

Guide to Managing Employment Tribunal Claims July 2013

This guide sets out the key steps in managing an Employment Tribunal claim. Whilst the timeline and structure of a claim will vary on a case by case basis, there are certain aspects that are common to every claim. This guide sets out what to expect, together with some tips for managing a claim. It takes account of the new Employment Tribunal Rules, which came into force on 29 July 2013 by means of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the “New Tribunal Rules”).

1 Pre-action steps

1.1 Disciplinary and grievance procedures

The key pre-action step in a claim is usually the disciplinary and/or grievance procedure. Large companies often have their own procedures for dealing with disciplinaries and grievances. However the [ACAS Code of Practice on Disciplinary and Grievance Procedures](#) (the “ACAS Code”) sets out minimum standards. If either party fails to follow the ACAS Code and the employee subsequently brings an Employment Tribunal claim, the Employment Tribunal can increase or decrease any compensation awarded by up to 25%.

1.2 Statutory discrimination questionnaires

It is common for employers to receive a [statutory discrimination questionnaire](#) prior to a discrimination claim being filed (or within 28 days of the claim being filed). These questionnaires enable employees to raise questions prior to (or shortly after) bringing a claim. Employment Tribunals are entitled to draw inferences from evasive or dishonest answers from an employer. However, employers have reported instances of misuse by employees. The government has announced that statutory discrimination questionnaires are to be abolished. This is currently expected to take place in Autumn 2013.

1.3 Subject access requests

A subject access request under the [Data Protection Act 1998](#) can be made by an employee at any time but is often used as a tool in employment disputes. This is a request by the employee for documents containing his personal data. The main purpose of a subject access request is to enable an individual to check whether his data is being processed unlawfully, in a way which infringes his privacy. In [Durant v Financial Services Authority \[2003\] EWCA Civ 1746](#), the Court of Appeal expressed the view that the primary purpose of subject access rights is not to assist a party to obtain disclosure of documents that may assist him in litigation or complaints against a third party. However, employees often seek to use such provisions as a means of assisting them in potential litigation.

Subject access requests can be very time-consuming for employers to deal with, particularly since it is often necessary to search emails. It is important to remember not to delete emails once a subject access request is received (or litigation is contemplated) so email “purge” policies should be modified.

Subject access requests need to meet certain criteria to be valid so it is worth checking a request meets them before complying.

The Information Commissioner is producing a Code of Practice on dealing with subject access requests. A [consultation](#) regarding this took place in February 2013 and the Code of Practice was initially expected by April 2013, however it has been delayed.

1.4 Pre-action correspondence

Unlike with High Court claims, there is no requirement for parties in the Employment Tribunal to follow any pre-action protocol prior to commencing a claim. However, if an employee is legally represented it is common for an employee’s lawyer to engage in pre-action correspondence prior to filing the ET1 Claim Form.

2 Commencing a claim

2.1 ET1 Claim Form

The first step in a claim is for the claimant to file with the Tribunal an ET1 Claim Form. A new ET1 Claim Form was issued on 29 July 2013 and the old form will now no longer be accepted.

Deadlines for filing claims vary but most must be filed within three months from the date of the cause of action.

2.2 Fees

Payment of fees for Employment Tribunal claims came into force on 29 July 2013, for claims commenced on or after that date. The Ministry of Justice has issued an [Employment Tribunal and EAT Fees Stakeholder Factsheet](#) which summarises the new fees regime.

Both issue and hearing fees will be payable by the claimant. The issue fee will be £160 for a type A claim and £250 for a type B claim. The hearing fee will be £230 for a type A claim and £950 for a type B claim. Individuals can apply for remission of all or part of any fee by reference to their financial circumstances. Claimants must submit the issue fee with their ET1 Claim Form or within 21 days of the Employment Tribunal rejecting their remission request. Hearing fees are payable 21 or 28 days prior to the hearing.

Employers should note that although fees are payable by the claimant, claimants may seek to recoup the cost through increased settlement offers or ask the Employment Tribunal to order payment if a claim succeeds.

Fees will be payable by the party applying for reconsideration of a default judgment and will be due from an employer making a counterclaim to an employee’s breach of contract claim. The amount of these fees is referable to the type of claim.

The trade union UNISON in England and a law firm in Scotland have applied for judicial review of the introduction of Employment Tribunal fees.

