Employment Tribunals 2008
Practical Guide

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EMPLOYMENT TRIBUNALS – TIM RUSSELL'S PRACTICAL GUIDE

1. INTRODUCTION

Employment tribunals are the main forum in which disputes between employers and employees are resolved. They were established with the aim of providing parties with *"an easily accessible, speedy, informal and inexpensive procedure for the settlement of their disputes" (Donovan Commission 1968).*

Although employment tribunals were originally designed to operate cheaply and informally, they have become more legalistic over recent years. This is due to a variety of factors, including increased legislation, a larger body of case law, higher awards and the fact that employment tribunals are judicial bodies expected to adhere to the principles of natural justice. There is also a continued move to align employment tribunal procedure with that of the civil courts. For instance since the end of 2007 employment tribunal chairmen have now been known as employment judges.

Applications to employment tribunals have increased enormously in recent years. Before 1991, the figure never reached 40,000 in a year. However, in the year 2003-4 the number of applications was over 115,000. Although unfair dismissal is still the most common claim, the number of discrimination claims is rising steadily. Legislative changes in 2004 reflect Government pressure to significantly reduce the number of employment tribunal claims and evidence in the last three years shows this is working as there are now less accepted claims (they are now "accepted" and not registered).

The aim of this guide is to explain the role, process and jurisdiction of employment tribunals and to provide practical guidance on preparing for and appearing in front of an employment tribunal panel. We hope that you find this guide helpful but it should not be considered as a substitute for legal advice.

2. RECENT DEVELOPMENTS

The rules governing employment tribunal procedure changed with effect from 1 October 2004, when the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 ("the Employment Tribunal Regulations") came into force. Many of the (still relatively new) rules are controversial and are already leading to a number of appeals (principally on procedure) to the EAT.

The main changes introduced by the Employment Tribunal Regulations were as follows:

(a) "applicants" are now to be referred to as "claimants";

(b) new claim and response forms known as “ET1s” and “ET3s”;

(c) respondents now have 28 days from the date the claim form is sent out by the tribunal to file a response;

(d) a fixed conciliation period (during which the hearing cannot take place) has been introduced in relation to certain less complex cases;

(e) an automatic process for sifting through and, if necessary, rejecting claims or responses when they are received by the employment tribunals;

(f) there are now “Orders” and “Judgments” in the employment tribunal replacing directions and decisions. When giving an order or judgment written reasons are only provided if requested or if the tribunal reserves its decision. The old “summary” and “extended” reasons have gone;

(g) steps have been introduced to bring the employment tribunal procedures in line with the new statutory dispute resolution procedures; and

(h) there is now a new right to strike out claims for lack of merit during pre-hearing reviews.

These changes are considered in more detail below. Employers and employees alike must understand the important statutory dispute resolution procedures which have been introduced by the Employment Act 2002 and Employment Act (Dispute Resolution) Regulations 2004. Though the detail of these changes are outside the scope of this guide, these mandatory procedures now have a significant impact on employment tribunal claims. There is some discussion of this in section 5(b) below. In particular, a failure to comply with the minimum disciplinary and/or grievance procedure may trigger higher compensatory awards against unsuccessful respondents and may prevent a claimant from making a claim at all. There are for instance already a number of cases on what are known as “section 32 compliance” issues. This is the requirement that a claimant makes a grievance before presenting (after also waiting at least 28 days) a claim to the Employment Tribunal where the complaint is one of e.g. discrimination or constructive dismissal. A failure to do this will mean the employment tribunal has no jurisdiction to hear the claim at all. You will find more about this in my guide to Disciplinary and Grievance Procedures which is also in the know how section of my website.

3. COMPLAINTS THAT MAY BE DETERMINED BY THE EMPLOYMENT TRIBUNALS

Apart from claims for breach of contract (see section 4), the employment tribunals have jurisdiction in respect of in excess of more than 70 different types of employment-related claims including:

(a) General and unfair dismissal: redundancy (including collective consultation rights), disputes over written particulars of employment and itemised pay statements, written reasons for dismissal; unlawful deductions from wages (formerly "Wages Act" claims, now Part II of the Employment Rights Act 1996) and claims under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended) and the Working Time Regulations 1998;

(b) Family friendly rights: time off for family emergencies, maternity, paternity, adoption, parental leave and issues over flexible working arrangements; and

(c) Discrimination: on the ground of sex, race, disability religion or belief, sexual orientation, equal pay claims and less favourable treatment on the basis of fixed or part-time employment status.

The employment tribunal's jurisdiction is being extended and changed all the time as new employment-related rules and regulations are introduced from time to time. There were, for instance, particular changes to the Disability Discrimination provisions in 2004 to widen the scope of the legislation e.g. the requirement, that a mental illness must be "clinically well – recognised" before it can be regarded as an impairment under the DDA 1995, has now ended. And, of course, in November 2006 new discrimination legislation was introduced which already has a more profound effect on tribunal cases than the disability provisions did post-1995 (disability claims currently are the fastest growth area of tribunal claims).

For most tribunal claims there is no minimum service requirement (i.e. how long someone has been employed though continuity of employment can sometimes be extended back to a previous employment where e.g. the old employer has been purchased by the new employer). The exception to this is an unfair dismissal claim where an employee needs one year's minimum "continuity of employment" with some exceptions e.g. where the dismissal was due to the employee asserting a statutory right (such as a request for written statement of terms of employment or holiday pay). There is no minimum service requirement.

Claims against an employer for failure to follow the minimum procedure under the Employment Act 2002 (e.g. failing to have a disciplinary hearing where dismissal is contemplated) is not a stand alone claim. However if the employee has other claims (e.g. unauthorised deduction from wages where contractual commission payments have not been paid) then an Employment Act 2002 claim (potentially this allows compensation to be increased by up to 50%) can be added irrespective of length of service.

