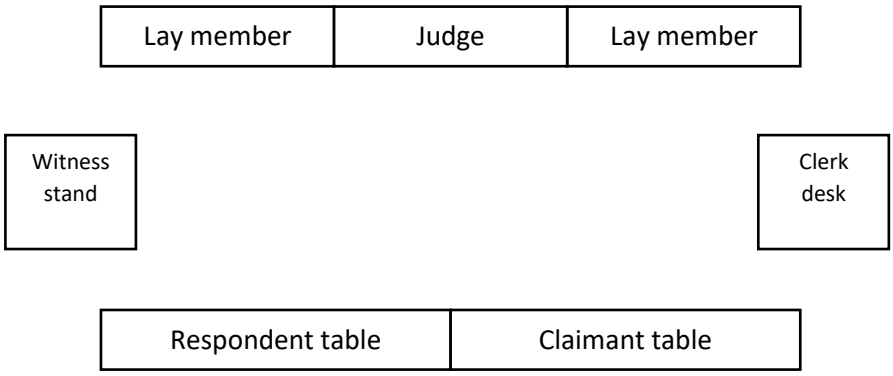
Preparing for employment tribunals

Julie Temple, Birkett Long LLP

Anatomy of an employment tribunal claim

1. Acas early conciliation (if applicable)
2. Claim submitted
3. Response submitted
4. Preliminary Hearing held (if applicable)
5. Parties comply with employment tribunal case management orders, including
    a. Statement of remedy
    b. List of documents
    c. Bundle for the hearing
    d. Witness Statements
    e. Cast list and chronology
6. Hearing
7. Written submissions (if applicable)
8. Judgment
9. Reconsideration (if applicable)
10. Appeal (if applicable)

Employment tribunal layout



The issue

Often a claim is made by a former employee; their employment has ended through resignation or dismissal.

Less often claims are made by individuals still employed – quite often discrimination claims. This can make the working relationship difficult and you need to be wary; actions by employers after claims have been made can give individuals protection against detrimental treatment because they have brought the claim.

Most employers, regardless of the circumstances, anticipate a claim. It is very rare for a claim to come completely out of the blue.

Acas

Claimants, in most employment tribunal claims, must comply with mandatory Acas early conciliation before they can proceed successfully with a claim. Acas is an independent, impartial organisation that is required to liaise between the parties to facilitate settlement prior to a claim being made.

Whether you want to settle or not, there are benefits to engaging with early conciliation. They include:

- Acas is neutral and can calm relations especially if one or both parties are not represented.
- you can gather information about what the individual perceived has happened and what claims they believe they have.
- there is no fee and settlement can save time and costs.
- in most instances the communications with Acas may not be used as evidence in any employment tribunal hearing without consent. This allows the parties to frankly explore the merits of the claim and test respective cases at an early stage.

You can find out more about early conciliation at https://www.acas.org.uk/early-conciliation or get in touch with any of Birkett Long's employment law specialists.

ET1 (claim)

If early conciliation is unsuccessful a certificate is issued. The claimant needs the certificate number to put on the claim form (or **ET1**) which they submit to the employment tribunal.

Notice of claim

Once a claim is submitted the employment tribunal sends a copy of the claim to the respondent/s along with a notice of claim which includes instructions to respond to the claim and a blank response form (or **ET3**).

Confidentiality

The respondent should make clear that discussions about the case must be limited to those involved in the case, are confidential and not to be shared.

If there is a risk of press interest, you should consider giving instructions about how to respond or who to direct enquiries to.

Deadline to submit response

The respondent must submit its response within 28 days of the date of the notice of claim; this date will be stated in the notice of claim. The response must be submitted no later than midnight on this date but ideally well before. It should be diary noted and not overlooked.

Start early! If you do not submit the response by this date you are unlikely to be able to play any part in defending the claim.

The date can be extended but it is dangerous to rely on it.

Preparing the response

The response should set out the respondent's version of events.

