

Managing Litigation



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11 March 2009





Why this is a live issue

“Employment tribunals face record numbers of unfair dismissal claims. The past nine months has seen a near 25% rise in the average number of monthly claimant cases accepted for consideration”

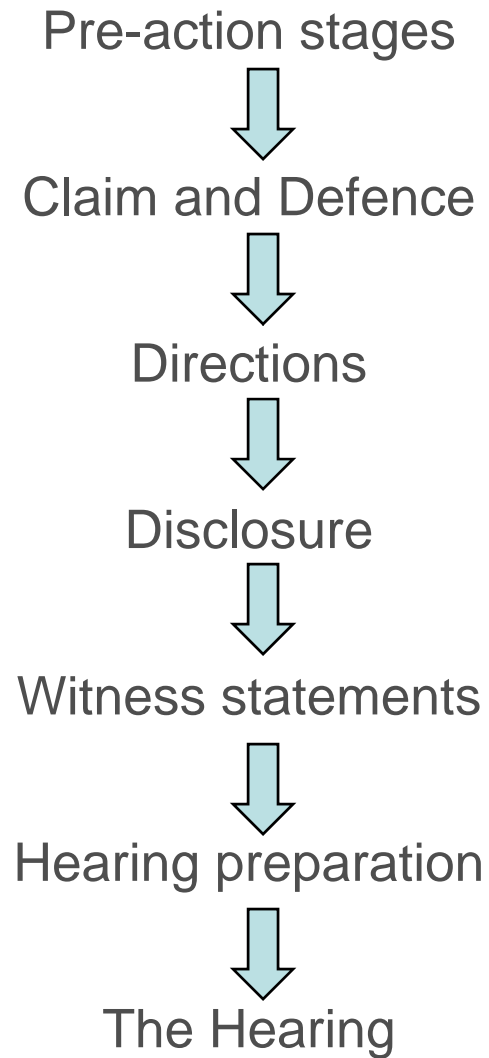
The Guardian, 8 March 2009



Overview

- Key stages in the litigation process
- Dealing with some common problems
- To settle or not to settle?

The litigation process





Pre-action stages

E.g.:

- Outcome of grievance / disciplinary action / appeal
- Responding to letters from the employee

Things to think about at this stage

- Outcome of the internal dispute process will form part of the evidence in Tribunal
 - so outcome needs to be reasonable and measured
- It is generally a bad idea to be too aggressive in correspondence
 - likely to aggravate matters
 - if the correspondence is 'open' will create a bad impression in Tribunal



The defence

- The basic statement of the employer's position
- Need to cover all the main points in the claim –
 - If don't deny something may be deemed to admit it

Things to think about at this stage

- Involve the relevant managers/employees as far as possible –
 - it is difficult to correct later inaccuracies in the defence
- The defence can be relatively generic
 - doesn't need to deal with every point of detail
- But should still tell a coherent/easy to read 'story'.
- Now is a good time to tell managers/decision-makers how time-consuming/expensive the process will be if it goes the distance



Directions

- The Tribunal tells the parties what they have to do and by when
 - e.g. disclosure of relevant documents / exchange of witness statements
- Tribunal may hold a Case Management Discussion or a Pre-Hearing Review, or may just issue a Case Management Order and Notice of Hearing

Things to think about at this stage

- How many witnesses will we need/who will they be?
- How long is the Hearing likely to last?
- Do you want the Tribunal to make any particular Orders?
 - e.g. Provision of further information / Removal of Respondents
- Make sure the Hearing (and other) dates go into witnesses' diaries(!)



Disclosure

- Each party sends to the other a list (and copies) of relevant documents
- Have to send damaging documents as well as helpful ones
 - but not ‘privileged’ or ‘without prejudice’ documents

Things to think about at this stage

- The disclosure process often reveals the true strength – or otherwise – of the employer’s position
 - How helpful the documents are may influence the timing of any settlement offer
- It is rare for the employee to have many relevant documents



Witness evidence

- Each party has to produce a witness statement for each person they want to call as a witness
- Each party sends to the other their witness statements
- The statements should expand upon and substantiate what is in the defence, and should refer to relevant documents
- Good witness statements are often the difference between winning and losing

Witness evidence (cont)