It should be noted, however, that claims for personal injury are not dealt with by the employment tribunals, although some claims (for example, sex discrimination) may include an award to reflect

personal injury.

4. CLAIMS FOR BREACH OF THE EMPLOYMENT CONTRACT

Since 1994, employment tribunals have been able to deal with claims arising from breaches of employment contracts. Compensation for "wrongful dismissal" claims in the employment tribunals are however still (well over a decade later) limited to a maximum of £25,000 and employees making such a claim must proceed with caution in that if they choose the employment tribunal "forum" they cannot then subsequently seek damages in the civil courts in respect of the same loss.

Employment tribunal claims (perhaps for unfair dismissal) and civil court claims (perhaps for wrongful dismissal seeking *more* than £25,000) can run in parallel although the former are usually adjourned pending the outcome of the latter to avoid the employment tribunals making a finding of fact which might bind the civil courts.

The principal part of any compensatory award in the employment tribunal is normally immediate and future financial loss. In consequence, where there is a longer notice period, damages for wrongful dismissal are often off-set from the compensatory award to avoid double recovery. For instance, if an employee is on 6 months' notice and the case comes to a hearing just before the expiry of what would have been the notice period, a successful claimant is unlikely to be awarded a significant compensatory award on top of wrongful dismissal damages. The main exception will be where future employment is unlikely. It is still anticipated that at some stage (if the new procedures survive - as they are heavily criticised in some quaters) the statutory and grievance disciplinary procedures will be implied into everyone's contract of employment. It has not happened yet but once this "contractual" minimum procedure is in place a failure to follow it will lead to a breach of contract claim and a possible claim for damages as well as (perhaps) a claim that restrictive covenants are no longer binding. The damages claim will be limited to a few weeks (the extent of the lost disciplinary notice) unless the 1 year threshold for qualifying service is approaching in which case a claim for unfair dismissal might also be made on the basis a proper procedure would have taken the claimant over 1 year's service.

5. THE TRIBUNAL PROCESS

(a) General

The employment tribunal process is impartial, but starts by assuming that there is a case for the employer to answer.

The overriding objective of the employment tribunals (which is very important) is to deal with

cases in a "just" manner. In practical terms this means that the employment tribunal must ensure that all parties are placed on an equal footing, saving expense, dealing with cases in ways proportionate to their complexity, and ensuring that they are dealt with expeditiously and fairly.

It is important to note that employment tribunal decisions have no binding authority as precedents. Parties seeking to rely upon case authority to defend a claim will normally cite EAT or Court of Appeal decisions. In practice, however, most cases will turn less on the authorities and more on legislative provisions seen in the light of the oral evidence of the parties. In consequence witness statements are invariably very important indeed.

(b) Commencing proceedings

(i) Issuing the claim

Most claims are able to be pursued by employees only, although there are an increasing number of rights available to "workers", such as in relation to working time and Wages Act claims. In addition, the definition of "employee" in relation to discrimination claims is quite wide.

In order to commence proceedings an employee or ex-employee or worker (where appropriate) (the "claimant") submits an ET1 claim form to a regional tribunal office. The ET1 claim form introduced under the Employment Tribunal Regulations and replaces the old IT1. A sample ET1 claim form as downloaded from the ETS website (which is accompanied by guidance notes which explain how the various sections should be completed) is available on the ETS website (http://www.employmenttribunals.gov.uk/default.asp) and can be completed on line. This should be used rather than e.g. a tailored version of the ETS form.

The ET1 directs the claimant to provide more information. For example, the new form requires the claimant to confirm whether he has found a new job and, if so, the level of remuneration received. The ET1 form also has different sections for completion depending on the nature of the claim (i.e. unfair or constructive dismissal, discrimination or some other claim), which will no doubt assist unrepresented claimants in clarifying the basis of their claim. Since the spring of 2005 there is now a strict requirement to use the prescribed form (which reflects the minimum information needed from October 1 2004 to overcome the tribunal's "pre acceptance" procedures).

(ii) Time limits for the claimant making a claim

The normal time limit for bringing a claim (for example, 3 months from dismissal in the case of unfair dismissal and most discrimination claims and 6 months from the act complained of in the case of equal pay claims) will be extended by three months in the following circumstances:

In cases where the statutory dismissal and disciplinary procedures apply

Where, on the expiry of the normal time limit, the employee has reasonable grounds to believe that the statutory process (which is likely to be the appeal stage) is continuing. This is the case whether or not the employee is mistaken in his belief, provided that he has reasonable grounds for his understanding of the position. In order to avoid any uncertainty, the employer needs to tell the employee when the internal procedure, including the appeal stage, has been concluded.

In cases where the statutory grievance procedure applies

Where:

(a) the employee has submitted a claim within the normal time limit but that claim is inadmissible because the employee has not sent a grievance letter to his employee. The employee must then send the grievance letter within 28 days of the normal time limit (i.e. between the end of the third and beginning of the fourth month of the date of dismissal in the case of unfair dismissal claims) before resubmitting the tribunal claim within the following 2 months (i.e. between the beginning of the fifth month and end of the 6 month date after the date of dismissal in the case of unfair dismissal claims);
(b) where the employee has sent the grievance letter to the employee but has not waited 28 days before submitting the tribunal claim. The employee must then wait the full 28 days and resubmit the claim within 3 months of the normal time limit;
(c) where the employee sends the grievance letter within the normal time limit and then resubmits a claim within three months of that date.

