Employment Tribunals 2008
A Practical Guide

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1. INTRODUCTION

Employment tribunals are the main forum in which disputes between employers and employees are resolved. They were established to provide 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 the 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.

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 2006-7 the number of applications was over 132,000. Although unfair dismissal is still the most common claim, the number of discrimination claims is rising steadily. In 2006-7, there also seemed to be a record number of equal pay claims submitted, probably because a number of class actions were brought against the public sector, mainly local authorities and the NHS.

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. COMPLAINTS THAT MAY BE DETERMINED BY THE EMPLOYMENT TRIBUNALS

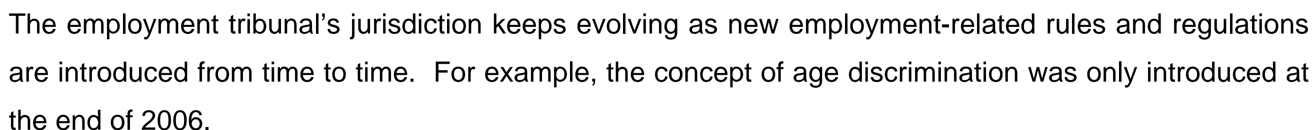
Employment tribunals have jurisdiction to hear in excess of 70 different types of employment-related claims including:

(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 and claims relating to TUPE or working time;

(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, age, 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 also has a limited jurisdiction to deal with breach of employment contract claims (see below). 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, often to compensate for psychiatric harm.



The employment tribunal's jurisdiction keeps evolving as new employment-related rules and regulations are introduced from time to time. For example, the concept of age discrimination was only introduced at the end of 2006.

3. CLAIMS FOR BREACH OF THE EMPLOYMENT CONTRACT

Employment tribunals can deal with breach of employment contracts claims which arise on or are outstanding at the date of termination of the employment. However, their jurisdiction is limited as they are not permitted to deal with certain types of claim, for example claims relating to confidentiality obligations or restrictive covenants (so these must instead be brought in the County or High Court). Additionally, the compensation that can be awarded by the employment tribunal in a breach of contract claim is capped at £25,000 (unlike in the civil courts where it is unlimited).

"Wrongful dismissal" claims (i.e. claims that the employment was terminated in breach of contract, for example, by failing to give notice) can therefore be brought in the employment tribunals but compensation will be limited to a maximum of £25,000. Employees making such a claim must therefore proceed with caution as 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. It should also be noted that damages for wrongful dismissal are often off-set from any unfair dismissal compensation to avoid double recovery.

4. THE TRIBUNAL PROCESS

(a) General

The overriding objective of the employment tribunals 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 (although they may be of persuasive value). Parties seeking to rely upon case authority to defend a claim will normally cite Employment Appeal Tribunal, Court of Appeal or House of Lords decisions. In practice, however, most cases will turn less on the authorities and more on legislative provisions seen in the light of the evidence put forward by the parties. In consequence, witness statements and documentary evidence are invariably very important.

(b) Commencing proceedings

(i) Preliminary steps

Depending on the type of claim (for example, in a constructive dismissal or discrimination claim), the claimant may need to raise a statutory grievance with their employer before they are permitted to bring a tribunal claim. This means that they must write to their employer setting out the basis of their complaint prior to them issuing tribunal proceedings. Their employer is then usually obliged to invite them to a meeting to discuss their grievance further.

Detailed guidance about the statutory grievance procedure is beyond the scope of this guide. However, further information can be obtained from Kemp Little's Employment Law Guide.

This statutory grievance procedure (and also a procedure known as the statutory disciplinary and dismissal procedure, which should usually be followed by the employer whenever they dismiss an employee) can impact on the tribunal proceedings, for example, it can lead to findings of automatic unfair dismissal, inflated or reduced levels of compensation or in some cases, can prevent the claimant from bringing a claim at all. See below for further details.

It should however be noted that in 2006 there was a review of these statutory dispute resolution procedures and as a result of this, a radical overhaul of the procedures was recommended. It is currently expected that the statutory procedures will be repealed in around April 2009. At the time of writing, it is expected that in place of the statutory procedures, employers will be encouraged to follow the guidance set out in the recent ACAS Code of Practice on Discipline and Grievances.

(ii) Issuing the claim

Employees have the most employment rights, although there are an increasing number of rights available to "workers", such as in relation to working time and unlawful deductions from wages claims. In addition, the definition of "employee" in relation to discrimination legislation is quite wide and would therefore incorporate workers as well as other individuals.