2.3 ET3 Response Form

A respondent is required to file an ET3 Response to the claimant's claim. (Again, please note that a new ET3 Response was issued on 29 July 2013 and the old form will now no longer be accepted.)

The deadline for filing the ET3 Response is generally 28 days. The consequences of an ET3 not being submitted and accepted within the time limit are that "judgment in default" may be given against the respondent and/or the respondent may be "debarred" from further participation in proceedings.

Under the New Tribunal Rules, a respondent can apply for an extension of time to present its response either before or after the original 28-day deadline has expired. However, since it is uncertain that such an application may be granted, employers should strive to file their ET3 Response by the deadline.

2.4 Sifting

The New Tribunal Rules set out a new sift stage at the start of proceedings. The aim is to identify and deal quickly with weak cases which should not proceed. As soon as possible after the ET3 Response has been accepted, an employment judge will consider the file to ensure there are arguable complaints and defences within the Employment Tribunal's jurisdiction. The claim or defence (or part thereof) may be dismissed if the judge is not convinced following representations by the relevant party and a sift hearing. It is unclear what format a sift hearing will take and what evidence parties will be permitted to adduce. However, it is likely to be similar to a Pre-Hearing Review ("PHR") under the old Tribunal Rules set out in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (the "Old Tribunal Rules").

It remains to be seen how effective the new sift process will be at eliminating unmeritorious claims at an early stage. Discrimination and whistleblowing claims in particular are usually fact-sensitive and so may be less likely to be struck out at this stage.

Employers should note the risk that blanket denial defences may be struck out at the sift stage. Respondents should prepare a full defence upfront to avoid this.

3 Case Management

3.1 Orders and directions

Employment Tribunals have extensive power to manage the progression of cases to a final hearing through the use of orders and directions, either on their own initiative or following an application from a party.

3.2 Inter-parties correspondence

The New Tribunal Rules provide that all communications with the Employment Tribunal must be copied to the other side.

3.3 Interlocutory hearings

Under the Old Tribunal Rules, most complex cases would involve a Case Management Discussion ("CMD") at which the parties would agree directions, and possibly also a PHR at which the Employment Tribunal would dispose of any preliminary points and substantive applications (e.g. deciding whether a claimant was disabled in a disability discrimination claim where the point was disputed, or dealing with an application for strike-out).

Under the New Tribunal Rules, CMDs and PHRs are combined into one preliminary hearing. Although this may streamline the interlocutory hearing process, this may mean that the work is front-loaded for parties. CMDs were often listed shortly after the ET3 Response was filed and were usually only one or two hours. PHRs were usually listed for some time after the CMD and

would usually last for at least several hours. Combining the two may mean parties need to carry out the work for dealing with preliminary issues upfront, meaning costs will be incurred at an earlier stage.

3.4 Disclosure

It is a standard Employment Tribunal direction that all documents relevant to an issue in the claim that are in a party's possession, custody or control and on which either party may wish to rely should be disclosed to the other party. Employment Tribunal rules on disclosure closely follow the [Civil Procedure Rules 1998](#).

The parties will usually produce a written list of their documents, exchange lists with the other party and then either exchange bundles in full or request copies of any documents from the other party's list of which they do not have a copy.

3.5 Hearing dates

Employment Tribunals tend to list the Hearing dates early on. They do not always ask for parties' dates of availability prior to doing so. It is therefore important to check with witnesses and counsel that listed dates are convenient and note that Employment Tribunals can be relatively inflexible about changing Hearing dates.

3.6 Hearing bundle

The parties should agree which documents from the parties' disclosure lists are relevant to the issues still to be determined by the Employment Tribunal at the Hearing and prepare a Hearing Bundle. This is the bundle of documents to which the Employment Tribunal will refer when determining the claim. Hearing Bundles are usually finalised around two to four weeks before exchange of witness statements so that the witness statements can refer to the appropriate pages of the Hearing Bundle.

3.7 Witness statements

Employment Tribunals will generally direct that witness evidence must be provided in the form of written statements, to be exchanged between the parties (usually simultaneously) before the final Hearing.

The New Tribunal Rules provide that witness statements are taken as read at Hearings, so witnesses will no longer need to read them out as a matter of course. However, witness statements must now be made available for inspection by members of the public at the Hearing.

Witnesses need to attend the Hearing, otherwise the weight attached to their evidence is significantly reduced. The other side will be given the opportunity to cross-examine witnesses at the Hearing.

