

## Managing Litigation – Case Study 1

### Scenario

You are the Human Resources Director for Technophobia Ltd (the “Company”), a software company specialising in data back-up and software solutions. The Company employs 90 employees and also engages 30 contractors, most of whom work off-site at client premises. Unfortunately, the Company had to implement a cost-cutting exercise in December and made 16 redundancies. The Company is due to launch a major new software product in April which it hopes will be good publicity and turn its fortunes around.

You’ve received a claim from an employee (Mr Winnalot) who was made redundant and had been with the Company just over a year. He is 52 and had been complaining of disability discrimination on the grounds that he had poor attendance records for a bad back and he feels that this was the reason he was selected for redundancy. He was offered alternative positions but wasn’t interested and claimed at the time that he was being forced out. When his role was made redundant, he appealed (the appeal is ongoing as unfortunately senior management have been unavailable for most of January and February). Unfortunately, there were also performance issues in the background but these weren’t dealt with effectively by the employee’s line manager at the time.

Mr Winnalot’s claim form is very short and rather unclear and reads like a bit of a rant but he seems to be claiming unfair dismissal. He has named five respondents in his claim - the company itself, two employees in HR, his line manager and a contractor who worked off-site with him.

Mr Winnalot also says that the Company should have paid him a bonus but hasn’t set this out as a separate claim. He also appears to be claiming disability discrimination but his ET1 is unclear: *“I was treated badly by the company and they forced me out because of my bad back”*.

He has also asked the Company to let him have all emails containing his name in the last 12 months. He has also sent you a disability discrimination and an age discrimination questionnaire.

He says he’ll drop everything if the Company can come to an agreement with him. You feel that the Company followed a proper redundancy selection process and that there was nothing discriminatory in Mr Winnalot’s dismissal.

### **1. What should the Company do first?**

You’ll need to submit an ET3 (or Response) on behalf of all named respondents within 28 days from the date the claim is lodged. In order to prepare for this, you’ll need to go on a fact-finding expedition and gather evidence from all relevant witnesses including Mr Winnalot’s line manager. You should also consider making a Further Information Request as the employee’s claim is so vague. This can be done after the ET3 has been lodged (you can reserve the right in the ET3 to seek further information). The Company should tell its own story in the ET3, but should reserve right to expand/amend the ET3 when further information is received from the employee.

You should also ensure press ahead with the appeal process as delays in process will not improve the Company’s position.

You will also need to respond to the questionnaires submitted by the employee (within 8 weeks).

You may wish to look into the issue of whether Mr Winnalot has a disability (for the purposes of the Disability Discrimination Act 1995) and should check the files to see whether there are any medical reports / occupational health reports on his condition to determine whether (in principle) Mr Winnalot has a potential disability discrimination claim.

## **2. How should the Company deal with the fact that the claim is short/unclear?**

You should submit a Further Information Request asking for particulars of the employee's claim so that the Company is clear on what is being alleged by Mr Winnalot (you should usually allow an employee around two weeks to respond to this). If Mr Winnalot fails to respond to the Request, you can apply to the Tribunal for an Order requiring the employee to respond within a certain time period. You should also (in this scenario) consider whether a strike-out of part or all of the claim is necessary/appropriate (although note that a Tribunal will normally only grant a strike-out application on the basis of very robust reasons showing that the claimant's claim is without merit, unreasonable or vexatious).

## **3. What can the Company do about the fact that Mr Winnalot has cited multiple respondents to his claim?**

You should normally (and with their consent) lodge the ET3 on behalf of all named respondents, even if the claims are denied and even if you do not consider that all of the respondents are appropriate respondents. You should check with the contractor whether he / she is happy for the Company to respond to the claim on his / her behalf.

If one has not already been scheduled, you should apply to the Tribunal for a Case Management Discussion or a Pre-Hearing Review to determine who the correct respondents should be. Subsequently, if you consider that any of the parties are not proper respondents, you can then apply to the Tribunal to have them removed.

## **4. Is the Company obliged to respond to Mr Winnalot's request for personal data?**

Yes, provided the scope of the request is not excessive(see guidance from the Information Commissioner on data subject access requests and see also *Durant v FSA [2003] EWCA Civ 1746*). In order for an employer to be obliged to respond to a data subject access request, the request should be reasonable and proportionate. You should therefore push back on the scope of it (i.e. the time-period specified and limit email correspondence to (for example) emails between specific named individuals on specific topics). Technically, to submit a valid request, the employee should also enclose a cheque for £10 payable to the Company.

Once a reasonable request is received, the Company has 40 days from the date on which the request is received to provide the data. The data provided should be redacted to delete any privileged / "without prejudice" /third party names / company-confidential information. Bear in mind that emails containing "without prejudice" material (e.g. details of an off-the-record offer to an employee) will only be genuinely without prejudice (i.e. not discloseable in legal proceedings) if there is a dispute in existence between the parties. This might not necessarily be the case if the Company has made an early offer to an employee but if an employee has a history of raising grievances, it is easier to argue.