In order to commence proceedings an employee or ex-employee (or worker, where appropriate) (known as the "claimant") submits an ET1 claim form to a regional tribunal office. The ET1 claim form (which is accompanied by guidance notes) is available on the employment tribunal website (www.employmenttribunals.gov.uk) and can either be completed on-line or downloaded. This prescribed form must be used, otherwise the claim will not be valid.

The ET1 directs the claimant to provide information about themselves and their claim. For example, it requires them to confirm whether they have found a new job and has different sections to complete depending on the nature of the claim (i.e. unfair or constructive dismissal,

discrimination or some other claim).

(iii) Time limits for 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 3 months in the following circumstances:

In cases where the statutory dismissal and disciplinary procedure applies

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 to the employment tribunal within the normal time limit but that claim is inadmissible because the employee has not sent a grievance letter to his employer. The employee must send the grievance letter within one month of the normal time limit (i.e. by the end of the fourth month of the date of dismissal in the case of unfair dismissal claims) and then resubmit the tribunal claim after working 28 days within 3 months of the normal time limit (i.e. by end of the sixth month after the date of dismissal in the case of unfair dismissal claims);

(b) the employee has sent the grievance letter to the employer within the normal time limit but has not waited 28 days before submitting the tribunal claim. The employee must then wait the necessary 28 days and resubmit the claim within 3 months of the normal time limit (i.e. by the end of the sixth month after the date of dismissal in the case of unfair dismissal claims);

(c) the employee sends the grievance letter within the normal time limit. The employee should wait 28 days after sending the grievance letter before submitting their claim within 3 months of the normal time limit (i.e. by the end of the sixth month after the date of dismissal in the case of unfair dismissal claims).

(iv) Acceptance procedure undertaken by the tribunal office

On receiving the claim, the tribunal office will check to make sure that the form 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 (see above for information on time limits) or the employee has not followed the statutory dispute resolution procedures (again see above for information).

There may be circumstances where there is a valid reason why the claimant has not met the usual legal requirements, for example, it may not have been possible for them to have presented the claim within the usual time limit because of serious illness or it may not have been reasonable to expect the employee to submit a grievance on the basis that the employee has been harassed by the person who would deal with their grievance. Such reasons should be fully explained in the ET1, otherwise the claim will be automatically rejected.

In some situations the claim may be rejected in part and accepted in part. This can lead to two separate claims and defences if the claimant resubmits the rejected part of the claim once a procedural flaw is remedied. Where there are two such cases on the same facts, there will normally be a consolidation of the claims later in the tribunal process.

(v) Questionnaires

In discrimination cases, the claimant may serve a questionnaire on the person who they allege carried out the discriminatory act. This must usually be sent within the same time limit as for bringing a tribunal claim or, if proceedings have already been brought, within 21 days of the claim being lodged. Questionnaires can be an extremely useful tool for claimants.

A reply to the questionnaire should be made within eight weeks (or in the case of claim relating to colour or nationality, within a reasonable time). However, it should be noted that there is no legal obligation to respond but if you do not, the tribunal can draw such inferences as it considers just and equitable (including on inference that there has been unlawful discrimination). It is therefore important that responses to discrimination questioned are made within the prescribed time limits and that such responses are not evasive or equivocal. Given the potential importance of responses to questionnaires, legal advice is recommended.

(c) Reply to claim by the employer

(i) Submitting a response

Assuming that the ET1 claim form is accepted by the tribunal office, the employer (or former employer) will then be sent a copy and must submit a response form (known an ET3) within 28

days from the date on which it was *sent* a copy of the complaint. If this is not done, the employer (known as the "respondent") risks losing its right to contest the claim. The ET3 response form can be downloaded from the employment tribunal website (together with notes on how it should be completed).

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 to append relevant documentation to the response form).

That said, including too much information can actually 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 formal pleading so the respondent's case must subsequently be conducted consistently with it, (for example, the witness statements provide the real detail but they must be consistent with the original defence).

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.

(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. It should be noted that an extension will not usually be granted without a very good reason so always be prepared to submit something before the original deadline. A solution may perhaps be to submit a defence as fully as possible but reserve your right to add to it when, for example, the key person returns from holiday.

(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 filed 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 Judge as "wing members" to make up a full employment tribunal panel) has wide ranging powers to make orders regarding the conduct of proceedings which he considers are appropriate, for example, setting dates for disclosure or exchange of witness statements. Alternatively, he may prefer to convene a preliminary hearing called 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). A CMD can only set directions to narrow issues and determine the timetable of the case; it is not possible, for example, to get the case struck out (unlike at a pre-hearing review, see below for details).