(iii) <u>Acceptance procedure undertaken by the tribunal office</u>

On receiving the claim, the tribunal office will undertake an acceptance procedure to make sure that it includes all the relevant information and that the tribunal has the power to deal with the complaint. The claim may be rejected, for example, if it has been issued by the claimant out of time.

The claim may also be rejected if it arises from a grievance (about something other than a dismissal) with the employer (or former employer) and the claimant has not either: (a) put his grievance in writing to his employer and allowed at least 28 days before the claim is issued; or

(b) stated (in the claim form) a valid reason why he should not have to meet this normal legal requirement (for example, on the basis that the employee has been harassed). Once again, these changes were introduced to comply with the statutory dispute resolution procedures introduced on 1 October 2004. The Claim may be rejected in part and accepted in part which can lead (if the rejected part leads to the Claimant returning to the tribunal once the procedural flow is remedied e.g. a grievance is presented) to two separate claims and defences. Where there are two such cases on the same facts there will normally be a consolidation later.

If the ET1 claim form is not accepted, because of a failure to lodge a written grievance and then wait 28 days before making the claim, it will be returned to the claimant together with the reasons why this is the case. The tribunal will not have jurisdiction to hear the case. In such circumstances, however, the normal three month time limit for lodging the claim (since the effective date of termination or last act of discrimination (as appropriate)) will be extended in order to enable the claimant to: (a) lodge the written grievance within a further period of one month i.e. 4 months from the effective date of termination of the contract or last act of discrimination; and (b) then make a tribunal claim within 2 months of that.

(c) Reply to claim by the employer

(i) Submitting a response

Assuming that the ET1 claim form is not rejected by the tribunal office, the employer or former employer will then be sent a copy and must submit a response form within 28 days from the date on which it was sent a copy of the complaint or risk losing its right to contest the case. The Prescribed - it is an obligation to use the standard form - ET3 Response form as with the ET1 Claim Form can be downloaded from the ETS Website (http://www.employmenttribunals.gov.uk/default.asp).

Respondents need to carefully consider the approach to be taken and the level of detail which needs to be included in the response. The guidance accompanying the claim form makes it clear that the respondent needs to give full reasons as to why he is resisting the claim, making it clear on what point he disagrees with the claimant and setting out the information to support his argument (although there is no need as yet to append relevant documentation to the response form).

That said, including too much information can weaken the defence (whilst the defence must be truthful, there is no need to dwell on weak issues especially if not raised by the claimant) or leave the respondent open to "selective" criticism from the other side. The response is a pleading and "on the day" the respondent's case must be consistent with it, but in practice the witness statements are more important when in comes to providing the real detail. They must

however be consistent.

Whatever approach is taken, the response should be clear and logical, leave open all avenues for the defence and, above all, relay the respondent's version of events in the best possible light in all the circumstances.

(ii) Extending the period for submitting the response

The respondent may apply (within the 28 day period from the date on which it was sent the ET1 claim form) to extend the period for lodging the response. Such an extension will only be granted if the employment judge is satisfied that it is "just and equitable" to do so in all the circumstances. This may be the case where the person who took the decision to dismiss the claimant is abroad on holiday and the respondent lacks vital information.

(iii) Acceptance procedure undertaken by the tribunal office

The response will be reviewed by the tribunal office and will be rejected (or a default judgement issued in the favour of the claimant) if, for example, it does not contain the requisite information or is out of time.

(d) Case management process

(i) Directions and case management discussions

The employment judge sitting on his own, (i.e. without the two lay persons who normally join the employment judge as "wing members" to make up a full employment tribunal panel) has wide ranging powers to make orders (which have previously been known, and are perhaps more accurately described as "directions") regarding the conduct of proceedings which he considers are appropriate. Alternatively, he may prefer to convene a "case management discussion" (CMD)) to hear the views of the parties on appropriate orders, particularly where the case is complex (such as a claim for equal pay). This is a new power introduced by the Employment Tribunal Regulations. It is not however possible to apply for a case to be struck out at a CMD or to turn it into a different kind of hearing. The parties can apply themselves for a CMD to deal with an interim or preliminary matter. However a CMD arises it is not (despite hopes from the legislators) likely to lead to a settlement of the case nor can it lead to e.g. a deposit order against a claimant with no reasonable prospect of success unlike a pre-hearing review (see below). So it is best to see the CMD as an opportunity for directions to narrow issues and determine the timetable of the case.

Either party may apply for an "order" at any time prior to the determination of the case, provided that they give the tribunal at least 10 days' notice. The most common orders are for further and better particulars of the claim or response (so that the parties can understand fully the case against them), disclosure of relevant documentation (which is normally ordered to occur shortly after the receipt of the response by the employment tribunal) and the preparation of the tribunal bundle and exchange of witness statements. An appropriate order may also be necessary where a particular witness is unwilling to attend the tribunal hearing voluntarily. Unlike pre-hearings reviews issues there is no requirement for the parties to agree an "agenda" in advance for CMDs which can roll with the need to "manage" the case.

(ii) Expert witnesses

In more complex cases, the employment judge may have to consider the use of expert witnesses, for example to assist the employment tribunal to determine whether the employee is disabled for the purposes of the Disability Discrimination Act. Guidance which has been issued on the use of expert witnesses makes it clear that where appropriate the parties should use a joint expert (or at least if one party is calling an expert the other party should have an opportunity to agree to the terms of instruction of the expert) and where there are experts on both sides, the tribunal should give directions setting out a timetable for the experts to meet to attempt to agree or at least to define the issues in dispute.

(e) Pre-hearing reviews

(i) General

It is also possible for either party to apply in writing for a pre-hearing review (which will normally be conducted by a employment judge alone) to deal with any interim or preliminary matter. The parties make submissions to the employment judge but no oral evidence is taken. A PHR can include case management issues and current practice is not to have both.

