

## **Employment tribunals – What you need to know to defend a claim**

Employment tribunals hear cases and make decisions on employment issues such as unfair dismissal, redundancy payments, discrimination and a range of claims relating to wages and other payments.

Although an employment tribunal is not as formal as a court, it must comply with statutory rules of procedure and act independently.

### **Common reasons for employment tribunal claims**

The best way to avoid someone making an employment tribunal claim against you is to avoid any disputes arising in the first place. Employees - and in some cases other types of worker - may make an employment tribunal claim over issues such as:

- equal pay
- unfair dismissal
- redundancy pay
- discrimination on the grounds of sex, race, disability, age, religious belief or sexual orientation
- breach of contract
- working hours
- unauthorised deductions from wages
- written statement of terms and conditions
- failure to inform and consult in a redundancy or business transfer situation

You can help to avoid disputes by:

- giving each employee a written statement of main terms and conditions of employment - this is a legal requirement
- having clearly written policies and procedures
- being prepared to consider employees' grievances, or raise disciplinary issues with them, informally and at an early stage wherever possible
- having clearly written policies and procedures where matters need to be dealt with formally
- take notes at all employee meetings and keep on file

You should:

- communicate these policies and procedures to your staff
- ensure that your staff fully understand them
- follow them consistently when the need arises

## **The employment tribunal claim procedure**

Generally, an individual must present their employment tribunal claim within three months of either:

- their employment ending
- the issue that is the subject of the claim

The tribunal can reject claims for various reasons, eg because the claim is made out of time (late) or doesn't contain enough information.

If the tribunal accepts a claim against you or your organisation, it will send you a copy of the claim form (form ET1) usually within three days of receipt. It will also send you a blank response form (form ET3).

## **Dealing with notification of an employment tribunal claim**

Before you respond to an employment tribunal claim, you could try contacting:

- a free advice service, such as a Citizens Advice Bureau or a law centre
- an employer's organisation
- a solicitor
- HR consultant

## **Acas conciliation**

Within five days of receiving your claim form ET1, which notifies you that a claim has been accepted against you, you will also receive a letter from Acas. The letter will give contact details for a named Acas conciliator, and invite you to get in touch to discuss resolving the matter.

## **Responding to an employment tribunal claim**

You have 28 days from the date the notification and forms were sent to you to return your completed ET3 to the tribunal office.

In the ET3 form, you must state:

- your full name and address
- whether or not you intend to resist (defend) the claim
- if so, your reasons for doing so

You can send your response as a paper copy in the post. However, it's quicker and easier to send it via the internet - at this point, you don't need to post anything. You can find downloadable forms and guidance on how to submit them on the Tribunals Service website. However you choose to send

the form, you should keep a copy for your records. The tribunal will reject your response if you do not use the ET3 form.

If the claimant is claiming a redundancy payment that you cannot pay due to financial difficulties, you should mention this in your response.

Note that the tribunal will send a copy of the ET3 to:

- the claimant
- Acas, which will contact you to help you and the claimant reach an agreed settlement as described above

### **Failure to respond properly to an employment tribunal claim**

You have 28 days from the date the ET1 notification and forms were sent to you to return your completed ET3 to the tribunal office.

The tribunal will not accept your response if:

- the response does not provide all the required information
- the response is not on the approved form (form ET3)
- the tribunal does not receive your response within the time limit (including any extension if one has been granted - see below)

In these circumstances, the tribunal will return your response and deal with the claim as if it had not received a response.

### **Applying for an extension to the 28-day deadline**

You may apply to the tribunal for an extension of time if you have good reason for doing so, eg an important witness - such as a manager who dismissed the claimant - is on holiday abroad. You must ask for such an extension in writing as soon as possible and within the 28-day time limit. You must give full reasons why you are asking for the extension. An employment judge will then decide whether to grant an extension. You will be informed of their decision and cannot assume an extension has been granted until then.

### **Default judgments**

An employment judge can, if the response has not been submitted or has been submitted and not accepted, issue a default judgment to determine a claim without a hearing. Such judgments may determine not only who is at fault, but also any appropriate remedy such as compensation.

You can apply to the tribunal to ask it to review a default judgment.