The response can be prepared internally or, for example, by a third party consultant or a specialist employment solicitor. Whether you instruct a third party will depend on a number of factors, ranging from in-house experience and confidence to deal with the case, costs and complexity. If you intend to instruct someone involve them early and make an early decision whether a barrister will be instructed to assist or represent you at the final hearing. The longer you leave involving someone the less choice you will have.

Whichever approach you take, to properly prepare a response, you should:

1. Ask all potential witnesses to summarise their involvement and what they can remember (or makes notes if you speak with them directly).
2. Ask them to send you all documents and correspondence (including messages exchanged by phone etc).
3. Collate any other documents and correspondence that might be relevant.

From this information you can prepare a summary of the events and decide if you:

1. Should admit an allegation made by the claimant. The claimant might allege a manager said something to them. If the manager agrees they said, admit it.
2. Deny an allegation made by the claimant. If the manager is very clear they did not say what is alleged deny it. If the

manager says they said something else, include that in the response.

3. Put the claimant to proof (i.e. make the claimant prove the allegation). If the manager doesn't remember the respondent should 'not admit it' and put the claimant 'to proof'.

Amending the ET3

In limited circumstances you may be permitted to make amendments to the response submitted (as might the claimant to their claim). As soon as you identify the need to, make a prompt application to the employment tribunal along with the draft amended response.

Discrimination questionnaires and written questions

If the claim involves allegations of discrimination, the claimant may send a questionnaire or written questions. You have no legal obligation to answer but an employment tribunal can consider failure to respond or the answers you gave when making their decision. For this reason alone, you should take specialist legal advice before responding.

Statement of remedy

It is increasingly common for employment tribunals to require the claimant to produce a 'statement of remedy' or what they want the employment tribunal to award if they are successful in their claim/s on the same date that the ET3 must be submitted.

Often, the statement of remedy is the financial loss the claimant says they have suffered as result of your alleged actions.

Preliminary hearings

In complex cases a Preliminary Hearing is held to review the claim, response and give case management orders.

Preliminary Hearings can also determine a 'preliminary issue', for example whether a claim is out of time or the claimant was a 'disabled person'.

More than one Preliminary Hearing may be held.

Case management orders

In straight forward cases (not involving claims of discrimination) employment tribunals tend to send case management orders at the same time as sending the notice of claim to you.

Case management orders set the timetable for steps to be taken by the parties to prepare the case for final hearing.

A timetable will usually be set for the following (although there may be others depending on the type of case):

1. Statement of remedy (see above)
2. Disclosure - list of documents and provision of copies
3. Expert evidence
4. Bundle for the hearing
5. Witness Statements
6. Cast list and chronology
7. The hearing

Lists of documents

The parties will be ordered to prepare and exchange with the other a list of all documents they have that are relevant to the issues in the case, including those that are not helpful to their case.

Parties must make a reasonable search for documents.

A document is "anything in which information of any description is recorded" and includes tapes, computer records, emails, databases, records of audio communications, text messages, instant messages on WhatsApp or similar, posts on social media, deleted 'documents' and those stored on servers and back-up systems as well as information stored and associated with electronic documents, known as metadata.

Practice varies between employment tribunals: some require just a list; some require only copies of the documents to be sent; others require both. Read the employment tribunal case management order carefully.

Exchanges with your solicitor or internally in anticipation of legal proceedings should not be included as they are 'privileged'. You may need to take specialist advice if you are unsure.

Whatever the claim, your list of documents must include:

1. Recent payslips.
2. Contract of employment.
3. Relevant policies and procedures.

Once lists have been exchanged both parties have an ongoing duty to disclose documents that come to light and documents sometimes appear in the days before the hearing or even at the hearing.

Copies and specific disclosure

You should review the claimant's list carefully and, if copies have not been provided, and you do not have a copy, ask for one. The employment tribunal may state how quickly copies should be provided. This is known as 'inspection'.