4 The hearing and judgment

4.1 Preparation

Employment Tribunals aim for both merits and quantum to be considered at the Hearing, rather than having a split Hearing. When the Hearing is listed, it is important to check that the length is appropriate for the number of witnesses that will need to be called, and that the witnesses are available for the dates listed.

Other documentation which may assist at the Hearing are as follows: issues list, agreed chronology, *dramatis personae* list and skeleton arguments.

4.2 The hearing

Employment Tribunal hearings are generally held in public, so note that members of the press could potentially attend. The Tribunal usually consists of an employment judge and two lay members (comprising one from each side of the industry). However, in some cases (e.g. unfair dismissal cases), the employment judge can sit alone.

4.3 Judgment

At the end of the Hearing, the Employment Tribunal will give its judgment, verbally and/or in writing after the Hearing.

Tribunal statistics indicate that the average time between submitting a claim to the tribunal and getting a final decision is 32 weeks.

4.4 Remedies

In unfair dismissal cases, Employment Tribunals have power to order reinstatement or re-engagement (where the claimant desires this and is reasonably practicable in the circumstances) or compensation. In practice, awards for reinstatement or re-engagement are rare.

The Unfair Dismissal (Variation of the Limit of Compensatory Award) Order 2013, which came into effect on 29 July 2013 limits the compensatory award in an unfair dismissal case to the lower of £74,200 or 52 weeks' pay in respect of all dismissals occurring after that date. Compensation for dismissals linked to unlawful discrimination or whistleblowing is uncapped.

Other Employment Tribunal remedies include awards for injury to feelings (in discrimination or whistleblowing detriment cases), punitive protective award claims (for failure to collectively consult in relation to TUPE or collective redundancies) and interim relief (in whistleblowing cases).

5 Costs in Employment Tribunals

The general rule in Employment Tribunal claims is that costs do not follow the event therefore each party is responsible for bearing its own costs in most cases. However, the Employment Tribunal may make a cost award where the party, or their representative, has acted vexatiously, abusively, disruptively, or otherwise unreasonably in the bringing or conducting of the proceedings, or any claim made in the proceedings has no reasonable prospect of success.

Please refer to [this](#) Linklaters article, first published in ELA Briefing, for practical tips in relation to costs awards in Employment Tribunals.

6 Settlement

Bringing or defending an Employment Tribunal claim can be costly and time-consuming. Moreover, since it is unusual for a winning party to recover his costs from the other side, most cases settle before they reach the final Hearing. Settlement can take place either before or after a claim commences.

6.1 The without prejudice rule

Discussions regarding settlement of a dispute are "without prejudice" i.e. inadmissible in Tribunal proceedings. However, it is important to note that settlement discussions which take place before a dispute arises are not without prejudice.

6.2 Confidential pre-termination negotiations

The protection of confidential pre-termination negotiations came into force on 29 July 2013. They allow certain discussions regarding settlements to be kept confidential should the matter proceed to Employment Tribunal litigation. There does not need to be a dispute for the confidentiality protection to apply. Such negotiations are inadmissible only in relation to unfair dismissal claims. If a claimant brings another claim or links his termination to unlawful discrimination or whistleblowing, the evidence will be admissible. Although this may be a helpful tool, employers will therefore need to proceed cautiously in initiating such discussions prior to a dispute arising.

6.3 Alternative dispute resolution

The New Tribunal Rules set out a new duty for the Employment Tribunal to encourage alternative dispute resolution. (This is essentially a statutory underpinning of existing practice.)

Parties wishing to engage in alternative dispute resolution have a range of options including ACAS conciliation, mediation and judicial mediation.

6.4 ACAS

If the claim is one in which ACAS has power to conciliate, the Employment Tribunal will send a copy of the ET1 and the ET3 to ACAS who will allocate a conciliation officer to the case. The conciliation officer is a neutral party who will try to assist the parties in negotiating a settlement of the claim. ACAS conciliation is a free service and communications with the conciliation officer are confidential. ACAS also offers mediation and arbitration services.

ACAS also offers a pre-claim conciliation service to assist in resolving a workplace dispute before proceedings are commenced in the employment tribunal. This is due to become mandatory for most types of claim in April 2014. Claimants will be required to notify ACAS before instituting Employment Tribunal proceedings. ACAS will then seek to achieve settlement for a prescribed period of one month. The Government published its response to its consultation on early conciliation on 12 July 2013.

