Tactics & strategy in defending Employment Tribunal claims

A WORKSHOP FOR CIPD CENTRAL LONDON

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What I'll be covering....

- Tactics and practical issues in defending an Employment Tribunal claim, including:
  - Keeping it all in perspective
  - Avoiding Employment Tribunal claims
  - Quick reminder of the two key areas of employment law that see valuable claims: unfair dismissal and discrimination
- The Tribunal Response Form
- Who are the parties, and how are they represented?
- Employment Tribunal directions, and Case Management Discussions
- Points to be resolved as "preliminary issues"
- Compiling relevant documentation
What I'll be covering....

- Briefing witnesses about the claim and the process
- Drawing-up witness statements
- If there is a preliminary hearing, how does this work?
- Settlement and the role of ACAS
- Practicalities of preparing for the full Employment Tribunal hearing
- Postponements
- The process of a full Employment Tribunal hearing
- The burden of proof
- What happens after a full Employment Tribunal hearing?
- Costs

*There are various ET reform proposals on the table, I will mention some as we go along – but they are all some way off, and how many will really make it into law?*
Let's keep it all in perspective!

- Our approach: much of UK employment law is a matter of commercial risk
- Which UK laws matter most?
- The ET system:
  - overloaded
  - costs rarely awarded to the winner
  - most awards are much lower than the Claimant expects
  - hearings take days
  - maybe after months of waiting
Key Employment Tribunal statistics for the year to March 2011

- Total number of ET claims down 8%
- Having been up 56% in 2009-10
- But more appeals, as one might expect, because they take longer to arise
- Claims under the Part-Timer Regs have tripled
- Age claims are up 32%
- Having already risen 36% in 2009-10
- Median awards:
  - Unfair dismissal £4,591 (but some of the figures exclude the 'basic' unfair dismissal award, so the reality will be a bit higher)
  - Race £6,277
  - Sex £6,078
  - Disability £6,142
  - Age: £12,697 (compared to £5,868 in 2009-10)
More stats

- Cost awards were made in 132 of the 382,400 ET claims lodged. The median cost award was £1,273
- 81% of claims lodged were settled or withdrawn
Be realistic

- There are people who set out to bring claims, some even who make a good career from it
- But they are rare
- What's more common is employees with a dispute, who take advice and realise that, aside from lodging a grievance, the law gives them little comeback without resigning
- And advisers are often inclined to feed a dispute
- In order to get a cut of something
- So - recognise this, and be ready to try to prevent things getting out of hand
Avoiding Employment Tribunal claims

- Where you think you might be faced with an Employment Tribunal claim, who should be your main focus in trying to prevent this?
- Be realistic about an advisor's interest and aims
  - To provide a good service to the individual
  - To recover money for time spent, unless a free advice service
  - Whether the claim justifies the advisor giving his/her time
  - Meeting the expectations that the advisor has created with the individual, which are sometimes unrealistic
- Good practice, comply with your procedures, act reasonably, all the points you would expect which would help to prevent claims being brought in the first place
- Conduct appeal processes properly, and do not be ashamed to uphold an appeal if it is in the business's best interest and/or if a claim is a real prospect
A reminder of unfair dismissal law

- All employees who have more than one year's service (two years for people recruited after 5/4/12)
- are protected against dismissal, except where their employer dismisses them for one of the following reasons:
  - capability
  - conduct
  - redundancy
  - illegality
  - retirement (until late 2012, but too late to start one now)
  - some other substantial reason

AND the employer acts reasonably and in line with the ACAS code
How does our discrimination law work?

