry of Defence and HMCTS.

7.5 As set out in the TPC's consultation response, the consultation found that CE-Filing improves the speed and efficiency of handling cases and that mandating its use would reduce administrative burdens and support the Upper Tribunal's modernisation and drive for efficiency.[2] It also found that not all users may have the necessary IT skills to use CE-File, but that it was not unreasonable to expect a professional to be able to master the use of CE File. The use of CE-File was subsequently mandated for parties with a professional representative - including legally represented parties - in the Upper Tribunal.

8. Applicable Guidance

8.1 The President of the Appeal Tribunal is intending to publish a revised Practice Direction which will include guidance on the use of CE-File, necessitated by the

[1] https://www.gov.uk/government/consultations/possible-changes-to-the-upper-tribunal-rules-2008-and-the-upper-tribunal-lands-chamber-rules-2010-in-connection-with-ce-filing

[2] https://assets.publishing.service.gov.uk/media/63999df4e90e077c2502f71e/tpc-ce-file-consultation-response.pdf

amendments made by this instrument. The Practice Direction will be published on (TBC) October on the Courts and Tribunals Judiciary webpage[3]. This legislation will come into force on 1 February 2025 to provide sufficient lead-in time for Appeal Tribunal users to prepare for the changes made by this instrument and become familiar with the associated guidance.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 An Impact Assessment has not been prepared for this instrument because the impact is expected to be minimal and below the threshold at which an assessment must be prepared.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies.

9.3 The legislation does impact small or micro businesses. However, the impact is expected to be low.

9.4 There is no, or no significant, impact on the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The Ministry of Justice will keep these Rules under review. It should be noted that the transfer of Appeal Tribunal rule making powers to the TPC is intended to be commenced in due course, following which the TPC will become responsible for monitoring and reviewing these Rules.

10.2 The instrument does not include a statutory review clause.

[3] https://www.judiciary.uk/guidance-and-resources/

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").