The parties can, if they so wish, apply themselves for a CMD. Also, either party may apply for a specific "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, 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.

(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 the very 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 possible for either party to apply in writing for a pre-hearing review ("PHR") (which will normally be conducted by an Employment Judge alone) to deal with any interim or preliminary matter. A PHR can also be ordered by the Judge of his own initiative. At the PHR, the parties make submissions to the Employment Judge but no oral evidence from witnesses is taken. A PHR can

include case management issues so it would be unusual to have both a CMD and a separate PHR.

(ii) Strike out of claims

The Employment Judge may 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. This can only be applied in certain circumstances, for example, where the claim/response has no reasonable prospect of success or where a party has conducted the proceedings unreasonably or vexatiously.

(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/response is pursued to an unsuccessful outcome. To this end, the employment tribunal may consider it appropriate to require the claimant/respondent to pay a deposit to allow them to continue with their claim/response (up to a maximum of £500).

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

(i) General

An official from the Advisory, Conciliation and Arbitration Service ("ACAS") is appointed as a conciliation officer to most employment tribunal claims. ACAS takes action to assist the parties to negotiate a settlement which is acceptable to both sides, where this is possible. Although funded largely by the Department for Business, Enterprise and Regulatory Reform, ACAS is a non-departmental body, employing over 700 staff throughout the country. In 2006-7, ACAS intervention saved 73% of tribunal hearing days by successfully securing settlement or withdrawal of claims.

From October 2006, ACAS's duty to conciliate was limited to fixed periods in straightforward cases. ACAS has recently announced, however, that in light of the government's intention to abolish fixed conciliation periods it will offer open-ended conciliation for all types of cases.

(ii) Role of the ACAS official

The ACAS conciliator will talk through the relevant issues with each of the parties and discuss the options open to them. They 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.

Discussions are “without prejudice” and therefore cannot be referred to in the tribunal proceedings.

If an oral agreement is reached between the parties, via ACAS, it will become binding (notwithstanding it is not in writing). It is however normal for the agreement to subsequently be recorded in a written agreement known as a COT3, which is then signed by all the parties.

(g) The hearing

(i) General

The procedure at an employment tribunal hearing is very similar to that of the civil courts, although tribunals are less formal, for example, 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 parties will each be directed to a different waiting room where the clerk will speak to them in turn and will collect copies of documents and statements on which the parties intend to rely. These documents will then be given to the tribunal panel.

Hearings are generally conducted in public and may be reported to the media, although either party can apply for the evidence to be presented in private where, for example, the evidence involves a trade secret or 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 members. The lay members rank equally with the Judge, and bring with them practical knowledge and experience of employee relations.

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

(iii) Representation

A party can choose not to be represented by a lawyer but instead conduct their own case or have other representation from a friend, trade union, CAB representative or suchlike. 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.

(iv) Bundle of Documents

The employment tribunal will expect an agreed bundle of documents. It should be single-sided and clearly paginated for ease of reference. All documents upon which the parties wish to rely should be included in the bundle. Although the duty to prepare the bundle falls on the claimant (unless otherwise directed by the tribunal), the respondent invariably has to assist and sometimes may take on the responsibility, for example where the claimant has no legal representation. The tribunal will not see the bundle until the day of the hearing.

Often hearings are listed to include (to the extent it is necessary) time for discussion about remedies so, if this is the case, a schedule of loss should be included in the bundle along with evidence relating to mitigation (or lack of it). A chronology is often helpful and a written skeleton argument is normally appreciated by the tribunal.

Original documents should be brought to the tribunal where clarity or authenticity is a possible issue. Typed copies of handwritten notes are sensible (though the original handwritten note should also be included in case the accuracy of the typed version is disputed).

Without prejudice correspondence and documents which are privileged, for example, because they were created in the course of legal proceedings should of course be excluded (unless privilege is waived).

(v) Opening submissions

Occasionally, the parties may be invited to briefly summarise their case before evidence is presented, particularly if the claim is complex. This is however up to the Employment Judge.

(vi) Evidence of witnesses

(a) 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 be on the respondent to establish that the dismissal was fair. In discrimination cases, the

burden lies with the claimant unless a prima facie case for discrimination can be established in which case the burden passes to the respondent.