- There are nine 'protected characteristics', such as race or sex or sexual orientation
- It is unlawful to treat people differently due to any of those
- Treating people differently is broken down into:
  - direct discrimination
  - indirect discrimination
  - harassment
  - and victimisation
- So there are nine protected characteristics, and four ways that people might be treated differently because of those characteristics
- Plus some organisations, such as schools and public bodies, have extra duties too
The nine protected characteristics

- Sex
- Race (including colour, nationality, ethnic origin, national origin)
- Disability (I'll explain what this means)
- Sexual orientation
- Religion, or similar belief
- Age
- Pregnancy and maternity
- Gender reassignment
- Marriage and civil partnership
The discriminatory acts that are prohibited

- Direct discrimination
- Indirect discrimination
- Victimisation
- Harassment

And for disability the list also includes extra duties, the key one being:

- The duty to make reasonable adjustments for any disabled person
The Tribunal Response form

- Known as an "ET3"
- Responding time: 28 days, as shown on the covering letter from the ET
- What to put in box 5, the detail of your response?
  - Great detail?
  - A brief denial?
  - Sufficient detail to set out the basis of your defence of the claim, but try to avoid committing yourself to things which might later turn out to be incorrect when the witnesses put their full recollections down in witness statements
- Admit liability?
  - Always remember that this is an option for you
  - Recognises commercial risk inherent in UK employment law
  - Usually unpalatable for discrimination claims, but otherwise worth considering
  - Usually the case would then simply be listed for a "remedies hearing"
  - Could be as part of a settlement?
Who are the parties, and how are they represented?

- Which employer?
- Are there other Respondents?
  - Other employers?
  - Individuals can be named in discrimination claims, such as the Claimant’s colleague or line manager
- Tactical considerations, in the light of who is representing the Claimant
  - No representation
  - Free advice centre, such as Citizens’ Advice Bureau
  - Trade union
  - Firm of solicitors – check their website
- Who will represent you, the employer?
  - Someone from the Company?
  - A solicitor?
No win, no fee advisers

- Often law firms
- Or advice centres
- They have caused more claims
- But they also don't like claims running too far
- And they do act as a filter for nutty claims
- The role of trade unions, and their local reps
- Who are the other influences on the employee?
  - Partner
  - Friends who know a bit of law
  - Colleagues
Think about the adviser's priorities

- To provide a good service, usually
- Not to back a losing case
- Often to settle after a few weeks' work
- To do as little work as possible - hence the relatively few 'questionnaires' served
- To be seen to have victories
- To enhance their local reputation as winners
- To satisfy (often unrealistic) expectations
- Perhaps to pick up work from the employee's colleagues
- To avoid cost awards against them or their client
- Maybe to take on an employer, particularly a big name employer
- So - keep those in mind as the case progresses
Employment Tribunal directions, and Case Management Discussions (1)

- In most cases the Tribunal will make directions about how the parties are to deal with:
  - Disclosure of documentation
  - Agreeing a bundle for a hearing
  - Copying the bundle for the hearing
  - Exchanging witness statements
- Often these are simply set by the Tribunal, in writing
- There will also be correspondence about the length of the hearing, and the dates it will be listed for. But initially, the Tribunal will often list the case for a single day, unless one of the parties writes to say it will need longer
- Press for a full 'schedule of loss' asap
In more complex cases, these and other house-keeping matters will often be dealt with in a Case Management Discussion

- Often by conference call
- Otherwise in person at the Tribunal
- To set a date for the hearing
- To set the length of the hearing
- To discuss any of the above issues, as necessary
- To consider whether there is any aspect of the Claim that needs to be decided in a Pre-Hearing Review

Usually, the representative of each party takes part in the Case Management Discussion

- Or sometimes either side will instruct a barrister to appear
- Occasionally, Case Management Discussions can go on for days
- Will the case get struck-out?
Points to be resolved as "preliminary issues" (1)

- Is the whole Claim out of time? If so, should any aspect of it be permitted to proceed?

- Are certain aspects of the Claim out of time? If so, should any of them be allowed to proceed?