Things to think about at this stage

- What do you need to prove to win the case / who can give evidence about this?
- How well will the witnesses 'perform' in Tribunal?
- Should you gloss over or deal expressly with weaknesses?
- The witnesses will be cross-examined on their statements so need to be comfortable with the contents of them
- Need to check the statements are consistent with each other/the documents
- Each statement should tell a coherent/easy to follow 'story'
- Witness statements are time-consuming and expensive to produce
 - so a good time to think about settlement



Final preparation and the Hearing

- Preparation of trial bundle
- Chronology and List of Issues
- Should have a Schedule of Loss from the Claimant at this stage

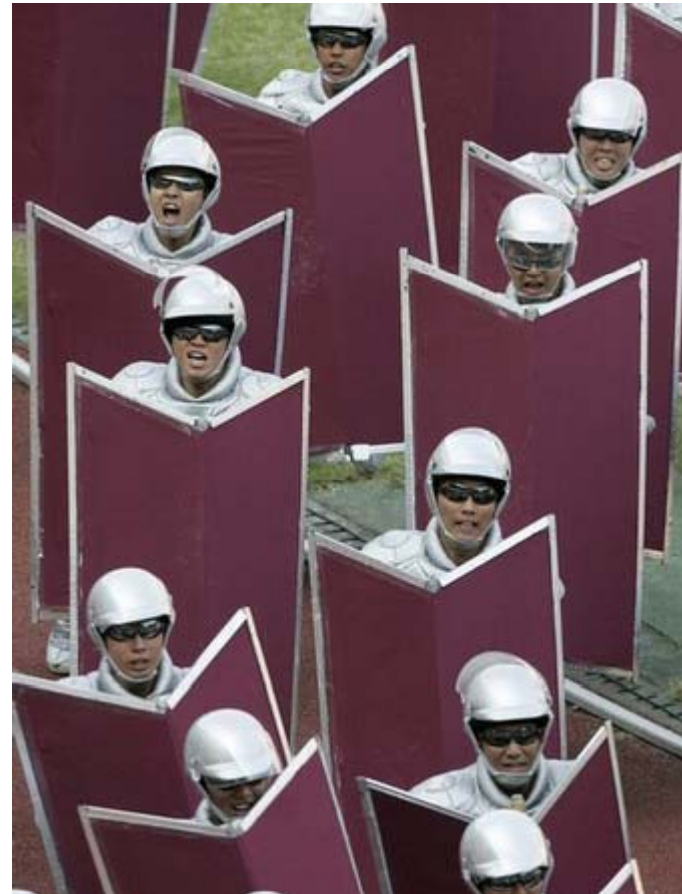
Things to think about at this stage

- Reality bites!
- And the final tranche of time & money
 - so cases often settle close to the Hearing
- Do the witnesses know where to go/what to expect?
 - worth having a pre-Hearing call/meeting to explain how things work at the Tribunal

Dealing with some common problems

Key issues

- Claim is unclear or vague;
- Data subject access requests;
- Questionnaires
- Multiple respondents
- Witness strategies
- Vexatious claims



Issue

- Employee's claim is not particularised or is vague e.g.

"I was discriminated against; there was a culture of bullying..."



SOLUTION:

- Serve a Further Information Request (Further & Better Particulars)
- Apply for a Tribunal Order
- Apply to the Tribunal to strike out the claim

Issue

- **Wide data subject access request e.g.**

“all sent and received emails during my entire period of employment, referring to me”...

SOLUTION:

- Limit scope of request
(Durant v FSA)
- Treat as disclosure
- Consider privilege etc



Issue

- Questionnaires
- Purpose
- Time limits
- Admissibility
- Adverse inferences



Issue

- **Multiple respondents**

CONSIDER:

- Vicarious liability
- Proper parties
- Contractors



SOLUTIONS:

- Pre-hearing review
- ET3 on behalf of all named Respondents
- Apply to the Tribunal to have inappropriate parties removed.



- **Witnesses**

- Reluctance
- No property in a witness
- Witness orders



Issue

- Vexatious claims

ISSUE

- Has the claimant acted improperly?