6.5 Mediation and judicial mediation

Private mediation involves a neutral third party (e.g. from CEDR) assisting the parties in reaching a settlement. The costs may be split between the parties or borne by one party (usually the respondent). Mediation is useful where privacy is required since mediations are confidential.

Where proceedings have been issued, a claim may be considered suitable by a judge for judicial mediation. If the parties agree, a trained employment judge is then selected to mediate the claim. From summer 2013, a flat fee of £600 is payable by a respondent where the parties agree to judicial mediation.

6.6 Settlement documentation

Contractual employment claims can be settled by means of a simple waiver. However, statutory employment claims can be settled only by means of a settlement agreement (known as a settlement and compromise agreement prior to 29 July 2013) or a COT3 agreement negotiated through ACAS.

6.7 Withdrawal and dismissal

Any settlement should be conditional on the claimant agreeing to withdraw his claim. The Old Tribunal Rules required the respondent to apply for dismissal and the claim could be reinstated if the claimant sought this following withdrawal but prior to dismissal. The New Tribunal Rules provide that the Tribunal may dismiss withdrawn claims on its own volition, unless the claimant asks for the claim to be kept on file and the judge agrees that this is in the interests of justice. This change is a welcome simplification of the process. However, note that there will be a fee of £60 for an application for dismissal following withdrawal for claims commenced on or after 29 July 2013.

7 Appeals

Appeals are made to the Employment Appeal Tribunal ("EAT"). A Notice of Appeal and its attachments must be lodged by the appellant within 42 days of the date of the order or decision of the tribunal appealed against, or if the appeal is against a judgment, within 42 days of the date on which the written reasons for the judgment were sent to the parties.

Appeals can be made only a point of law. The EAT will interfere with a Tribunal's finding of fact only if it is perverse.

7.1 Fees

Fees will be payable by the party applying for reconsideration of a judgment following a final hearing.

In the EAT, an appellant will be responsible for an issue fee and a hearing fee, the amount of which is not referable to the type of claim being appealed.

8 The future

Further changes to Employment Tribunal procedure are likely to be forthcoming.

8.1 Presidential guidance

For the first time, the New Tribunal Rules give the President of the Employment Tribunals the power to issue presidential guidance. He currently has power to issue directions, however guidance will be non-binding (potentially akin to the ACAS Code). The Department for Business, Innovation and Skills has suggested that it may be used to suggest standards for costs awards.

8.2 Financial penalties

From spring 2014 there will be financial penalties of between £100 and £5,000 for losing respondents where the employer's breach has "one or more aggravating features".

8.3 New forms

Mandatory ACAS conciliation is due to come into force in April 2014. New ET1 and ET3 forms may come into force, since the forms may need to be amended to take account of this.

9 Tips for managing a claim

- > Note that confidential pre-termination negotiations will not be confidential if an employee brings a claim other than unfair dismissal.
- > Subject access requests need to meet certain criteria to be valid so it is worth checking a request meets them before complying.
- > Do not destroy documents where litigation is contemplated or a subject access request has been made.
- > Try not to create new documents, unless they are subject to legal privilege.
- > If you miss the deadline for filing the ET3 Response, consider filing an application for an extension of time after the deadline. However, strive to meet the deadline since this may not be granted.
- > Make sure the ET3 Response sets out the employer's substantive case and not simply a blanket denial, since such defences may now be struck out at the new sift stage.
- > Consider early on whether there are any preliminary issues need to be dealt with as preliminary hearings are now likely to take place much earlier than PHRs.
- > Note that preparation time for a Tribunal Hearing will be significant for those involved.
- > Prepare the following documentation for the Hearing: issues list, agreed chronology, *dramatis personae* list and skeleton arguments.
- > All witnesses will need to attend at least part of the Tribunal Hearing. Check early on that your witnesses can attend the listed Hearing dates and block the dates out of their diaries.
- > Be ready to state why reinstatement or re-engagement is impracticable at the remedies hearing if the claimant seeks this and the employer does not wish to agree to this. Please see [this](#) Linklaters article, first published in Employment Law Journal for further details.
- > Consider whether it is worth trying to settle the claim, bearing in mind that parties do not usually recover their costs in Employment Tribunal claims, even when they win.
- > Consider mediation, particularly where a dispute is sensitive or involves confidential information as Employment Tribunal hearings are in public, but mediation is confidential.
- > Any settlement should be conditional on the employee agreeing to withdraw his claim.

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