- How "out of time" issues are determined by the Tribunal:
  - In discrimination claims, they are only allowed to proceed if it is "just and equitable" to permit them to proceed
  - Alternatively, if there are aspects of the discrimination which are in-time, then the Tribunal may consider the earlier allegations to be part of a continuing course of potential discrimination, and thus permit them to be heard

- In most other claims, such as claims for unfair dismissal, the test is whether it was "reasonably practicable" for the claim to be brought in-time
Points to be resolved as "preliminary issues" (2)

- Often a lot hinges on whether the individual was receiving legal advice while the claims were still in-time; the extent of the individual's knowledge of the potential claims (as opposed to knowledge of the law and time limits); and the Tribunal's attitude to the individual
- Being one day out of time is enough to defeat the claim
- In a Claim for disability discrimination, did the Claimant qualify as "disabled" at the relevant time? This may hinge on a clash of medical evidence, but ultimately is a decision for the Tribunal to determine. The test is:
  - Did the Claimant have a physical or mental impairment which had a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities?
  - But see the alternative version of this, on the next slide
  - Marshalling medical evidence to deal with this issue
- Will the case get struck-out?
Who's covered by disability discrimination law?

- This only protects disabled people, but that's a large group. It covers:
  - Any person who has cancer, HIV or MS
  - Or any person who has a physical or a mental impairment:
    - Which has lasted for twelve months
    - Or is likely to last for twelve months, even if it has only just started
    - Which has a more than minor or trivial adverse effect
    - On their ability to carry out normal day-to-day activities
    - Ignoring medication or other treatment
    - But not ignoring coping strategies
  - Plus many of the people who have qualified in the past, even if they don't qualify now
  - And to some extent it protects employees who are carers of disabled people
Other examples of points to be resolved as "preliminary issues"

- Does the Claimant have the right to bring the claim? For example:
  - Was he/she an employee, or self-employed?
  - Is he/she a part-time worker, entitling him/her to bring a claim about part-time rights?
  - Similarly is he/she a fixed-termer?
Compiling relevant documentation (1)

- The obligation is to disclose all relevant documentation
- Includes emails, notes of meetings, notes of calls
- Also includes confidential documents where there are relevant references, such as Board minutes, policy documents, and a manager's personal notes about an individual or a case
- Can also include documents held by a third party:
  - Either party can apply for an Order from the Tribunal, requiring a third party to produce relevant documents
  - If either side thinks the other party is withholding relevant documents, they can apply for a Tribunal Order for disclosure
- Not privileged documents
As always, failure to comply with a Tribunal Order could lead to:

- That party's case (claim or defence) being struck-out
- Ultimately, theoretically, criminal conviction for contempt of court
- More likely, an award of costs in favour of the other side

Watch chains of emails…

Withhold items which are legally privileged

Consider anonymising documents which refer to unrelated employees

Be prepared to mask documents where they include privileged or irrelevant information, but be prepared to explain why you masked it, and keep the original in case you are challenged

Do not erase scribbles
Briefing witnesses about the claim and the process (1)

- Keep them involved, informed and reassured
- But remember that information can leak to the other side…
- A good idea for them to attend a Tribunal hearing, and sit at the back as a member of the public
- Get the lawyer to explain the process, particularly what will happen in the Tribunal hearing itself, and issues such as:
  - The witness stand
  - Witness statements
  - Reading out the statement
  - Cross-examination by the other side
  - Questions from the Tribunal
Briefing witnesses about the claim and the process (2)

- The importance of telling the truth
- Taking an oath

- Consider how the witness will come across to the Tribunal: a lot hinges on whether a person will be *believed*

- Remember, and perhaps remind the employee, that Employment Tribunal claims are a commercial risk in employing people, not the end of the world

- Might any of them be called by the Claimant's side instead?
Drawing-up witness statements (1)

- Sketch-out a plan of what each witness is going to cover – not the statement itself, but a plan for how it will be structured.

- If you write-up the statement, try to use the witness's own words, as given to you in a meeting to discuss.

- Remember that the witness will often have to read-out the statement in the Tribunal, so they need to be comfortable with the wording.