## **Preparing for an employment tribunal hearing**

Even if you have responded to an employment tribunal claim, you can still try to resolve the issue without the need for a tribunal hearing. Although Acas offers both conciliation and mediation services, many legal and professional organisations can help you resolve workplace disputes. However, if you fail to resolve a dispute in this way, a tribunal hearing is likely to become necessary.

The tribunal will write to you giving key dates in your preparation for the hearing. In particular, it will write to you with a hearing date for your case at least 14 days in advance.

Before your hearing, you could consider attending another hearing at a tribunal so you understand the procedure and what happens. You can do this by contacting any tribunal office and asking if there is a suitable hearing for you to observe.

### **Preparing documents for the hearing**

The tribunal may order you to disclose the documents you intend to bring to the hearing to the claimant or their representative if they have one. However, even if the tribunal doesn't order this disclosure, you must make sure that the claimant has at least seven days' notice of any documents which you plan to use at the hearing to support your case. If you are relying on any documents, you must bring six copies to the hearing unless specifically advised otherwise by the tribunal.

### **Preparing information that may affect remedies**

You should be prepared to produce any evidence and submissions which relate to the outcome the claimant is looking for if their claim is successful. If the claimant succeeds in a complaint of unfair dismissal (or a complaint relating to your failure to allow her to return to work after pregnancy/maternity leave), the tribunal may consider ordering reinstatement or re-engagement.

As a result, you should be prepared to give evidence at the hearing as to:

- the availability of either the job which the claimant held or similar jobs
- whether you would take the claimant back either in their old job or in a similar one
- your reasons if you say it would not be practical or possible to reinstate the claimant

You should also be prepared to give evidence at the hearing as to what you would consider to be appropriate compensation and how you arrived at your assessment.

If the claimant was a member of a pension scheme, you must bring to the tribunal the following information:

- whether the scheme was a money-purchase or a final-salary scheme
- if it was a final-salary scheme, what is the value of the deferred pension
- the retirement age under the scheme
- the amount of the employers' contribution to the scheme

If you do not give the tribunal the information it asks for, a further hearing may be needed, which could cause an order for costs to be made against you.

### **Arranging witnesses for an employment tribunal hearing**

You can bring witnesses to your employment tribunal hearing to give relevant evidence. Even if you have not been told to, it is helpful if you let the tribunal know beforehand how many witnesses you plan to bring.

You may have been ordered by the tribunal to produce a written statement of your own evidence and statements from your witnesses. However, even if you have not, you may wish to consider doing so.

If you believe that a witness may have something of value to contribute to the evidence, you should ensure they attend the hearing, rather than relying just on the contents of signed statements. This is especially important if you believe that the claimant or his or her representative might challenge what the witness has to say. It is your responsibility to make sure that your witnesses come to the hearing.

### **Ordering a witness to attend a hearing**

You may ask the tribunal to issue a witness order, which will summon someone that you want to have at the hearing, even if they do not want to be there. You must apply in writing well before the hearing.

If you do so, you will need to tell the tribunal:

- the name and address of the witness
- what the witness will say and how it will help your case
- why the witness is not willing to come to the hearing voluntarily

### **Getting further information, counterclaims and postponement of an employment tribunal**

Before your employment tribunal hearing you may need to get further information from the claimant, eg because they have not adequately

explained their claim. To do this, write to the claimant, asking for the information you need and giving a reasonable time limit for replying. If the claimant does not respond or fails to provide all the information you asked for, write to the tribunal as soon as possible:

- enclosing a copy of your original written request to the claimant
- asking the tribunal to issue an order

If the tribunal agrees to your request, it will order the claimant to provide you with the information you asked for.

### **Postponing the hearing**

You must make a request to postpone the hearing in writing as soon as possible. You must:

- give full reasons for your request
- send a copy of the request to the claimant

An employment judge will decide whether or not to postpone the hearing. You should not assume that the postponement will be granted but the tribunal will inform you if it has.

### **Corresponding with an employment tribunal**

In any correspondence from the employment tribunal office dealing with your case, you will be referred to as the 'respondent'.

