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# Employment Tribunals



- Industrial Tribunals and Employment Tribunals
- A simple, cheap, quick and effective way of resolving workplace disputes (and then the lawyers got involved...)
- Employment Judge or panel of 3 – Judge and 2 ‘wing’/lay members
- The ‘Industrial Jury’ – local knowledge and experience of industry
- Legal Officers to decide certain cases
- Statutory basis of the Employment Tribunal
- Rules of Procedure – the ‘Overriding Objective’
- Less formal than other courts
- Hearings generally in public and judgments now accessible online

# Tribunal Claims and Complaints

- Jurisdiction to hear various types of complaints:
  - Unfair dismissal and redundancy
  - Discrimination
  - Whistleblowing and other unlawful 'detriments'
  - Unlawful deductions/arrears of pay/holiday and working time claims
  - Collective consultation and trade union-related claims
  - TUPE (transfer of undertakings)
- Breach of contract claims:
  - Limited to £25,000
  - Only if 'outstanding or arising' on the termination of employment
- Personal injury claims (if related to discrimination)
- Employer's counter claims

# Dealing with Tribunal claims

- The key milestones in the litigation will be:
  - Submitting the Response
  - Disclosure documents (and preparation of the hearing bundle)
  - Exchange of witness statements
  - The final hearing of the claim
- Things to consider from the outset:
  - How strong will our defence be?
  - Do we have all the relevant documents ready to be disclosed?
  - Are the witnesses available, cooperative and likely to be persuasive?
  - What is the likely award if the claim succeeds?
- Cost benefit analysis – the risks of litigation, costs and inconvenience of defending the claim, the potential for a more cost effective settlement, and your preferred outcome

# Responding to a Claim

- Initial steps to bring a claim – ACAS Early Conciliation
  - The Claimant submits a Form ET1 (almost always online now)
  - Initial ‘sift’ of claims by Tribunal then served on Respondent(s)

## **The Response must be submitted within 28 days!!**

- Keep a copy, note the date, and follow up on submitting the Response regularly
- Form ET3 and attachment (Grounds of Resistance)
- Consequences of late Response – no right to participate in the claim
- Applications to extend the time limit to submit the Response
- Are Tribunals now taking a more lenient view on late Responses?
- Individuals can be Respondents to certain claims (discrimination and whistleblowing)

# The Contents of the Response

- The Grounds will form the basis of the defence to the claim: set out your stall
- Response Form ET3 – very few essential answers required
  - Grounds of Resistance – putting forward the best defence
  - Avoid narrative style pleadings
  - ‘Distil the relevant factual matters to their essential or key component parts’ (C v D, 2019)
  - Respond to all claims and allegations
  - Seek further information or ‘further and better particulars’
- Identify any jurisdictional issues, for example:
  - Is the claim brought within the correct time limit?
  - Is the Claimant an employee?
  - Do they have sufficient length of service to bring the claim?

- Disclosure of relevant documents: the documents on which you rely, which adversely affect your own case or another party's case, or support another party's case
- A reasonable and proportionate search for relevant documents
- Assemble original copies, handwritten notes, emails, drafts and final versions as early as possible
- There are exceptions:
  - Is the document relevant to the issues in the case?
  - Without prejudice
  - Legally privileged
- Applications for specific disclosure or third party disclosure
- Privacy or reporting orders (e.g.confidential or sensitive data)
- Relevant documents are put together into the final hearing bundle ready for the hearing

# Statements and Evidence

- The role of witness evidence at the hearing
- Written witness statements to be taken as read
- Formalities – contempt of court: a reasonable belief that it is true and accurate
- Format – chronological, numbered paragraphs, references to pages in the hearing bundle
- Tribunals and hearsay evidence
- Evidence of fact on allegations of discrimination or unlawful conduct
- Witness management
- Giving evidence ‘second hand’ if a particular witness is not available
- Simultaneous or sequential exchange of statements
- Supplemental statements or amendments to existing statements



- Preliminary Hearings
  - Interim hearings to deal with case management issues, directions and timetable
  - Jurisdictional issues – limitation, employment status, disability
  - Costs Orders, Unless Orders, Deposit Orders, applications to strike out
- Full Hearings
  - Deciding the claim – liability and remedy
  - Full panel or Judge sitting alone
  - Public hearing, with access to the statements and bundle
  - The Claimant (usually) goes first
  - Evidence, submissions, deliberations and judgment
  - In person, remote (CVP), or hybrid hearings