SOLUTION

- Strike out
- Costs warning
- Costs order
- Deposits



Settlement

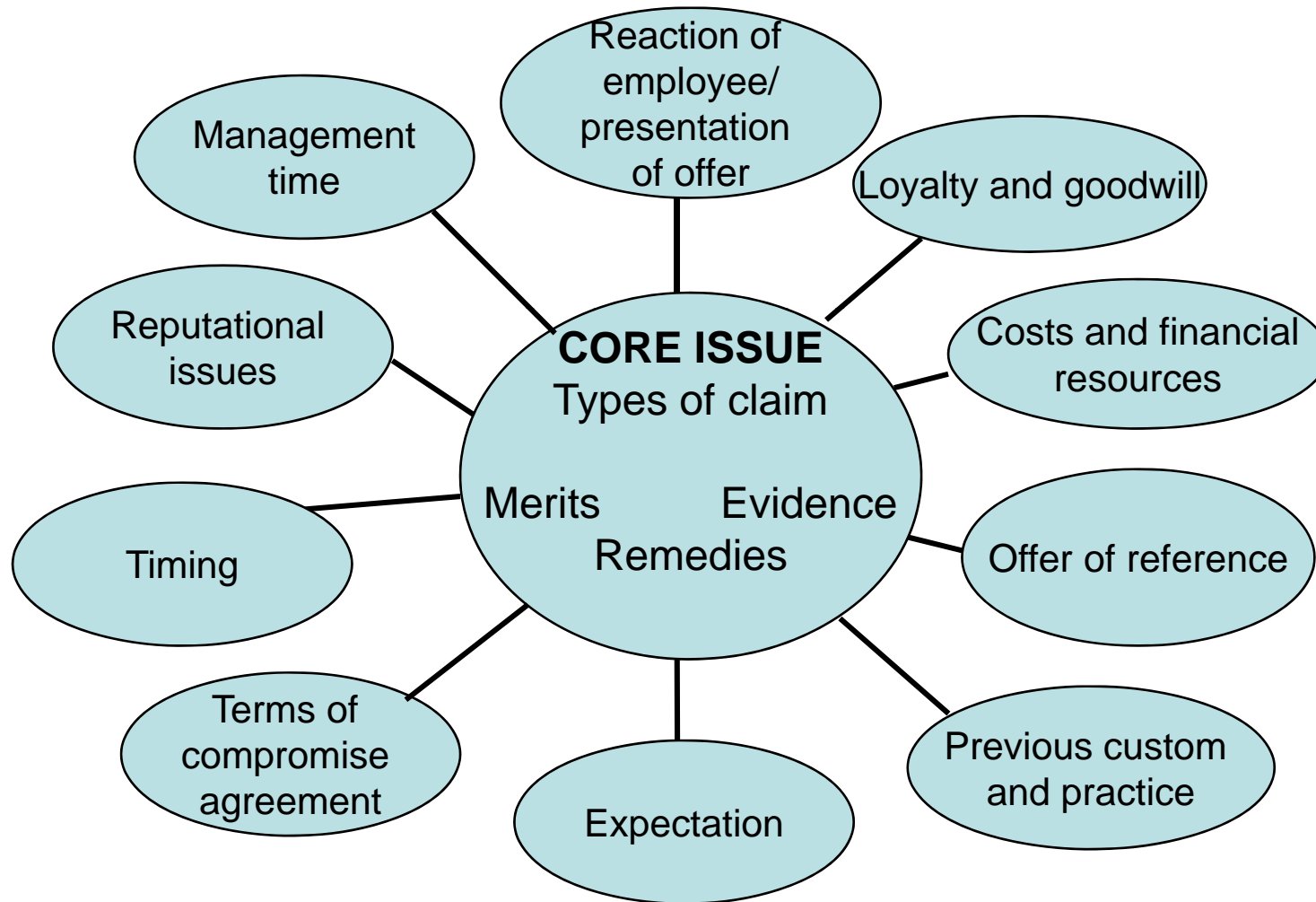
- To settle?



- Or not to settle?