(b) Evidence in chief

Witnesses are examined on oath or affirmation (depending on whether they opt to swear on a religious book or not). They give their evidence seated at a table. A written witness statement should always be prepared in advance and the tribunal panel will usually ask the witness to read it out, or alternatively will read the statement themselves and take it into evidence "as read". A witness's representative may stop the witness during their reading of the statement to direct the tribunal panel to relevant documents or to clarify certain points. This is known as giving evidence in chief.

(c) Cross-examination

Following evidence in chief, the witness is then open to "cross-examination" by the other side (or his representative, if he has one) 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.

(d) 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 usually to clarify certain points This is known as re-examination.

(e) 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. It is therefore extremely important for witnesses to speak slowly and clearly when giving their evidence.

(vii) <u>Closing submissions</u>

The parties are given the opportunity to summarise their cases before a decision is taken by the employment tribunal. On occasions, the tribunal may request that written submissions are lodged. A written summary is usually helpful in any event. Copies of any case law referred to should be

handed to the tribunal (3 copies should be provided for the tribunal and 1 for the other side). Whoever starts the case (i.e. the party who has the burden of proof) ends the submissions.

(h) Tribunal judgment

After the submissions, the Employment Judge and lay members retire and consider the evidence which has been presented to them. The panel will often come back and give the judgment that day, together with oral reasons for their decision. However, the panel can reserve their decision instead, and may do so in long or very complex cases or if they are running out of time. Written reasons are only sent out automatically in the case of a reserved decision. In all other cases written reasons are not provided unless the parties request them at the hearing or within 14 days of the judgment being sent out.

The tribunal panel 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 claimant/respondent may apply for a review.

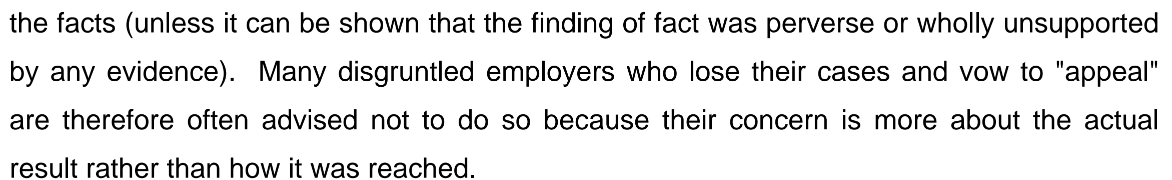
Any application for a review must be made to the relevant tribunal office (stating the grounds) within 14 days of the judgment being sent to the parties (or within such further period as the Employment Judge considers is just and equitable in all the circumstances). It must identify the grounds of the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

(a) General

Appeals are more common than reviews although appeals can only proceed on a *point of law*. It is not possible to appeal on the basis that the tribunal misunderstood or misapplied



the facts (unless it can be shown that the finding of fact was perverse or wholly unsupported by any evidence). Many disgruntled employers who lose their cases and vow to "appeal" are therefore often advised not to do so because their concern is more about the actual result rather than how it was reached.

(b) 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. The lay members are appointed in a similar way to the lay members of the employment tribunals, but are generally very senior and well respected in their fields. The EAT normally sits in panels of three, although there is provision for appeals to be heard by a Judge alone where the decision being appealed was given by an Employment Judge sitting alone.

The person bringing the appeal is known as the "appellant" and the defending party is the "respondent".

(c) 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).

There is a prescribed form which must be used (known as "Form 1"). This is available on the EAT's website (www.employmentappeals.gov.uk). It should also be noted that the EAT office shuts at 4.00pm so any documents filed after this time are considered to as being submitted the next working day.

(d) Preliminary hearings to weed out weak cases

In order to weed out weak or spurious applications, the EAT reviews all notices of appeal. Where they think that there are no reasonable grounds for bringing an appeal or that the appeal is an abuse of process, a preliminary hearing, known as a "Rule 3(10) hearing" will usually be held. At this hearing, the onus is on the appellant to try and convince the EAT that there are reasonable grounds. The respondent to the appeal does not usually attend. Many appeals flounder at this preliminary stage. If the appeal survives the sift, a full hearing will then be listed.

(e) Possible decisions of the EAT

Prior to the full EAT hearing the parties need to agree a bundle of documents for use during the hearing and submit skeleton arguments.

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. Alternatively, they may of course uphold the original decision of the tribunal and dismiss the appeal.

(f) Further appeals

In rare cases following an EAT hearing, the issues may be referred to the Court of Appeal and eventually perhaps even to the House of Lords. Leave to appeal is needed in both cases. Where questions arise about the interpretation of European law, it is also possible for cases to be referred to the European Court of Justice.