(ii) New right to strike out claims for lack of merit

The employment judge may now give judgement on any preliminary issue of substance relating to the proceedings, which may result in the proceedings being struck out, dismissed "or otherwise determined", resulting in no need for a further hearing. Therefore, summary judgement for lack of merit is introduced as a concept for the first time in the employment tribunals. This reflects a desire to reduce the number of spurious cases reaching a full hearing.

(iii) Payment of a deposit

If, however, the matter has little prospect of success but remains arguable, the employment tribunal may issue a warning that an award of costs could be made if the claim is pursued to an unsuccessful outcome. To this end, the employment tribunal may consider it appropriate to require the claimant to pay a deposit to be allowed to continue (up to a maximum of £500).

(f) Fixed-period of conciliation prior to the hearing

(i) General

The Employment Tribunal Regulations introduce a new fixed period of conciliation between the parties and an official from the Advisory, Conciliation and Arbitration Service ("ACAS").

The standard conciliation period (e.g. for an unfair dismissal case) is 13 weeks (beginning on the date on which the tribunal sends a copy of the claim form to the respondent) except:

Fast track cases

(a) A "fast track" type of case (e.g. uncontested) in respect of which the fixed conciliation period is 7 weeks (unless the claim is relatively complex in which case the employment judge has the power to substitute the standard 13 week period); or

More complex cases

(b) These arise under the Sex Discrimination Act 1975, the Equal pay Act 1970, the Race Relations Act 1976, the Disability Discrimination Act 1995, the whistleblowing legislation or the 2003 Regulations on equality in relation to sexual orientation or religion or belief, which are exempt from the rules on fixed conciliation (although ACAS will have an ongoing duty to conciliate until the case is disposed of). The reason for these exemptions is that cases brought under these jurisdictions tend to be inherently complex, making a fixed period of conciliation inappropriate.

It is possible for the claimant or respondent to apply to extend the fixed conciliation period by 2 weeks where, for example, an offer has been made and is under consideration by the other party. The conciliation process may also be brought to an end early, for example where one or more of the parties has declared in writing to ACAS its unwillingness to cooperate with the process. However ACAS then have to inform the tribunal before the tribunal will accept that the conciliation period has ended.

The hearing cannot take place during the fixed-period of conciliation, although it can be listed by the employment tribunal. In addition PHRs and CMDs can take place within the conciliation period.

(ii) Role of the ACAS official

The conciliator will talk through the relevant issues with each of the parties and discuss the options open to them. He will attempt to help each of the parties understand how the other views the case to discover whether the matter might be resolved without the need for a tribunal hearing. The conciliator will inform each side of any proposals the other has for a settlement. As an ancillary point however ACAS have been under pressure to make cuts over a number of years and some 150 conciliators took voluntary redundancy in January 2006. Arguably this did not benefit the "user" i.e. claimant or respondent as the ACAS workload inevitably reduces the opportunity for conciliated settlement. Certainly ACAS are now involved less than used to be the case. Parties may find they have to find their own compromise if the case is to be settled before a full hearing.

(g) The hearing

(i) General

The procedure at an employment tribunal hearing is very similar to that of normal civil court procedure, although tribunals are less formal than the courts, and parties are seated throughout the hearing.

Tribunal hearings are usually conducted in modern rooms (sometimes even air conditioned!) with the tribunal panel sitting at a table on a slightly raised platform and the claimant and respondent sitting at tables facing them and a separate witness table from which the witnesses give evidence from in turn.

Before the hearing starts, the clerk will speak to both parties and make a list of names of representatives and witnesses, and will collect copies of documents on which each party intends to rely to give to the tribunal panel.

Hearings are generally conducted in public and may be reported to the media, although either party may apply for the evidence to be presented in private where, for example, the evidence involves a trade secret and is confidential in nature.

(ii) Composition of tribunal panel

In employment tribunal hearings the employment judge (an experienced solicitor or barrister appointed by the Lord Chancellor, who is addressed as "Sir" or "Madam") will usually hear the case with two lay representatives, or members. The lay members rank equal with the employment judge, and bring with them practical knowledge and experience of employee relations.

One lay member is appointed from each of an employer organisation (such as the CBI) and an employee organisation (such as the TUC).

(iii) Representation

A party can of course choose not to be represented by a lawyer but instead to conduct their own case or have other representation from a friend or union or CAB representative. It is estimated that three claimants out of every five have some form of representation, although respondents are more likely to be legally represented than claimants. Except in Scotland, Legal Aid is not available for tribunal hearings.

(iv) Opening submissions

Occasionally, the parties may be invited to summarise briefly summarise their case before evidence is presented, particularly if the claim is complex. This is however up to the employment judge. More usual is for the employment judge to talk to the parties to determine and, if possible, narrow the issues before proceeding directly to the evidence.

(v) Bundle of Documents

The employment tribunal will expect an agreed bundle of documents. Although the duty to prepare this falls on the claimant, the respondent invariably has to assist if the claimant has no legal representation. However inevitably both parties will sometimes bring their own "bundles" and if so any failure to comply with previous directions as to an "agreed" bundle is usually overlooked in the interests of getting the case heard, provided one party has not been unduly prejudiced. The tribunal will not see the bundle(s) until the day of the hearing. As all hearings are listed include (to the extent it is necessary) time for a remedies hearing, a schedule of loss (up to the date of the hearing) should be included along with evidence relating to mitigation (or lack of it). A chronology is always helpful and a written skeleton argument is appreciated by the tribunal. Original documents should be brought to the tribunal where clarity or authenticity is a possible issue and the agreed or any other bundle should be clearly paginated for ease of reference. There is no need to include the 'claim' or 'response' because the tribunal will have

this to hand but any request for further and better particulars should be included along with all documents upon which the parties wish to rely. Typed copies of handwritten notes are sensible (though the original handwritten note should be included). Without prejudice correspondence must of course be excluded unless privilege is waived.