The tribunal will send:

- to the claimant a copy of your response form - and any other supporting documents or letters from you
- copies of all the documents it receives from the claimant to you
- any decision the tribunal makes to both you and the claimant

You must tell the tribunal immediately if your contact details change. If you have a representative acting for you, the tribunal will send all correspondence about the case to them and not to you. You must pass any further requests for information through your representative and not straight to the tribunal.

### **Employment tribunal pre-hearing discussions and reviews**

Sometimes an employment judge or tribunal may hold preliminary hearings to clarify issues or review certain aspects of the case in question.

## **Case management discussions**

Case management discussions (CMDs) are held in private before an employment judge sitting alone and aim to identify the issues to be determined in the case and to consider procedural aspects such as whether a pre-hearing review is required or particular evidence, eg medical evidence in a disability discrimination case, should be gathered. They do not consider the merits of the case (ie whether it is likely to succeed or fail).

CMDs may be conducted face to face or, if the parties are legally represented, by telephone conference between the judge and the parties' representatives. No evidence is given by the parties or their witnesses.

The employment judge may make orders on a wide range of matters including:

- that a party provide additional information
- that a hearing be postponed or adjourned or the proceedings stayed

If you do not carry out or comply with any order made by the tribunal:

- your response may be struck out
- you may be ordered to pay all or some of the claimant's costs

## **Pre-hearing reviews**

Pre-hearing reviews (PHRs) are for deciding preliminary issues in the case. For example, they could be to decide:

- whether a claimant's late claim can proceed
- the employment status of the claimant, ie whether or not they are an employee
- whether a claimant is disabled within the meaning of the Disability Discrimination Act 1995 for disability discrimination claims
- whether the claimant has enough continuous service with you to make an unfair dismissal claim

However, a PHR may decide actual aspects of the case or whether the case should go ahead.

The letter giving you the date of the hearing will state the matters to be decided at the PHR. Such reviews are usually heard by an employment judge on their own, although a full tribunal will usually be called if one or more issues of substantive fact are likely to be determined. In a PHR, both sides must explain the basis of their case. A claim which appears to have no reasonable chance of success will usually not be allowed to go ahead. If a

party's case appears to have little reasonable prospect of success, they may be ordered to pay a deposit of up to £500 to proceed with the case.

Unless the PHR is only to consider whether a deposit should be paid, you may need to give evidence. If necessary, you will need to decide which witnesses (if any) and evidence to bring, bearing in mind the specific matters which the tribunal will be considering at this stage. Judgments or orders made at a PHR may result in part or all of the case being determined, with the result that no full hearing will be needed.

## **Employment tribunal hearings**

If no agreement to a dispute is reached through conciliation, mediation or arbitration, and if it is not struck out as a result of a pre-hearing review, the case will proceed to a hearing - sometimes called a 'full' or 'merits' hearing.

The hearing will decide:

- whether the claims succeeds or fails
- if it succeeds, what remedy is appropriate (re-instatement, re-engagement or compensation)

Note that a tribunal can decide on your case even if you or the claimant (or either your or the claimant's representative) fails to attend.

## **The members of an employment tribunal panel**

The tribunal panel is made up of:

- an employment judge - an experienced employment lawyer
- two lay (non-legal) members - they are appointed because of their experience as, respectively, employers and employees (or workplace representatives)

Sometimes, however, the hearing can be heard by the judge sitting alone.

## **Tribunal-hearing procedure**

When you arrive at the tribunal, you should report to reception. Before the hearing, a tribunal clerk will discuss with you the number of witnesses you have and collect any documents you may have brought for the tribunal. You should tell the clerk if you or any of your witnesses have any special needs or concerns.

The employment judge will make sure that the hearing proceeds in a calm and measured way. However, they may have to be firm in moving the case on to make sure that it is dealt with within the time set aside.

Generally:

- in an unfair dismissal case, you will give evidence and call any witnesses first
- in a discrimination case, the claimant will give evidence first followed by any witnesses

However, there is no absolute rule as to which side starts and this will be discussed with you before the hearing begins.

You could be convicted of perjury if you lie after swearing an oath or affirmation. Similarly, your witness could also be convicted of perjury if they lie after swearing an oath or affirmation.