If the case is appealed, 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 an award for costs to be paid. 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 PHR 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 wealth are also unlikely to have a costs order made against them.

The amount of any order will depend on the circumstances of the case. The bulk of costs typically relate to legal fees.

The maximum amount that the tribunal may order is £10,000. Alternatively, the tribunal may order that costs are "assessed" (which requires a separate hearing in a civil court but means that the amount of costs that are awarded is unlimited).

In 2006-7, the average costs award was approximately £2,000 and only about 500 such orders were made. Even where a costs order is made, it is usually less than the actual fees incurred.

Preparation of time orders

Even if a party has not been legally represented, they might still have incurred significant personal costs, including time spent in making or responding to a claim. The tribunal can therefore make a "preparation of time" order, in which time spent on the case can be reimbursed at an hourly rate (currently £26 per hour, although this increases annually in April), up to a maximum of £10,000. Preparation time cannot include time spent at any hearing.

Wasted costs orders

The tribunal has an additional power to make a "wasted costs" order against the legal representatives of one party if they have acted improperly, unreasonably or with negligence. However, these are, in practice, rarely made.

5. 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) <u>General</u>

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 should not however normally be incorporated into the employee's contract of employment as having policies with contractual effect is likely to be too inflexible for the employer.

- Ensuring that the procedures for dealing with discipline and grievance issues are clearly set out and followed properly. In particular care should be taken where employees have put in a written grievance because there is a legal obligation on employers to 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 disciplinary 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 often 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. However, that said, employers may consider that some cases are worth defending to signal their resolve to other employees.

The party making an offer of settlement should make it clear that it is being made on a "without prejudice and subject to contract" basis. Genuinely without prejudice correspondence cannot usually be brought to the attention of the tribunal panel at the hearing. However, offers will only be treated as such if there was a "dispute" between the parties at the time the offer was made. 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.

Unless a claim has been made and ACAS is involved, it is advisable to record the terms of any settlement in a legally binding "compromise agreement" (in respect of which the employee or former employee will need to take independent advice). This is a formal agreement in which the claimant agrees to waive their employment claim, usually in exchange for a sum of money.

(iii) Alternatives to litigation

In recent years, much emphasis has been placed on alternative ways of resolving disputes.

ACAS Arbitration

ACAS offers an arbitration service which can be used by parties involved in a simple unfair dismissal claim or flexible working dispute. ACAS help the parties to settle the dispute in an arbitration hearing, rather than at an employment tribunal hearing. Arbitration is usually more informal, quicker and therefore cheaper. It is also confidential as discussions are conducted in private (unlike a hearing which is public). In order to participate in the arbitration scheme, both parties must agree and each must sign a waiver confirming that they no longer wish to pursue the claim in the employment tribunal. At the arbitration hearing, the arbitrator will listen to each parties' view and then reach a decision. Compensation, if any, is calculated in the same way as in the employment tribunal.

Judicial Mediation

In July 2006, Birmingham, London Central and Newcastle employment tribunals launched a pilot scheme whereby race, sex and disability discrimination claims (and equal pay claims in Newcastle) are selected for a mediation hearing prior to the employment tribunal hearing taking place. The meditation is held in private and the details of the discussions remain confidential (so the content of the discussions cannot be referred to in any subsequent employment tribunal hearing, should one be necessary). It is hoped that the mediation will allow the parties to reach a solution to their dispute and so avoid the need for a full tribunal hearing.

The main difference between mediation and arbitration is that a mediator does not decide who is right and who is wrong. Instead the mediator's role is to facilitate discussions to help the parties reach an amicable solution. It is therefore often particularly useful where the employment relationship is ongoing.

(b) Prior to the hearing

The following points should be considered:

- First, you should check to see whether the other side's claim (or response, if appropriate) is technically flawed, for example whether it is in time, whether the applicable statutory dispute resolution procedures has been complied with etc. If so, an application should be made to strike out the claim. These are preliminary issues and can best be dealt with at a PHR 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. Alternatively, a request for further information can be made about issues relating to the case, for example, about the claimant's efforts to mitigate his losses. An application to the tribunal for an appropriate order should be made if such particulars/information are not forthcoming.

- Request a schedule of loss (if this has not already been provided or ordered by the tribunal) and details of steps which have been taken by the claimant to mitigate his loss. Employers should also collate 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. This helps you to plan your strategy going forward.