Think about documents you know (or suspect) exist but have not been included in the list. For example, the claimant may have made notes at a hearing or you suspect they exchanged messages with a colleague but these are not listed. Ask for a copy. This is known as 'specific disclosure'. If the claimant does give you a copy you may need to make an application to the employment tribunal.

Expert evidence

Expert evidence might be necessary in some cases. Commonly, this will be medical evidence in a claim for disability discrimination and to assist with determining whether a claimant was a 'disabled person'.

Experts are often appointed jointly but can be appointed by one party.

Bundle of documents

You will often be responsible for the bundle. This is the complete copy of documents witnesses and the employment tribunal will refer to during the hearing.

You will have to provide a copy to the claimant and enough copies for the employment tribunal and witness box at the hearing.

The bundle should be prepared in accordance with the employment tribunal's order, which will generally mean in chronological order, paginated and indexed.

Witnesses and witness statements

The order will give a date for exchange of statements. Usually this is the same date. Sometimes, an employment tribunal orders one party to send their statements and the other to send theirs later.

You should consider who will give evidence to support your case **and** respond to the claimant's case.

All potential witnesses must give their version of events as early as possible. Memories fade quickly – the hearing can be many months or years after the events took place. Individuals may also move on.

Witnesses should put the hearing in their diary and keep the dates free. Once listed, an employment tribunal will only change the hearing date in limited circumstances and the unavailability of witness could be the difference between success and failure of the defence.

Each witness will be required to submit a written statement. The statement will detail their role in the case and:

- have numbered paragraphs.
- be in chronological order.

- deal only with the facts.
- not give opinion or try to argue the case.
- refer to documents in the bundle.

Any witness who has not given evidence in an employment tribunal before should watch an employment tribunal hearing. This will give them a better idea of what happens during a hearing and should make giving evidence a little less daunting.

Most hearings are public and some are online now: you can find out what cases are listed at:

https://www.courtserve.net/services/tribunal-express/employment-tribunal-landing-page.php

Each witness should be given (or be able to access) copies of:

- All the respondent and claimant witness statements.
- The bundle.

They should read through them and familiarise themselves with them before the hearing.

The hearing

You will know the dates of the main or 'substantive' hearing well in advance. The number of days the hearing is scheduled for will depend on the complexity of the claim, the response and the number of witnesses anticipated by the parties. If there was a Preliminary Hearing this will have been discussed then.

The substantive hearing can be postponed at short notice by the employment tribunal. If you have or will incur considerable costs for the hearing, for example, because a witness must travel you should notify the employment tribunal so they can take this into account when considering if the hearing should go ahead.

Witnesses should bring to the hearing:

- Copies of the respondent and claimant witness statements and hearing bundle to use during the hearing.
- Something to write with and on. Post-it notes are best. They can be detached with little noise and passed easily to the representative.

There may be members of the press or public in the building, at the hearing and in public areas; there could also be someone with some connection to the claimant. Witnesses must be careful about being overheard.

Employment tribunals tend to be laid out in a standard way.

Although employment tribunal hearings are less formal than hearings in the High Court or County Court everyone should stand when the tribunal members enter or leave. Members of the employment tribunal should be referred to as Sir or Madam.

Employment tribunals generally start at 10 am but some start at 9.45 am or earlier. Double check this for each day of the hearing.

There will be several breaks during the day with lunch generally between and 1pm and 2pm and the hearing finishing between 4 pm an 5 pm.

There may also be breaks for a party's representative to speak to someone or so the employment tribunal panel can confer.

The hearing will be chaired by the Judge. If the case involves allegations of discrimination or is complex, they will be accompanied by two lay members. The Judge is legally qualified whereas the lay members will have practical experience in industry (one with an employer background and one with an employee background).

Often, before any evidence is heard, the Judge will cover some housekeeping matters with the representatives, including the order of witnesses, a timetable for the hearing and documents to read before the hearing starts. There might also be some preliminary applications or disputes about documents or issues that need to be resolved. Sometimes no evidence is given at all during the first morning or even day and the parties may be sent away.