You may give evidence by reading a prepared written statement if you want. You or your witnesses can then be asked questions by the claimant or their representative.

You or your witnesses can then give further evidence to clarify matters which came up when being asked questions by the claimant or their representative. Finally, the employment judge and lay members may ask questions.

The same procedure is then usually followed for the other witnesses and then with the claimant.

Once the tribunal has heard all the evidence, both sides can sum up before the tribunal retires to consider its judgment.

### **The judgment**

Unless the tribunal 'reserves' its judgment, the employment judge will announce the judgment at the end of the hearing. If the judgment is reserved, you will receive it in writing at a later date. This may happen in complicated cases or if there is not enough time on the day of the hearing to come to and announce the judgment. If the claim succeeds, the tribunal will normally deal with compensation issues at the hearing. The time set aside for the hearing will usually include time for this.

The tribunal will always send a written judgment to you or to your representative. It will also give you written reasons for the judgment if the judgment was announced at the end of the hearing, you asked for them on the day, or you make a written request within 14 days of the date that a written reserved judgment was sent to you.

### **Key deadlines in the employment tribunal process**

Below is a list of the key time limits for an employment tribunal case. Be aware that the tribunal will write to you giving dates for your hearings and advising you of any other deadlines specific to your case.

Judges may have the discretion to extend certain deadlines if it can be shown that it is 'just and equitable' to do so.

Key deadlines for making and responding to a claim are:

- the tribunal must receive the ET1 form from the claimant within **three months** of the date of the act complained of or the date the employment finishes
- the ET1 form will be sent to you within three days of the tribunal receiving it
- you must return the ET3 form within 28 days of receiving the ET1
- if you wish to appeal against notice on the grounds of underpayment under national minimum wage, you must do this within 28 days
- if you wish to apply for an extension, you must do this within 28 days of receiving the ET1
- if you wish to make a counterclaim for breach of contract, you must do this within 42 days of receiving the ET1

Key deadlines for conciliation are:

- conciliation is an option at any point throughout the tribunal process, including before the ET1 form is filed
- the ET1 form will be sent to Acas within three days of the tribunal receiving it
- you will usually hear from Acas offering conciliation services within five days

Key deadlines when preparing for the hearing are:

- the tribunal will write to you with a hearing date for your case at least 14 days in advance
- if you plan to use documents to support your case at the hearing, you must give notice to the claimant of these of at least seven days

Key deadlines for requesting reasons are:

- if you wish to request written reasons for a judgment, you must ask for them on the day (if the judgment is announced at the hearing), or make a written request within 14 days of the date that a reserved written judgment is sent to you

Key deadlines for reviews and appeals are:

- if you wish to apply to the employment tribunal to ask it to review a judgment (either default or non-default), you must apply in writing within 14 days of the date the judgment was sent by the tribunal office
- if you wish to appeal, the EAT must receive your notice of appeal no later than 16.00 on the 42nd day after the date on which the employment tribunal sent you the judgment, decision, direction or order
- you should get an acknowledgment of receipt from the EAT within seven days
- you can make an application to the EAT for an extension of time to lodge an appeal at the time of, or after, lodging a notice of appeal
- any appeal against the Registrar's refusal of an extension of time application must be made to the EAT within five working days

Key deadlines for paying awards are:

- if you do not pay an award within 42 days of the date when the employment tribunal's decision is sent to the parties, you will start paying interest on it
- interest accrues from the day the tribunal's decision is sent to the parties in discrimination judgments, unless the full amount is paid within 14 days
- if recouping benefit costs, Jobcentre Plus (JCP) will send a recoupment notice to you within 21 days following the announcement or within nine days of the judgment being sent to the parties, whichever is the later, or, if not announced at the hearing, within 21 days of the date the judgment was sent to the parties
- if you receive a recoupment notice, you must make pay the amount outstanding to the appellant immediately
- if an employment tribunal advises you to send JCP information for a protective award, you must send the information within ten days of the judgment being announced at the hearing or, if not, when it was sent to the parties
- JCP will send you a recoupment notice within 21 days of receiving the above information or as soon as practicable

For more information of help with defending an employment tribunal claim call Sandra Beale on 07762 771290.

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