(vi) Other Documents

Each case may have its own requirements e.g. perhaps video evidence is appropriate. However it is usually helpful and expected to have a claimant's schedule of loss, chronology and (where there are a lot of involved persons) "cast" list as well as a written summary of closing submissions (see below). Witness statements are always required and should be exchanged before (usually at least 7 days before) the hearing.

(vii) Evidence of witnesses

(aa) Order in which evidence is given

The party who has the burden of proof will normally begin the proceedings by giving their evidence through the witnesses. In unfair dismissal claims, for example, the burden will usually be on the respondent to establish that the dismissal was fair. In discrimination cases, the burden lies with claimant unless a prima facie case for discrimination can be established in which case the burden will pass to the respondent.

(bb) Evidence in chief

Witnesses are examined on oath or affirmation. They give their evidence seated at a table. A written witness statement should always be prepared and the tribunal panel will normally allow the witness to read it out, or will read the statement themselves and take it into evidence "as read". Whether in chief or in cross-examination, a witness' representative may stop the witness during their reading of the statement to direct the tribunal panel to relevant documents or to clarify evidence.

(cc) Cross-examination

The witness is then open to "cross-examination" by the other side (or his representative but not both) and questions from the tribunal panel (normally asked after cross examination but occasionally, for clarification, during evidence). Searching questions, to test the evidence which has been given, the reliability of the witness and to deal with any omissions, should be expected during this process.

(dd) Re-examination

The representative for the witness will then be given the opportunity to ask a few final questions which may arise from cross-examination. This is known as re-examination.

(ee) Note of evidence taken by the employment judge

The employment judge is required to keep a full note of the evidence given; this is normally done in longhand. The notes are important, not only to assist the employment tribunal in reaching its decision (especially if the hearing is adjourned part-heard, or the decision is reserved) but also for the basis of any appeal on the judgment given by the tribunal.

(viii) Closing submissions

The parties are given the opportunity to summarise their cases and any supporting evidence before a decision is taken by the employment tribunal. On occasions, the tribunal may request that written submissions are lodged. A written summary is helpful in any event as mentioned above. Copies of any case law referred to should be handed to the tribunal if it has not already been provided and/or requested (3 copies should be provided for the tribunal and 1 for the other side). Whoever starts the case ends the submission.

(h) Tribunal judgment

After the submissions, the employment judge and lay members retire and consider the evidence. The panel will normally come back and give the judgment that day and oral reasons for it. If so, under a 2006 Practice Statement, the tribunal should provide the typed judgement the same day (though not "reasons"). Typists are ready to do this where the parties choose to wait. The panel can also reserve their decision, and may do so in long or very complex cases. Written reasons are only sent out automatically in the case of a reserved decision. In all other cases (including discrimination cases where it used to be obligatory to give extended reasons for the tribunal's decision) no written reasons are provided unless the parties request them at the hearing or within 14 days of the judgment being sent out. In addition there is no longer a distinction between summary and extended reasons. Where they are now given however they tend to follow a similar (but less comprehensive) pattern to the extended reasons that were given, where requested or in a discrimination case, pre October 2004.

The tribunal may reach a unanimous or majority decision. In the rare cases in which the

tribunal panel is composed of only two members (for example, because of the illness of a member part-way through the proceedings) the employment judge has the casting vote. If there is a minority view on any point this is (or certainly should be) set out very carefully to avoid ambiguity and/or a possible appeal.

(i) Reviews and appeals

(i) Reviews

In limited circumstances where, for example, a new material fact emerges within 14 days of the judgment or there has been an administrative error, then the parties may apply for a review.

Any application for a review must be made to the relevant tribunal office (stating the grounds) within 14 days of the judgment being sent to the parties (or within such further period as the employment judge considers is just and equitable in all the circumstances). It must identify the grounds of the application in accordance with the tribunal rules.

Reviews are normally undertaken by the employment judge or tribunal panel who made the original decision and decisions can be confirmed, varied or revoked following the review.

(ii) Appeals

(aa) General

Appeals are more common than reviews although they can only proceed on a point of law, though this may include a perverse finding of fact by the employment tribunal. Many disgruntled employers who lose their cases and vow to "appeal" are however advised not to do so because their concern is more about the result than how it was reached.

A typical situation where an appeal may take place is where the employment tribunal has substituted its opinion for that of the employer. They may say in the decision, for instance, that “we would not have dismissed the claimant and we find the dismissal was unfair because …..” instead of “we find that the respondent's decision to dismiss the claimant was unfair because it does not come within the band of reasonable employer responses…”

(bb) Appeals to the Employment Appeals Tribunal (“EAT”)

An appeal from the decision of the employment tribunal is heard by the EAT. The composition of the EAT mirrors that of the employment tribunals. The judicial members are high court or circuit Judges, with one High Court Judge appointed as president for three years. The lay members are appointed in a similar way to the lay members of the employment tribunals, but are generally very senior and respected in their fields. The EAT normally sits in panels of three, although there is provision for appeals to be heard by a judicial member alone where the decision appealed from was given by a chairman sitting alone.

(cc) Time limits for appeals to the EAT

Appeals must be lodged within 42 days of the employment tribunal's judgment. If the decision was relayed to the parties orally at the end of the hearing, "judgment" will be the date of the last day of the hearing. If the decision was reserved, judgement will be the day on which the decision is reached and sealed by the employment tribunal, which means that any delay in sending the decision to the parties on the part of the tribunal office will eat into the 42 day period.