# Hearing Preparation

- Key points to consider when approaching a hearing
- Make sure the witnesses are:
  - Aware of the central issues that the Tribunal will need to decide
  - Satisfied that their own statement is accurate and complete
  - Familiar with the documents and the bundle
  - Familiar with other witnesses evidence, including any other parties
  - Available for all or most of the hearing dates
- Conference with Counsel or advocate
- Have the bundles and statements ready for the Tribunal
- Consider a cast list, chronology, reading list or core bundle

# Judgments, and how to challenge them

- The Tribunal can uphold or dismiss the claim(s)
- If it is a judgment on liability only, remedy will be considered later
- Judgments are enforced like county court judgments
- Appeal to the Employment Appeal Tribunal (EAT):
  - Strict time limit to appeal within 42 days
  - Tribunal must have made an 'error of law' or reached perverse decision
  - EAT may send the case back to the same (or new) Tribunal to reconsider the issue
- Apply to the Tribunal to reconsider its judgment:
  - Within 14 days
  - Same Tribunal reconsiders the judgment it reached
  - Limited grounds to challenge a judgment on the 'interests of justice'

# Remedies and Compensation

- Tribunals have a limited range of remedies and outcomes:
  - A declaration that a dismissal was unfair or that a person was discriminated against
  - Compensation
  - For unfair dismissal, reinstatement (the same job) or reengagement (a similar job)
  - For discrimination, a recommendation to tackle the possibility of discrimination in future
- Compensation for unfair dismissal
  - Basic Award – equivalent of statutory redundancy entitlement
  - Compensatory Award – capped at normal annual salary or £93,878 whichever is the lower (except for automatically unfair dismissals)
- Compensation for discrimination
  - Injury to Feelings
  - Compensation for the losses caused by the discrimination

# Challenging the valuation of a claim

- Basic Award
  - Calculated according to a formula and can often be agreed
- Compensatory Award/Compensation
  - Loss of earnings for such a period of time as it will take to find suitable alternative employment
  - Reasonable steps to mitigate loss – evidence of job hunts, suitable roles elsewhere?
  - Employee would have been dismissed in any event or contributed to their dismissal
- Injury to Feelings
  - How serious was the discrimination?
  - One-off incident or lengthy campaign? Minor decision or ending in dismissal?
  - Ultimately for the Tribunal to determine according to the Vento bands

- The costs regime in the Employment Tribunal:
  - Each party is expected to pay their own costs, they do not ‘follow the event’
  - Contrast with the civil court system (‘the loser pays’)
  - Limited grounds to make a costs order – unreasonable conduct (vexatious, abusive or disruptive), or no reasonable prospects of success
  - Breach of Tribunal Orders or late postponement of hearings
  - Amounts initially limited to £20,000 (with option to consider more)
  - Deposit Orders of up to £1,000 per claim, allegation or argument
  - No fees for either party (at the moment)
- The impact of funding:
  - Claimants can fund themselves, with legal expense insurance, or with union support
  - Costs may not be recoverable unless they have means, or backing


- ACAS: free and confidential service
  - Involved before the claim begins in mandatory Early Conciliation
  - Ongoing assistance to the parties to settle
- Negotiations between parties directly
  - Protected Conversations
  - Without Prejudice negotiations – a genuine attempt to settle a dispute
- Judicial Mediation
  - One day hearing before a Judge to mediate a settlement (no judgment will be made)
  - Confidential
  - Requires someone with authority to give instructions to settle
- What can the Claimant get in settlement that they can't get from a Tribunal? (e.g.references)
- Tribunal's remedies are limited (and usually public)

- Settlement via ACAS:
  - COT3 agreement – ACAS prefers a standard wording
  - Binding as soon as the parties agree terms
  - ACAS notifies the Tribunal
  - The Claimant withdraws the claim
- Settlement between the parties – a Settlement Agreement
  - Any reasonable wording the parties can agree
  - Guidance on certain settlements and confidentiality clauses
  - More formalities; the Claimant must have the benefit of independent legal advice
  - Can settle more than just Tribunal claims
- The parties would then have a dispute over the agreement, rather than revive the initial claim
- Some clauses are harder to enforce in practice than others, e.g.confidentiality



# Questions and answers

**Thank you**

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