Who starts depends on the case. Generally, you will give evidence first in a case of unfair dismissal and the claimant will start in a case of discrimination.

Statements are not normally read out loud by witnesses and, bar any points of clarification or additions to the witness statement, the claimant or their representative will ask questions. This is known as 'cross-examination'. Once they have finished asking questions the respondent's representative will ask questions (known as 're-examination') as will the Judge and any lay members. The Judge and the representatives may interrupt if, for example, they think the question is not relevant or unclear.

Closing or written submissions

Once the evidence has been given there will often be a break before the representatives give 'closing submissions'. This is a summary of the issues and the evidence that supports each parties case or undermines the other parties.

Closing submissions can be given verbally at the end of the hearing. The party who went first will be the last to make their submissions.

If there is not enough time at the end of the hearing or the case is complex, the parties will prepare written submissions. The employment tribunal will give a date by which they must be exchanged and sent to the employment tribunal.

The decision will usually deal with how much the claimant should receive (if anything).

The employment tribunal's decision

If verbal submissions have been given, the case is straightforward and there is enough time at the end, the employment tribunal will give its decision verbally after a period of deliberation.

If the case is more complex and/or there is not enough time left, the employment tribunal will hold back or 'reserve' its decision and send its judgment in writing. This can often take more than six weeks.

Reconsideration or appeal

An unsuccessful party can apply to the employment tribunal for a reconsideration of the decision (or part of it) verbally at the hearing or within 14 days of the date of the judgment (or written reasons for the judgment were sent). A reconsideration will take place where it is 'in the interests of justice' and the reconsideration can confirm, vary or revoke the original decision.

As well as a reconsideration (or alternatively), an unsuccessful party can appeal to the Employment Appeal Tribunal (or EAT) within 42 days of the date written reasons were sent. Appeals are much more restrictive and will only be allowed to proceed on a point of law or where the judgment was one which no reasonable tribunal could have reached.

If a decision has been given verbally at the end of a hearing, the party will need to request written reasons. This can be done at the hearing or in writing within 14 days of the date on which the written record of the judgment was sent.

Remedy hearing

If the claimant was successful in their claim, and the hearing did not consider what the claimant should receive, a further hearing will be listed to consider this. This is known as a remedy hearing and may not be required as the parties often reach agreement at this stage.

Costs

The general rule in the employment tribunal is that each party pays their own costs, although costs can be awarded in limited circumstances, including where one party has breached an order or the party or their representative 'has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting

of the proceedings, or a part of them' or any 'claim made in the proceedings by a party had no reasonable prospect of success'.

Although the number of costs awards are increasing they remain the exception rather than the rule. Respondents should proceed on the basis they will not be awarded any contribution to their costs by the claimant. This, along with the risk of a costs award against the respondent, should be regularly reviewed.

Settlements

Defending employment tribunal cases can be expensive; in terms of time and money. For this reason, cases often settle on an economic basis. Settlement also provides certainty and can be the most appropriate route if, for example, you recognise your position is weak, witnesses are no longer available or press coverage could be detrimental even if the case is successfully defended.

Settlements often, but not always, include a payment of some level to the claimant (and on occasion the respondent) in return for the claimant withdrawing their claim as well as non-financial terms such as a commitment by both parties to keep the settlement confidential and an agreed reference. This can be appealing to a claimant as an employment tribunal will rarely order the parties to keep aspects of the case confidential and cannot order a respondent to provide a reference.

Settlement should always be considered and kept under review. Settlement in the early stages, when costs are low and the parties are less emotionally invested, is often the best option.

Once there is an agreement in principle the settlement should be recorded in writing either in the form of a settlement agreement (on which the claimant must take independent legal advice) or a COT3 agreement negotiated with the assistance of Acas.

Aggravated penalty

For completeness, an employment tribunal has the power to order a respondent to pay a penalty to the Secretary of State of between £100 and £20,000 if the case has 'one or more aggravating features'. This penalty award is an exception rather than the rule but something to keep in mind.