(dd) Legal aid

Unlike claims before the employment tribunals, legal aid is available to individuals for appeals to the EAT.

(ee) Preliminary hearings to weed out weak cases

In order to weed out weak or spurious applications there is almost always a preliminary EAT hearing. At the hearing, the onus is on appellant to try and convince the EAT that there are reasonable grounds to appeal. The respondent to the appeal does not usually attend. Many appeals flounder at this preliminary stage. Those which proceed are dealt with by an experienced employment appeal tribunal panel. No oral evidence is given.

(ff) Possible decisions of the EAT

It is possible for the EAT to reverse the employment tribunal's position but more commonly they will remit it for a further, but differently constituted, employment tribunal hearing to the extent the matter is not settled in the interim period.

(gg) Further appeals to the Court of Appeal, House of Lords and the European Court of Justice

In rare cases the issues may be referred to the Court of Appeal and perhaps even to the House of Lords. Leave to appeal is needed in both cases. It is also possible for some cases to be referred to the European Court of Justice. If the case is referred, it will be the employment tribunal's original decision, and not the EAT's decision, which is scrutinised. Again this puts a great emphasis on the parties preparing fully in the first place.

(j) Costs and expenses

Unlike most civil courts (where legal costs are paid by the losing party) the general rule in an employment tribunal is that each side pays their own cost regardless of the outcome of the case. However, to aid the employment tribunal in managing the conduct of parties and their representatives, it may in certain circumstances make costs orders and since 1 October 2004 the opportunities for costs orders have become more common. These include where a party:

- has acted vexatiously, abusively, disruptively or otherwise unreasonably during the proceedings;
- is misconceived in making or defending a claim;
- was warned at a pre-trial hearing review that the claim had no reasonable prospect of success; or
- has failed to comply with an order.

In practice costs orders will rarely be made when the claimant's only fault is that the case is "misconceived" assuming he or she are (in such circumstances) acting in good faith. Equally, as financial "means" can be taken into account claimants with no or limited means are also unlikely to have a costs order made against them.

The amount of any order will obviously depend on the circumstances of the case. The tribunal may order a specified sum up to £10,000 to be paid. The bulk of costs will typically consist of legal fees, and include other expenses incurred. Costs orders may seek to cover part or all of these.

Alternatively, the tribunal may order that costs are assessed (requiring a separate hearing in a civil court, where any costs order, which is not complied with, can be enforced). Costs which are so assessed can exceed the maximum of £10,000 applying to costs orders made "on the day". There is no limit other than of course the fact that a party can only recover costs properly incurred (and taxed i.e. scrutinised by the court which usually orders a considerable reduction to

the solicitor costs actually charged).

Where a party has not been legally represented at a tribunal, they might still have incurred significant personal costs, including time spent in making or responding to a claim. To address this situation, the tribunal can make a 'preparation of time' order, in which time spent on the case can be reimbursed at an hourly rate of just under £30 per hour, up to a maximum of £10,000. Preparation time cannot include time spent at any hearing.

Costs orders have historically been ordered against one of the parties to the claim. The tribunal now has the additional power (from 1 October 2004) to make a 'Wasted Costs' order (a "WACO") against the legal representatives of one party if they have acted improperly, unreasonably or with negligence. This is a significant change though very few WACOs have been made in the year since this provision was introduced.

Wasted costs orders can be made against in-house lawyers or solicitors acting on a contingency fee basis and in some cases representatives deemed to have negligently encouraged a spurious claim or defence may be faced with a bill for the other side's costs without being able to charge their own client. Care is therefore needed especially as without prejudice correspondence may now be admissible (once liability and remedy are determined) as part of a submission on costs.

6. PRACTICAL CONSIDERATIONS

In any employment tribunal claim, the way in which the case is managed by the parties is key. Case management is important both prior to any hearing and during the hearing itself.

(a) **Avoiding a claim**

(i) General

Even before a claim is brought, there are various steps which can be taken to prevent disputes from arising which include:

- Ensuring that a staff handbook is distributed to all employees so it is clear what is expected in the employee/employer relationship. The handbook will not however normally be incorporated into the employee's contract of employment as this is too inflexible for the employer.

- Ensuring that the procedures for dealing with discipline and grievance issues are set out in the handbook, that there are clear lines for reporting and that the procedures are

followed properly. In particular care should be taken where employees have or may have put in a grievance (which may include constructive dismissal) because if they have employers must arrange a meeting to discuss it. This is a more common area of fault than where disciplinary action is contemplated as most employers understand the need for a full and fair disciplinary procedure.

- Training staff, which is vital and is the best way in which to prevent disputes from arising. Managers should be trained to ensure they are competent to deal with discipline and grievance procedures and are aware of (and follow!) the terms of any equal opportunities and anti-harassment policies.

- Using staff appraisals to deal with any performance issues or problems, which may have arisen.

- Ensuring that detailed written personnel records are maintained on issues such as warnings, absences and performance issues.

- Taking early advice before a claim is made to ensure procedural flaws are avoided. Delay in getting such advice is a false economy.

(ii) Settlement negotiations

Employees should consider making an attempt to resolve the dispute prior to the issue of proceedings. It is worth bearing in mind that even a simple case can take months to be resolved and the resultant cost in disruption and management time can be considerable. A case can also damage the morale and credibility of a business. Most who appear before an employment tribunal regret the experience. However, employers may consider that some cases are worth defending to signal their resolve to other employees.

Unless a claim has been made and ACAS is involved, it is advisable to record the terms of a settlement in a legally binding compromise agreement (in respect of which the employee or former employee will need to take independent advice).