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

- Ensure all or any possible witnesses have the hearing dates in their diary. It will be almost impossible to get a postponement once hearing dates are fixed. Usually, the opportunity to avoid certain dates for listing the full hearing comes as/after the ET3 is presented so forward planning is needed. The tribunal will expect witnesses to prioritise the hearing over other commitments.

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

- Consider whether an attempt should be made to settle the claim, whether through ACAS during the conciliation period, directly with the other party or their representative or through mediation. Clearly, any such offer should be made on a without prejudice basis.

- All relevant witnesses should be identified and statements taken and prepared. Ensure each witness has 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 an inaccurate or 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 by making a judgement against them 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 records of managers/supervisors, staff handbooks and of course written statements; both contemporaneous notes of relevant meetings and statements from witnesses.

- The parties should try to agree a bundle of documents which includes 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 indexed. Six copies will normally be needed for the hearing including 3 for the tribunal, 1 for the witness table and 1 for each of the claimant and respondent.

- Research into relevant case law is often essential in order to generate and strengthen legal arguments. Copies of any case law relied upon should be made available to the tribunal panel and the other side.

(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 and given adequate time to read them.

It is often helpful to prepare a chronology of events and statement of issues 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 parties (even where they are represented by a non-lawyer).

When dealing with unrepresented parties, you should bear in mind the lengths to which tribunals will go to assist and adjust your conduct accordingly. For example, aggressive questions are discouraged and the extent to which further and better particulars can be requested from unrepresented parties may be less extensive in scope than for a party who is represented by a lawyer.

Legal aid is not available for employment tribunal claims (except in Scotland), but it is available for EAT appeals. Organisations such as the Citizen's Advice Bureau, Free Representation Unit and the Bar Pro Bono Unit can assist parties in the absence of legal aid by providing free advice and representation in tribunal cases.

6. 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 unlawful deductions of wages claim) will be obvious in most cases. Compensation for other claims, such as a statutory redundancy payment, is calculated in accordance with a statutory formula, having regard to the employee's age, length of service and weekly pay (subject to any statutory maximum - currently £330 per week, although this amount increase's from 1 February each year).

The rules relating to some other claims specify the amount of the award (for example 90 days' pay in the case of a failure to consult on a collective basis during a redundancy situation), although usually the employment tribunal has the power to substitute a lesser award if it considers that it is just and equitable. Remedies of this nature are known as "protective awards".

(b) Unfair dismissal

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

Basic award

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

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 benefits, such as pension) 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), normally £250.

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 making reasonable efforts 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 if these arguments are to be run successfully.

The current maximum compensatory award is £63,000 (again increasing from 1 February each year) but will be greater if a reinstatement or re-engagement 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 the financial loss suffered and likely to be suffered by the claimant, in the same way as a compensatory award under the unfair dismissal regime. However, there is no statutory cap on the amount of compensation that can be awarded.

Additionally, the claimant will also be eligible for compensation for injury to feelings caused by the fact that he has been discriminated against. This is assessed as follows:

(i) £500 to £5,000 for isolated or one-off incidents or low level discrimination or harassment;

(ii) £5,000 to £15,000 for more severe cases or acts extending over a longer period of time, and

(iii) £15,000 to £25,000 for the most serious cases, for example where there has been a sustained campaign of deliberate discrimination or harassment.

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

discrimination) and an award to compensate for personal injury (for example, psychiatric harm) can also be made.

(d) Increases to or reductions in awards

Tribunals are also empowered to increase compensation in a wide range of claims where the employer has failed to follow the statutory disciplinary or grievance procedures. The increase may be up to 50%, (though in unfair dismissal cases, the statutory cap on compensation still applies).

Where the failure to follow the procedures is the employee's fault, awards may instead be decreased by up to 50%.

(e) Remedies hearings

Compensation is normally determined by the employment tribunal in 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 or uplift. Often, remedies hearings follow on immediately after the merits hearing and judgment by the employment tribunal. It is therefore vital for all parties to be prepared to make submissions on remedy. Claimants must have a schedule of loss and evidence of mitigation to hand whilst respondents should ensure they have asked the claimant to provide details of approaches to recruitment agencies, prospective employers and the like and have carefully investigated 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, this requires forward planning.

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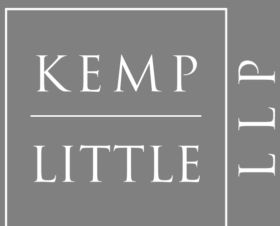

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