Seven tips to help employers manage an Employment Tribunal Claim

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Seven Tips to help employers manage an Employment Tribunal Claim

Running an employment tribunal claim can be challenging. When an employee brings a claim against your company and the ET1 form lands on your desk, what happens next? Tina Elliott, a part-time employment tribunal judge, offers a few tips to help you manage the tribunal process efficiently.

The seven tips covered in this guide are:

- You have received a claim form – can you bring a counterclaim?
- The case management hearing – what to expect
- Disclosure – fishing not permitted
- Witness statements (1) – stick to the facts
- Witness statements (2) – be consistent and avoid the conditional
- Make sure that you know where all your witnesses are going to be when you find out the hearing dates
- Don't bungle the bundle

1. You have received a claim form – can you bring a counterclaim?

You might think that when an employee brings a claim against you, you can bring a counterclaim, as you would be able to do in the civil courts. That is generally untrue in the employment tribunal. The process is largely restricted to a claim (ET1) and a response (ET3), which is the employer's defence.

There is one exception, however. This is when an employee brings a breach of contract claim, including a claim for notice pay. In such cases, the employer can bring a counterclaim. The amount that can be claimed is capped at £25,000.

2. The case management hearing – what to expect

For more complex claims – that is, those that are not for unfair dismissal or that are just money claims for holiday pay, notice pay or unpaid wages – the tribunal will schedule a case management hearing. A case management hearing invariably takes place in a discrimination claim or whistleblowing detriment claim. Usually lasting two hours and conducted over video, it has the purpose of setting out the steps and the timeline preparatory to the main tribunal hearing.

The most important goal of the case management hearing is to allow the tribunal to work out the legal and factual issues that need to be decided at the main hearing. Much of this work in establishing the list of issues will be done with the claimant since they have brought the case, but the employer's input will also be needed, and you may want to flag up matters such as time limits or defences you may wish to raise.

The tribunal will ask parties about their time estimate for the duration of the main hearing. It is common at this point only to think about how many witnesses are involved and how long the cross-examination will take. But there are other factors to build in.

For instance:

- tribunal reading time at the outset, which is usually not less than half a day;
- closing submissions, which again often need half a day;
- any requirement for additional breaks, for example if there is a need to accommodate a disability; and
- tribunal deliberation time.

It is better to overestimate rather than underestimate the time needed. The need to add more time at the end of a hearing usually results in delay while the tribunal finds another day when everyone – tribunal members, witnesses, lawyers – are available.

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3. Disclosure – fishing not permitted

In the preparatory stage each side is obliged to disclose the documentary evidence that it intends to rely on during the hearing and that is relevant to the questions the tribunal has to decide. There is an obligation for claimants and respondents to disclose all relevant documents, which can extend to text and WhatsApp messages as well as emails and more formal documents such as policies and procedures, even if you think they will hinder your case.

Claimants frequently ask respondents for more documents than the other way round, and these requests often extend to documents that they would merely like to see, rather than those that are strictly necessary for the tribunal hearing. The case law tells us that relevance is a factor, but it is not the only consideration when deciding whether a particular document must be disclosed. The case of Canadian Imperial Bank of Commerce v Beck 2009 IRLR 740 says that a document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings. Tribunals will not allow parties to go on "fishing expeditions" for documents to see what they can find.

4. Witness statements (1) – stick to the facts

Witnesses no longer set out their evidence orally, so it is essential to capture all the relevant evidence in the written statements. Preparing the witness statements is one of the most important parts of the process.

In a tribunal hearing, the statements are "taken as read", which means that the tribunal will read the statements as submitted and ask each witness to swear to the truth of them. Witnesses are then cross- examined on the content of those statements.

The best way to structure a witness statement is to think about what issues the tribunal has to decide and then set out the knowledge of the witness on those matters. Using the list of issues usually provides the best structure, including adopting the headings from that list as the statement moves from topic to topic.

Witnesses should stick to what is within their first- hand knowledge. They should deal only with the facts and, unless they are expert witnesses, should avoid giving opinions. The tribunal has to make findings of fact on the contentious issues, so the role of the witness is to help the tribunal make those findings.

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5. Witness statements (2) – be consistent and avoid the conditional

It is important to check statements for inconsistencies, both internally and against contemporaneous documents, as these can undermine the credibility of a case in the eyes of the tribunal.

Another tip is to avoid saying in the statement what the witness "would have" done. This formulation often crops up when the witness cannot quite remember what they did – but it is of no help to the tribunal, which needs to know what the witness actually did, not what they think they "would have" done. It is acceptable for a witness to say that, due to the passage of time, they can no longer remember.

6. Make sure that you know where all your witnesses are going to be when you find out the hearing dates

Sometimes a witness will have left your employment and be living abroad, or they may be on holiday, and they may assume that they can simply connect online from their holiday destination.

Having witnesses give evidence from overseas via video link can be complicated as it is necessary for the country from which the witness is giving their evidence to grant permission for this to happen. Some countries have given blanket consent, some have refused consent and some give consent on a case-by-case basis.

The Tribunal Presidential Guidance provides information on how to apply for consent.

Applications take time, so make them as early as you can. It can derail a hearing if a witness is overseas, and you haven't sought and obtained permission in advance. Check upfront to see what alternative arrangements can be made. Could the witness travel to the UK or to another country which has given permission? How important is their evidence – could it be covered by someone else? Should you apply to postpone the hearing?

7. Don't bungle the bundle

Closer to the hearing date you will need to prepare a set of documents for the hearing, which is referred to as "the bundle". It is good practice to try and agree the contents of a joint bundle with the claimant so that the tribunal only has to navigate one set of documents. Commonly the bundle is now put together electronically. It will assist the progress of a hearing if the electronic page numbers are the same as the paper pagination.

Just because a document has been disclosed does not mean it belongs in the hearing bundle. Ask yourself: "Why is it there? What issue does it help with?" It may not be necessary to include the entirety of policies and procedures documents when only a section is needed. Try to avoid duplications from multiple email chains.

Late additions to the bundle should go at the end and not in the middle as this will throw out the page numbers. It can be a significant drain on hearing time if everyone is grappling to find the right page.

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