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HR Rely Guidance

Guide to Employment Tribunals

August 2017

Guide to Employment Tribunals

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This document provides only a basic guide to employment Tribunals. More comprehensive guidance may be obtained by talking directly to your HR Rely Advisor.

Introduction

Nearly all employment rights introduced by legislation can be enforced by the employment Tribunal system. Employment Tribunals were established in the early 1970's as an informal means of resolving legal disputes between employees and their employer. The Tribunals were to provide a quick and cost effective means of dealing with cases arising in a non legalistic setting, but a large escalation in legislation has resulted in ever increasing numbers of claims being made and the complexity of case law arising has ensured the involvement of more legal professionals in the role of representative.

Mandatory early conciliation

Subject to some very limited exceptions, a Claimant will not be able to bring a claim before the Employment Tribunal unless they have been issued with an Early Conciliation Certificate ("ECC") from the Advisory Conciliation and Arbitration Service (ACAS). ACAS is an impartial "third party" neutral body with a conciliatory role and an ECC is a certificate confirming that the Claimant has complied with its obligation to contact ACAS.

Before being issued with an ECC, the Claimant must first go through a mandatory early conciliation process. This process consists of the following steps:

Step 1 – The Claimant sends "prescribed information" in the "prescribed manner" to ACAS. The prescribed information will include the Claimant's name and contact details and the prospective Respondent's name, address and telephone number and should be sent either on line via the ACAS website or delivered to the relevant address stated on the early conciliation form. (It is not proposed that the Claimant need provide any detail about the nature of their claim.)

Step 2 – An early conciliation support officer ("support officer") will then make contact with the Claimant. If the Claimant confirms that they wish to proceed with early conciliation, then their prescribed information is sent to an ACAS Conciliation officer. (It may be that an ECC is issued at Step 2 if the support officer is unable to contact the Claimant or the Claimant indicates that they do not wish to proceed with conciliation.)

Step 3 - The ACAS Conciliation officer will try to promote a settlement within a prescribed period. This will require the ACAS Conciliator to contact the prospective respondent to see if they are interested in conciliating. An ECC will be issued to the Claimant if the prospective Respondent does not wish to conciliate. If both parties agree to conciliation then the ACAS officer has one month to achieve a settlement, this time limit starts from the date of receipt by ACAS of the Claimant's prescribed information. This period can be extended by a further two weeks provided that the ACAS Conciliator officer believes that settlement is a reasonable prospect by the end of that period and both the Claimant and the Respondent agree to the extension.

Step 4 – If a settlement is not reached, either because the ACAS conciliation officer does not believe it possible or the prescribed period expires, the ACAS conciliation officer will issue an ECC. If the parties agree a settlement that this may be recorded in a COT3, which is the most likely, or a settlement agreement. (For more information on a COT3 or settlement agreement, see The Role of ACAS below.)

The ECC will have a unique reference number. The Claimant will need to provide this reference number on their Tribunal claim form, failure to do so will result in the Tribunal rejecting the claim.

The claim

The claim is made by a claimant (the person making the claim) submitting an ET1 (Employment Tribunal 1) form to the appropriate office of the employment Tribunals in either England, Wales or, Scotland. Applications are increasingly being made online, by completing the form on the Employment Tribunal's website; however manually completed forms are still accepted. The claim will be rejected if it does not contain all of the required information, or, is not one over which the Tribunal has jurisdiction.

Claims must be made within a three month time period save for certain types of claim where six months are given. However once the Early Conciliation process comes into being, the time period for bringing a claim will be extended to take account of the Early Conciliation period. This will be done either by effectively stopping the clock between when the Claimant contacts ACAS and the day when the Claimant receives the ECC certificate, or if the normal time limit would expire in the period between when the Claimant contacts ACAS and one month after the day the Claimant receives the ECC, then the time limit will be extended to one month after the Claimant receives the ECC certificate.

In the case of late submissions a Tribunal will consider whether it was reasonably practicable for the Claimant to have submitted the ET1 on time or, whether it would be just and equitable to permit the claim to continue. Tribunals have only limited discretion to accept late submissions. Once the claim has been accepted by the Tribunal the Respondent (usually the employer against whom the claim is being made) will be forwarded a copy of the ET1 and supplied with a form ET3. The ET3 is the form on which the employer must submit its defence A Respondent has 28 days to return the claim form to the Tribunal although this time period may be extended upon the request of the Respondent if there are good reasons as to why the ET3 can not be completed within the given time frame.

Fees were introduced into the Tribunal on July 2013 with the result that in most circumstances, a Claimant would have had to pay an issue fee when presenting a claim to the Tribunal and an additional fee (the hearing fee) prior to the full hearing taking place.

However, on 26 July 2017, the Supreme Court announced that the Order introducing these fees was unlawful with the effect that fees are no longer payable for Tribunal or EAT claims. It remains to be seen whether a different fee regime will be introduced at some future point.

Defending a claim

It is recommended that the paperwork received from the Tribunals should be given to your HR Rely advisor at the earliest opportunity to allow the best defence to be prepared. Responses are again mainly sent online; by completing the ET3 form on the

Employment Tribunals' website.