**5. What should the Company do about the disability discrimination and age discrimination questionnaires?**

The Company will need to respond to these within 8 weeks. The Company should bear in mind that its responses can be disclosed in Tribunal proceedings and failure to respond or an inadequate response can lead to an inference of discrimination. Where a questionnaire is not very well-drafted, it may be difficult to respond fully to all of the employee's questions, but the Company should do its best to provide full responses, supported by data / statistics where applicable and/or appropriate.

**6. What considerations should the Company take account of in deciding its strategy in relation to the claim?**

The Company may consider that Mr Winnalot's claim is weak but it will also need to consider the impact on management time and costs and the potential adverse publicity that Tribunal litigation could cause given that it is launching a new product. It may therefore wish to consider offering a settlement sum on a "without prejudice" basis (perhaps after the disclosure stage if it emerges that there are documents which do not support the Company's position).

The Company may wish to liaise with the ACAS conciliator going forward and should also take legal advice early on the potential merits / strengths of Mr Winnalot's claims. This may depend, to a large extent, on how the redundancy process was implemented and what selection criteria were used. If the Company is comfortable that it has been through the proper process with Mr Winnalot, it may not be prepared to throw money at him for the claim to go away (and may also be wary of setting precedents for other employees).

## Managing Litigation – Case Study 2

### Scenario

You are the Human Resources Director for Technophobia Ltd (the “Company”), a software company specialising in data back-up and software solutions. The Company employs 90 employees and also engages 30 contractors, most of whom work off-site at client premises. Unfortunately, the Company had to implement a cost-cutting exercise in December and made 16 redundancies. The Company is due to launch a major new software product in April which it hopes will be good publicity and turn its fortunes around.

You understand from one of your line managers that an employee who worked in sales and was a bit of a fiery character had a heated debate with her manager regarding working practices, then announced her pregnancy. She put in a grievance the same day but resigned the following day indicating that she did not want to continue with the grievance. She has put in a claim of constructive unfair dismissal, sex discrimination, equal pay and age discrimination. She also seems to be alleging whistle blowing although it's not entirely clear from her claim.

On investigation, it appears that the employee raised a number of grievances previously and that there may be some grounds to her claims.

You are tempted to throw in the towel and offer her a minimal sum to settle the case here and now.

### ***1. When and how is the best way to broach the topic of a settlement?***

Your approach to settlement will depend on how keen you are to settle the claim – the earlier you make a settlement offer, the more likely it will look that you are ‘desperate’ to settle. In addition, if you make the settlement offer too early, you risk the offer/conversation not being truly ‘without prejudice’ and therefore being admissible as evidence in proceedings.

However, you may be able to explain an early offer on the basis that the Company will pay a certain amount now to avoid incurring the costs associated with litigation, but if the offer is not accepted before a certain date it will be withdrawn as the Company will start incurring costs beyond that date.

### ***2. How can you put pressure on the employee if they are reluctant to negotiate?***

One option you could consider is making a “without prejudice save as to costs” offer, explaining that if the employee declines the offer and recovers less than the amount you have offered at a hearing, you will seek reimbursement of your legal etc costs.

Any settlement offer you do make should be large enough to at least tempt the employee into considering it. Any offer should usually be subject to a time limit, beyond which it will cease to be available to the employee.

You could also consider making a Further Information Request in relation to the vague and/or unsubstantiated parts of the claim, and seeking a strike-out order if this is not complied with. Similarly, if you think parts of the claim are unjustifiable/unwarranted, you could notify the employee that you intend seeking recovery of your costs if they proceed with those parts of the claim.

More generally, even if you want to settle the claim, it is often helpful to defend the claim as if you intend to go to a hearing. This can help give the employee the message that you will not cave-in that easily. Similarly, you should also put as much doubt as possible in the employee's mind about the strength of their claim (see the answer to question 3 below).

### **3. What type of arguments might you be able to use in responding to the claim?**

Although we are told that there may be something in some of the employee's claims, there are still arguments you can make on behalf of the Company.

Firstly, we are told that the employee is a fiery character – there may therefore be scope to present her as 'difficult' or a problem employee. It is also worth pointing out that the employee resigned – she was not dismissed (and we would also say that she was not pushed out). Similarly we can point out the employee did not give the Company a chance to go through a grievance process with her before she resigned (and so even if her claims were successful any compensation would be reduced accordingly).

You may also be able to make something of the fact that the employee seems to have taken a 'scatter gun' approach, bringing several different types of claims. You may be able to undermine her overall credibility by picking holes in the weaker parts of the claim.

Finally, it is worth noting that the Company only became aware of the employee's pregnancy after the matters she has complained about (allegedly) took place, so this was not a factor in any treatment she has complained about

### **4. What are the pros & cons of settling the claim?**

The obvious benefits of settling the claim are that it will avoid the time and cost associated with defending a claim and going to a hearing. In addition, the Company will be able to avoid the risk of the reputational damage associated with losing a discrimination claim and it should be possible to keep matters confidential as part of the settlement agreement.

On the flip side, however, if the Company does settle the claim it may get a reputation for paying up in response to claims – which may encourage other claims. In addition, the employees cited in the claim may think that they can get away with inappropriate behaviour and that the Company will 'buy them out of trouble' –sometimes the experience of being a witness in Tribunal will focus the minds of employees in future(!)

*These materials were prepared for a Kemp Little LLP seminar and do not constitute legal advice.*