- At all costs avoid the risk of the witness saying "well I was given this to sign, it's not really mine", or something like that!

- Cross-refer to documents in the agreed bundle, as far as possible, as a means of introducing those documents to the Tribunal.
Drawing-up witness statements (2)

- Try to avoid each witness repeating the same issue, since this can annoy the Tribunal, and can lead to inconsistencies when each witness is cross-examined on the same points.
- Usually, use headings, such as:
  - My role and employment background
  - My work with the Claimant
  - The incident
  - My involvement in the disciplinary process
  - The outcome of the disciplinary process
  - then any other aspects. Of course this is just one example, but it is useful to give some structure to the statement.
If there is a pre-hearing review, how does this work?

- Preparation is usually similar to a full hearing, but on a smaller scale
- Exchange of documents; and agreed bundle; and witness statements, usually exchanged in advance
- An advocate for either side:
  - Whoever is representing the party
  - Or a barrister instructed by them
- The Tribunal may give its decision on the day, or reserve it and send it in writing at a later date
- It can be appealed to the Employment Appeal Tribunal
Settlement and the role of ACAS (1)

- Remember settlement is always an option, and usually there is no shame in at least contemplating this.
- Most costs are irrecoverable in the Employment Tribunal process, so be commercially realistic.
- But remember that settlement can set a precedent for others, so maybe don't settle too early in the process.
- Options:
  - The Claimant withdraws the claim.
  - The Claimant withdraws the claim, against a promise that you will not pursue them for costs (rather a bluff by you!)
  - The Claimant withdraws in return for a sum of money, and perhaps other promises from the employer, such as an agreed reference.
Any of the above can be achieved through:

- A simple agreement, although this carries the risk that it will not be binding if the Claimant changes their mind
- A Statutory Compromise Agreement
- A "COT3" agreement brokered by ACAS

The role of ACAS:

- An ACAS officer is assigned to each Tribunal case
- For some cases, there is a finite period for conciliation
- The ACAS officer is not there to decide the case, or to be a mediator, but is effectively a messenger between the parties, trying to achieve a deal
The great advantage of ACAS negotiations is that once agreement is reached (potentially the night before the hearing), if the ACAS officer is satisfied that there is a deal, he/she can immediately contact the Tribunal and the case is off.

The agreement is then set-out in a simple document called a "COT3".

But be careful about what can be settled validly through a COT3 agreement.

And be clear about the terms agreed with the ACAS officer.

Some settlement tactics:
- Cost warning?
- The unrepresented Claimant – pay for advice?
Mediation?

- Judicial mediation?
- Some other, such as led by ACAS?
- A meeting, various rooms, only happens if everyone agrees to it
- Can you trust the outcome?
- The unrepresented Claimant
  - Pay for an adviser to attend meeting?
  - Or to be there in another room to support the Claimant?
Statutory Compromise Agreements

- A long legalistic document:
  - By which the individual agrees to waive their potential statutory claims against the employer
  - And their contractual claims
  - Signed by both sides, and the individual's solicitor to confirm the advice given to the individual

- *Cannot settle all potential claims*, only the claims which the Claimant has raised or intimated

- And settles the actual claim being brought in the Tribunal, as long as it says so

- These often take time to negotiate, particularly where the advising solicitor tells the individual that they should demand more money

- Often with an agreed reference

- Remember the alternative, which is simply an agreement in full and final settlement of all claims, signed by both sides, under which the individual gets some money – this does not validly settle statutory claims, but it has other advantages, and tactically is a real option to bear in mind…
Practicalities of preparing for the full Employment Tribunal hearing

- How many copies of statements and the bundle will be needed?
  - Three for the Tribunal panel (or often now just one, if it's just unfair dismissal)
  - One bundle for the witness stand, and one witness statement for the witness to read aloud or refer to
  - One witness statement for the other side, if they have not already received it
  - A bundle, and a set of statements, for our witnesses to refer to while they are listening to the rest of the case
  - One bundle, and one set of witness statements, for our representative to use, although he/she should have had that well in advance of the hearing itself
Postponements