The role of ACAS

We have explained the initial role of ACAS prior to a claim being submitted. ACAS can continue to be involved even after a Tribunal claim has been submitted. Once a Tribunal office has accepted a claim, a copy is forwarded to ACAS.

ACAS will allocate a Conciliation Officer to the case who will promote a settlement if both parties have requested it or else the ACAS officer believes there is a reasonable prospect of negotiating a settlement. The conciliation process is entirely voluntary and confidential; discussions with ACAS have no relevance to actual Tribunal hearings.

Once settlement terms are agreed through ACAS, this is legally binding. It is then confirmed in writing on a form COT3 (Conciliation Officer to the Tribunals 3). In this document usually the Claimant accepts the resolution of the claim, ordinarily in return for a financial sum and/or other consideration such as an agreed reference. A claim is withdrawn by the completion of form COT4.

A legally binding settlement can also be achieved by means of a settlement agreement. Your HR Rely advisor can advise and assist with the completion of such agreements.

Preparing a case

It is most helpful to your HR Rely advisor if relevant documentation is collated and indexed as all documentary evidence will need to be reviewed. It is also of great assistance if a time line of key occurrences in relation to the claim can be provided.

The Tribunal is likely to direct the parties to agree in advance of the hearing, the contents of a 'joint bundle' of documents they wish to refer to at the hearing (see reference to the Case Management Discussion below). The Tribunal can also order the parties to disclose and provide copies of relevant documents to the other party although this can also be achieved by voluntary disclosure/discovery.

Bundle documentation ordinarily includes:

Copies of correspondence between the parties to include letters, memos and emails;

Notes or minutes of meetings (written and typed);

A copy of a policy or procedure;

A copy of the contract;

Details of induction or training provided etc;

Documents used in any internal meeting or hearing; and

Witness statements and evidence collected (e.g., for disciplinary or grievance purposes)

In England and Wales, Tribunals expect evidence to be given by means of written statements. Statements should be taken from those involved in the case by your HR Advisor. The Tribunal is likely to order that the Claimant and the Respondent should, in advance of the hearing, exchange copies of the statements of any witnesses upon whom they will rely. The statements should include everything that is of relevance to the case as it will become the witnesses' evidence in chief. This is particularly important as witness statements are to be taken as read at the Tribunal. This means that the witness will not read out their statement, unless the Tribunal directs otherwise. It is therefore critical that the statement refers to all the evidence that witness intends to rely on.

The Tribunal has the power either on its own initiative or, on the application of one of the parties, to order a person who may not be willing to attend voluntarily to come to the hearing to give evidence. The person must have evidence that is relevant to the case. Click here to view Guide to employment Tribunal hearings for managers.

The Tribunal

The composition of the panel

Employment Tribunal panels comprise of three people, an Employment Judge and two lay members except that for certain cases a Judge will sit alone. Those claims where a Judge will sit alone, unless the Judge directs otherwise, are unfair dismissal, breach of contract and unlawful deduction claims.

The Judge is usually a solicitor or barrister of several years standing with extensive knowledge of employment law.

Lay members are appointed because of their experience and expertise in either management or, in trade union activities (one will be a representative of employers, the other Trades Unions), regardless of where sympathies may lie, they are under a duty to deal with cases impartially. Should a party have concern over the allocation of a lay member to a case, then this can be raised at the outset of the hearing and a request made for another panel member to be substituted accordingly. The decision of the panel can either be unanimous or by majority.

Types of hearing in advance of the full hearing

It is fairly common practice for a Tribunal to hold a hearing or discussion in advance of the full hearing, to deal with 'preliminary' procedural or legal issues arising. These hearings are known as preliminary hearings and can cover case management issues or jurisdictional issues or other applications. Parties can request that such hearings or discussions be held if it is believed that it may assist the Tribunals to achieve their overriding objectives, please see below.

If the hearing is to deal with case management issues then it will be aimed at clarifying the legal issues, addressing points of concern, issuing directions as to the time frames to be adhered to for the disclosure of documentation and exchange of witness statements and to agree how many days a hearing is likely to take. It is useful in advance of such discussions for the HR Rely advisor to be supplied with the diary commitments of witnesses in order to assist the Tribunals with the listing of the case.

At the hearing the Judge will allocate the responsibility for the collation of the joint bundle (the documents to be relied upon by both parties at the hearing). Ordinarily this task goes to the Respondent's representative. The discussion is conducted by a Judge sitting alone and can often be carried out by telephone conference.

The purpose of such discussions is to help assist the Tribunals overriding objectives to deal with cases in a way that is proportionate to the importance and complexity of the issues, to save cost (the tax payers' purse!), to ensure the parties are on an even footing and to deal with the case quickly, fairly and efficiently. Should a party wish to call a witness who is not prepared to attend the Tribunals of his or her own volition, then an application can be made at a preliminary hearing for a witness order to be issued.