The party making the offer should make it clear that it is being made on a "without prejudice and subject to contract" basis. Genuinely without prejudice correspondence cannot be brought to the attention of the tribunal panel at the hearing. However, a recent case has suggested that offers will not be treated as such (even though they may be clearly marked without prejudice) unless there was a "dispute" between the parties at the time the offer was made. In that case, it

was held that the raising of a grievance did not necessarily mean that the parties were in dispute. It is also worth emphasising that internal communications (unlike advice from a solicitor) are not privileged and many cases are lost on the back of prejudicial internal emails disclosed at the hearing.

(b) Prior to the hearing

The following points should be considered:

- First, the party should check to see whether the claim or response is technically flawed, for example no grievance has been raised pre a discrimination claim or because it has been issued out of time. If so, an application should be made to strike out the claim. These are preliminary issues and can best be dealt with at a pre-hearing review though a tribunal may sometimes have to be persuaded not to deal with this as a preliminary point at full hearing (however frustrating this is given the consequences for case preparation).

- Consider requesting further and better particulars of any elements of the claim or response which are not clear. An application for an appropriate order should be made if such particulars are not forthcoming.

- Consider requesting a schedule of loss (though it would normally be provided at any CMD) and details of steps which have been taken by the claimant to mitigate his or loss. This can be vital as the duty to mitigate falls (initially) upon the ex-employee although he does not have to e.g. apply for a job in another part of the country or for a much less senior job – certainly not in the initial few months. In other words the duty is not unduly onerous. Employers, in the meantime, should be collating evidence of available jobs (which the claimant could have applied for) from the outset.

- Weigh up the merits of the claim, the likely cost of any award and the likely cost of pursuing and defending the claim.

- Avoid any bullying tactics, false accusations, unreasonable claims or defamatory conduct. Any unreasonable behaviour now invites a costs order.

- Ensure all or any possible witnesses have the hearing dates blocked out in their diary. It will be almost impossible to get a postponement once hearing dates are fixed. A respondent may make a compelling case for postponement but the opportunity to avoid certain dates for listing the full hearing comes as/after the ET3 is presented and forward planning is needed then.

- If, despite all this a request to postpone the hearing has to be made, make this as early as possible to minimise disruption to the tribunal lists. Also, ensure that the application is supported by full documentary evidence (such as plane tickets). Postponements are only granted in exceptional cases.

- The availability of the witness to attend any proposed hearing dates must also be checked. The tribunal will be unwilling to postpone or adjourn a hearing if it does not receive prompt notification as to the unavailability of witnesses. Even then, the tribunal will expect witnesses to prioritise the hearing over other commitments. The tribunal will however be flexible (within reasonable limits) as to which point during the hearing when a witness can give evidence. A prior request will therefore help the employer's cause where a busy manager only has a small window of time to attend the hearing.

- Consider whether an attempt should be made to settle the claim, whether through ACAS during the fixed-conciliation period, or directly with the other party or their representative or through mediation. Clearly, any such offer should be made on a "without prejudice" basis. Marking letters "without prejudice save as to costs" is sometimes helpful to focus the mind of the other party.

- Ensure all witnesses have given a statement with which they are genuinely happy and that they have rehearsed their evidence. Nasty surprises are commonplace at tribunal hearings and usually arise from witnesses being inconsistent and/or caught out in a lie or an incomplete story.

- It is advisable to prepare a case strategy based on the strengths of the case. For example, in an unfair dismissal case employers may decide to admit a claim, but then to focus efforts into establishing mitigating circumstances (for example, employee contributory fault), a failure to mitigate, or that a fair procedure would have been a waste of time. The tribunal may then reprimand the employer but decide to award little or even no compensation.

- Evidence should be gathered to show the background to the case and to prove what happened. Examples of such evidence will include documents such as employment contracts, best policy statements, training of managers/supervisors, staff handbooks and of course written statements; both contemporaneous notes of relevant meetings and statements from witnesses to the claimant's misconduct or underperformance. Contemporaneous handwritten notes should be included in the Bundle as well as a typed up version of them for ease of reference at the Hearing.

- As mentioned above, it is desirable for the parties to agree a bundle of documents including those to be relied on by both sides and the tribunal may make an order to this effect. If there is an "agreed" bundle this means that the authenticity of the documents is not disputed, but not that their relevance or accuracy is necessarily conceded. The bundle should be paginated and, if substantial, indexed. Six copies will normally be needed for the hearing including 3 for the tribunal and 1 for the witness table.

- The relevant witnesses should be identified and their statements taken and prepared. An employer in an unfair dismissal case will be expected to call the manager who took the decision to dismiss and the manager who heard any appeal. In a redundancy case, evidence of the redundancy situation, the decision to select the claimant, consultation with the claimant (and any appropriate representatives), and any attempts to redeploy may all be required.

(c) During the hearing

Witnesses should be encouraged to keep calm, give a considered response to questions, direct their evidence to the tribunal panel and to not speak too quickly so that the employment judge can make a note of the evidence which is being given. In general "less is more" (particularly on cross-examination) to avoid unintended "mistakes".

Wherever necessary, the tribunal should be referred to relevant documents in the bundle with time to read new documents.

It is helpful to prepare a chronology of events to assist the tribunal. If possible, this should be agreed with the other side.

Aggravating the tribunal or the other side (for example, overrunning on allocated time, badgering a witness or interrupting without good cause) is of course unhelpful

(d) Dealing with litigants in person

Tribunals go to considerable lengths to ensure that unrepresented parties are not prejudiced by their lack of representation. For example, the employment judge may explain the tribunal procedure, the relevant law, and assist them in the presentation of their case in a way which they will not do for represented claimants (even where they are represented by a non-lawyer).