- Often hearings are postponed for reasons such as:
  - One side cannot make it, and the Tribunal takes pity on them
  - Administrative error by the Tribunal
  - Illness or otherwise non-availability of a member of the Tribunal panel
  - Less frequently, last minute evidence coming to light
- But unfortunately, do not rely on being granted the postponement you would like…
The process of a full Employment Tribunal hearing (1)

- Opening comments by both representatives and the Tribunal, dealing with whatever house-keeping issues may be necessary
- Sometimes, opening submissions by each representative
- The first witness, for one side, is called
  - Takes an oath
  - Their witness statement is read by the Tribunal members, or the witness reads it out
  - The witness will often be interrupted in that process by their side's representative, to ask additional questions about the witness statement and to take the Tribunal panel to particular documents in the Tribunal bundle
  - Often, questions by the Tribunal
  - Cross-examination by the other side's representative
  - Some further questions by the party's own representative
The process of a full Employment Tribunal hearing (2)

- The same for the next witness, for that party
- And so on through all of that party's witnesses
- Then the same for the other side's witnesses
- Closing submissions from each representative
- The Tribunal may make a decision on the day, and announce it, or may go away to think about it and give their decision in writing during the following few weeks
- Hours for which a Tribunal generally sits
- Many cases go "part-heard", meaning that they run out of time and have to be reconvened at a later date, often months later
- At any point, the Chairman might encourage the parties to settle – looking sternly at one side…
The burden of proof

- In discrimination claims
  - The initial burden is on the Claimant, to persuade the Tribunal that, on the balance of probabilities, there are facts from which the Tribunal *could infer* unlawful discrimination
  - If the Claimant succeeds, the burden then shifts to the Respondent to persuade the Tribunal, on the balance of probabilities, that there was no unlawful discrimination
  - This is a tough burden upon the Respondent
- The test in any ET claim is "on the balance of probabilities"
What happens after a full Employment Tribunal hearing?

- Often, the Tribunal's decision is given later in writing
- Or the Tribunal will give the decision on the day, with a written version to follow in the post
- The defeated party can appeal to the Employment Appeal Tribunal, within 42 days, but beware as the grounds of appeal are limited
- If the Claimant has won:
  - If there is time in the hearing itself, and the decision is made on the day, then the hearing can move immediately to consider "remedies"
  - More often, the question of remedy is dealt with at a subsequent "remedies" hearing
Deciding the award, the 'remedy'

- If the Claimant wins any aspect, this occurs at the end of the full hearing, or usually at a subsequent remedies hearing.
- Preparing for a remedies hearing, as the defeated Respondent:
  - Get an (updated) schedule of loss from the Claimant.
  - Jobs the person could have applied for.
  - What has he/she done to mitigate their loss?
  - Is there an argument that one side breached the ACAS code, leading to 25% uplift or cut?
  - Did the mistakes make no difference to the outcome?
- Award in unfair dismissal is usually:
  - basic award.
  - compensatory award, what the ET considers appropriate.
  - usually the maximum is about £75k.
  - occasionally reinstatement or re-engagement, plus an award.
- Award in discrimination is usually:
  - actual loss, and future, as what the ET considers appropriate.
  - plus an award for 'injury to feelings', usually £5k to £15k.
Costs

- You should assume that each party will have to bear its own costs, regardless of the outcome of the Tribunal process, even if:
  - You win
  - The other side withdraws
- Occasionally, limited amounts of costs are awarded to a party that has suffered from poor conduct of the other side. There are complex rules about this, but frankly it is not worth getting too excited about these…
- Threatening a claim for costs can be a useful tactic
- Remember that allowing a Claimant to withdraw and not be pursued for costs, is one means of achieving a settlement
- The powers, and inclination, of Tribunals to make cost awards are greater than they used to be, but…
Closing comments
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