A Judge may also decide, on his or her own initiative or on application by one of the parties, to hold a preliminary hearing to consider preliminary legal questions, for example:

Is the Claimant an employee?

Should a late claim be accepted?

Do the Tribunal have jurisdiction to hear the claim?

Does the Claimant have the necessary qualifying service etc?

If a Judge believes that a party has 'little' reasonable prospect of success, he/she can order the party to pay a deposit of up to £1000 in order to continue the action. The Judge also has the power to strike out a claim or the response if he or she believes it has no reasonable prospect of success. The Judge also has power to order a deposit if any individual allegation, or argument, has little prospect of success.

The full hearing

Although Tribunal hearings are less formal than hearings in the civil courts, there is still a degree of formality to the proceedings. All parties will stand as the panel enters the room and witnesses will be asked to give their evidence under oath or affirmation and will be subject to cross-examination. The panel is also seated on an elevated platform.

The Tribunal will determine which party will present its case first. In a discrimination claim it is usual for the Claimant to go first, whereas in an unfair dismissal claim the company usually puts its case first, if it is accepted that the Claimant was dismissed.

In claims of constructive dismissal it is the Claimant who usually goes first as dismissal is denied by the Respondent.

Once a party's witness has presented its evidence, which will usually be on the basis that the statements are taken as read, the other party may ask the witness questions, and so may the Tribunal.

Having heard all the evidence, the Judge usually asks the parties to sum up their case before the Tribunal retires to consider its decision.

The decision

The Tribunal may reach its decision on the day of the hearing, in which case it will announce its judgment and the reasons for it to the parties. The decision will be based on the evidence heard in regard to the legislation. It is often the case that the witnesses' recollections of events will differ and the Tribunals have to determine whose evidence it prefers.

Following the hearing, a written copy of the judgment will be sent to the parties. Full written reasons for the judgment will also be sent to the parties if either has requested these at the hearing itself or within 14 days of the date the judgment was sent to the parties.

If a decision cannot be given on the day of the hearing, then it will be necessary for the Tribunal to reconvene at a later date. The decision taken by a reconvened panel is termed a 'reserved judgment'. The parties will be sent a copy of the judgment and the reasons for it.

Remedies

If the Tribunal finds in favour of the Claimant then a remedies hearing may follow the full hearing should time permit, or it may be necessary for the Tribunal to reconvene at a later date for this hearing to take place. The remedies hearing will determine the level of compensation to be awarded to the Claimant following submissions from the parties as to what the Tribunal should take into account before determining at what level the compensation should be.

Costs and expenses

If the Tribunal considers that a party has acted 'vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting the case' it can award costs. It can also award costs if it considers that a claim or response has no reasonable prospects of success.

Costs can be awarded if a party's representative is adjudged to have acted unreasonably in the conduct of the case. The Tribunal is also empowered to order a party's representative to pay costs for improper, unreasonable or negligent conduct but only if the representative was acting in pursuit of profit.

For cases submitted on or after 6 April 2012 a Judge can order that a party makes a payment to a witness to cover or contribute to the costs of the witness attending the Tribunal Hearing.

Reviews and appeals

A Tribunal may decide to review its decision either of its own volition or because of an application by a party. An application for a review must be made within 14 days of the date the Tribunal's decision was sent to the parties. There are limited grounds over which a review can be obtained. A review can be granted where the decision was incorrectly taken as a consequence of a mistake by the Tribunal's administrative staff, or where new evidence that could impact on the decision has appeared after the Tribunal. On reviewing its decision, the Tribunal can confirm or amend it, or overturn it entirely and order a re-hearing of the claim.

A party may wish to appeal the Tribunal's decision. The right to appeal against the Tribunal's decision is limited to an error having been made in law. Appeals are made to the Employment Appeal Tribunal (EAT). A party has six weeks to lodge an appeal with the EAT from the date on which the Tribunal sent out the reasons for its decisions or, if written reasons were not given, from the date on which the written record of the judgment was sent out. If the EAT concludes that the Tribunal did make an error in law it can overturn the whole or part of the Tribunal's decision, or return the case to the same or different constituted Tribunal to be reconsidered.

It is possible to appeal against a decision of the EAT on a point of law to the Court of Appeal in England and Wales and the Inner House of the Court of Session in Scotland.

Penalties for employers

The Employment Tribunal may order that a losing Respondent employer pay a financial penalty. Such a penalty will be applied if the employer's breach has "one or more aggravating features", such features are not defined.

The minimum penalty award is £100 and the maximum is £5,000 and if compensation has been awarded (which is not necessary for a penalty award to be made) then the penalty must be at least 50% of the compensation award, subject to the £5,000 maximum. An employer who pays the penalty within 21 days will only have to pay 50% of the award; payment is not made to the Claimant but the Secretary of State.

Tribunal Decisions

Subject to limited exceptions e.g. National Security or restricted reporting or proceedings, a Tribunal decision will be entered on the Tribunal Register. This will be the Judgement itself and where written reasons are given, these too will be entered.

Since 9 February 2017, Tribunal decisions have been loaded onto an online Tribunal Decisions database available for the Public to access.