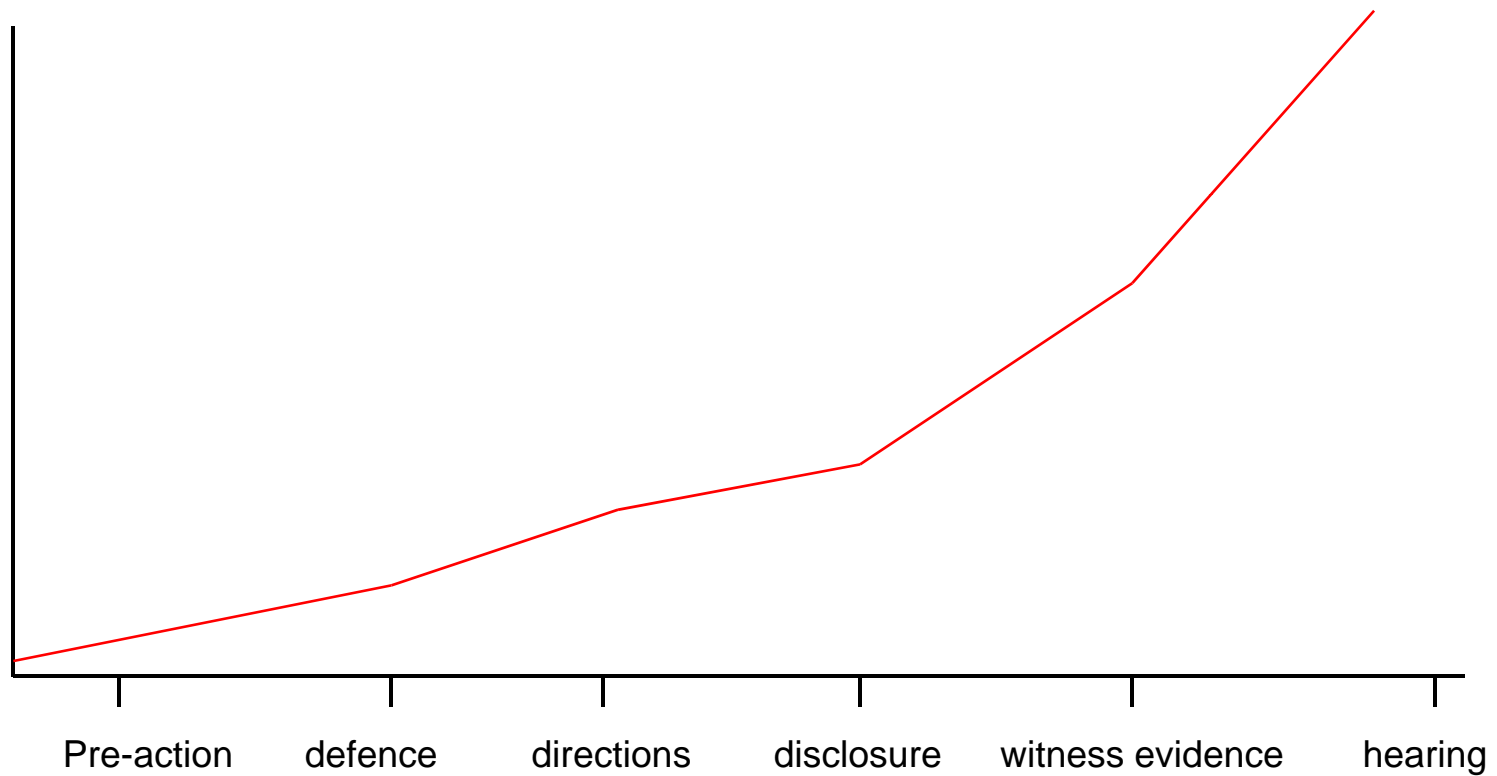


To settle or not to settle?



When do the costs and time start running up?

Costs/
management time





Negotiation strategy

- Think about when to present offer
- Stress your best points on merits
- Think about how you will deal with any weakness
- Point to any evidential difficulties
- Stress potential to incur costs
- Put forward arguments and evidence on mitigation



Making settlement more likely

- Prepare as if the case will go to a Hearing even if you want to settle
- Make sure you are completely on top of deadlines
 - and when the Claimant isn't consider seeking an Order from the Tribunal
- Can you apply to strike-out any of the claim?
- Consider costs warnings
- Make settlement offers plausible (even if low)
 - apply appropriate time pressures
 - consider non-monetary elements

Questions

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Managing Litigation – case studies



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