When dealing with unrepresented claimants, employers should bear in mind the lengths to

which tribunals will go to assist and employers may also be required to adjust their conduct accordingly. For example aggressive questions are discouraged and the extent to which further and better particulars can be requested from unrepresented claimants may be less extensive in scope than for a claimant who is represented by a lawyer.

Legal aid is not available for employment tribunal claims (except in Scotland), but it is available in the normal way for appeals from tribunals. Organisations such as the CAB, Free Representation Unit and the Bar Pro Bono Unit can assist claimants in the absence of legal aid by providing free advice and representation in tribunal cases.

7. REMEDIES

The remedy available to a successful claimant will clearly depend on the type of claim which has been brought.

(a) General

The remedy for certain simple claims (such as a failure to pay wages or unlawful deductions) will be obvious in most cases. Compensation for other claims (such as a statutory redundancy payment) is slightly more complicated in that the amount will have to be calculated having regard to the age, length of service and salary entitlement (subject to any statutory maximum - currently £330 per week (likely to increase slightly from 1 February 2009), for statutory redundancy payments) in accordance with the statutory formula.

The rules relating to certain claims (such as a failure to consult on a collective basis) specify the amount of the award (90 days' pay in the case of a failure to consult on a collective basis during a redundancy situation), although the employment tribunal has the power to substitute a lesser award if it considers that it is just and equitable in all the circumstances. Remedies of this nature are known as protected awards. A recent case has suggested that no such reduction should be made unless there is a good reason to do so.

(b) Unfair dismissal

In unfair dismissal cases, the employment tribunal will always consider whether reinstatement or reengagement is appropriate, although it rarely is the case. More commonly, employees will be awarded compensation comprising two elements, namely a "basic" and "compensatory" award.

(i) <u>Basic award</u>

The basic award is calculated in a very similar way as a statutory redundancy payment, with the maximum award currently standing at £9,900 (likely to increase slightly from 1 February 2009). It is not awarded where, following a dismissal by way of redundancy, a redundancy payment has been made in full.

(ii) Compensatory award

The compensatory award is determined by the employment tribunal on "just and equitable" grounds and is designed to compensate the employee for immediate and likely future loss (including the loss of any pension benefits) as well as giving a more nominal amount for loss of statutory rights (because the employee will have to work another year before having the right not to be unfairly dismissed again) which does not normally exceed £250. The House of Lords has recently ruled, however, that compensation for injury to feelings is not recoverable in unfair dismissal proceedings. The tribunal should not seek to penalise the employer though the employer's conduct is relevant in determining the employee's loss.

In certain circumstances, the compensation which would otherwise be awarded is reduced by the employment tribunal where, for example, the employee has contributed to his dismissal by virtue of his conduct (more commonly known as "contributory fault") or where the employee has failed to mitigate his loss by taking steps to find alternative employment. However, the barriers to showing contributory fault or failure to mitigate are high for the employer and careful preparation is needed.

The current maximum compensatory award is £63,000 (likely to increase slightly from 1 February 2009) but will be greater if a reinstatement or reinforcement order is made and ignored.

(c) Discrimination

Unlike unfair dismissal, compensation for discrimination claims is potentially unlimited. The principal element of the awards is calculated by reference to financial loss suffered and likely to be suffered by the claimant, in the same way as a compensatory award under the unfair dismissal regime.

The claimant will also be eligible for additional compensation for injury to feelings caused by the fact that he has been discriminated against. The Court of Appeal has suggested that this element of compensation should fall within a range of £500 and £25,000 (for particularly serious conduct). Further "aggravated damages" may be awarded where the respondent's

behaviour has been malicious or insulting (perhaps where the employer has failed to investigate complaints of racial discrimination which have been reported).

(d) Increases to or reductions in awards

Since 1 October 2004, tribunals are empowered to increase compensation in a wide range of claims where the employer has failed to follow the statutory minimum discipline or grievance procedures. The increase may be up to 50%, though in unfair dismissal cases, the current £60,600 cap still applies. The Basic Award is never increased but the Compensatory Award and compensation for claims such as unauthorised deduction from wages can be increased or decreased if an employer/employee fails to follow the statutory minimum procedure.

If the failure to follow procedures is the employee's fault, however, awards may be decreased, again by up to 50%. By way of example, where an employee has declined to avail himself of the chance of an appeal following a (unsettled) grievance, he may now get a 10% reduction in any subsequent compensatory award. Recent caselaw suggests a 40% increase in compensation is appropriate where a large employer has ignored the statutory procedure completely. However it is, on the whole, a matter for the tribunal and their decision is rarely one that can be successfully appealed.

(e) Remedies hearings

Compensation is normally determined by the employment tribunal following a remedies hearing, during which both parties will be given the opportunity to comment on the proposals for compensation and justifications put forward for any reduction made by the other. Often, remedies hearings follow on immediately after the merits hearing and judgment by the employment tribunal. Sometimes a tribunal will expect submissions on "remedy" points at the end of the "liability" hearing where the remedy issues are straight forward. The parties are usually given advance warning if this is the case and need to be suitably prepared. It is vital for all parties to be prepared to make submissions on remedy. For instance a claimant must have a schedule of loss and evidence of mitigation to hand whilst a respondent must ensure they have asked the claimant to provide details of approaches to recruitment agencies and the like and have carefully reviewed the response.

On occasions, it may be necessary to call an expert (such as a recruitment consultant engaged in a particular field) to give evidence on the future loss which is likely to be suffered by the claimant together with the likelihood that such loss could be mitigated. Again forward planning is needed.

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