A Practical Guide to Employment Tribunals 2014
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Introduction

Employment tribunals are the main forum in which disputes between employers and employees are resolved. They were established to provide parties with "an easily accessible, speedy, informal and inexpensive procedure for the settlement of their disputes" (Donovan Commission 1968).

Although employment tribunals were originally designed to operate cheaply and informally, they have become more legalistic over the years. This is due to a variety of factors, including increased legislation, a larger body of case law, higher awards and the fact that employment tribunals are judicial bodies expected to adhere to the principles of natural justice. There is also a continued move to align employment tribunal procedure with that of the civil courts.

Applications to employment tribunals have significantly reduced since the introduction of fees in July 2013. The number of claims brought by single individuals in the final three months of 2013 dropped by 63% compared to the same period in 2012. Although unfair dismissal is still one of the most common claims, recent years have seen a spike in claims arising under the working time rules and under the new heads of discrimination.

Employment tribunals have seen a large amount of change within the last 18 months including the introduction of fees, changes to tribunal procedure and mandatory Early Conciliation. The Labour Party also announced that, if it wins the General Election in 2015, it would scrap the Employment Tribunals system and replace it with a fairer system for all, so further change may well be afoot.

The aim of this guide is to explain the role, process and jurisdiction of employment tribunals and to provide practical guidance on preparing for and appearing in front of an employment tribunal panel. We hope that you find this guide helpful but it should not be considered as a substitute for legal advice.
## Employment tribunal process

1. Complaints that may be determined by the employment tribunals  
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Employment tribunal process

1 Complaints that may be determined by the employment tribunals

Employment tribunals have jurisdiction to hear in excess of 70 different types of employment-related claims including:

(a) General and unfair dismissal: redundancy (including collective consultation rights), disputes over written particulars of employment and itemised pay statements, written reasons for dismissal; unlawful deductions from wages and claims relating to TUPE or working time;

(b) General and unfair dismissal: time off for family emergencies; maternity, paternity; adoption; parental leave and issues over flexible working arrangements; and

(c) Discrimination: on the ground of sex, race, age, disability, religion or belief, sexual orientation; equal pay claims and less favourable treatment on the basis of fixed or part-time employment status.

The employment tribunal also has a limited jurisdiction to deal with breach of employment contract claims (see below). Claims for personal injury are not dealt with by the employment tribunals, although some claims (for example, sex discrimination) may include an award to reflect personal injury, often to compensate for psychiatric harm.

The employment tribunal’s jurisdiction keeps evolving as new employment-related rules and regulations are introduced from time to time.

2 Claims for breach of an employment contract

Employment tribunals can deal with breach of employment contracts claims brought by employees (not "workers") which arise on or are outstanding at the date of termination of the employment. However, their jurisdiction is limited as they are not permitted to deal with certain types of claim, for example claims relating to confidentiality obligations or restrictive covenants (so these must instead be brought in the County or High Court). Additionally, the compensation that can be awarded by the employment tribunal in a breach of contract claim is capped at £25,000 (unlike in the civil courts where it is unlimited).

“Wrongful dismissal” claims (i.e. claims that the employment was terminated in breach of contract, for example, by failing to give notice) can therefore be brought in the employment tribunals but compensation will be limited to a maximum of £25,000. Employees making such a claim must therefore proceed with caution as they cannot then subsequently seek damages in the civil courts in respect of the same loss.

Employment tribunal claims (perhaps for unfair dismissal) and civil court claims (perhaps for wrongful dismissal seeking more than £25,000) can run in parallel although the former are usually adjourned pending the outcome of the latter to avoid the employment tribunals making a finding of fact which might bind the civil courts. It should also be noted that damages for wrongful dismissal are often off-set from any unfair dismissal compensation to avoid double recovery.
# The tribunal process

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1 Introduction

The overriding objective of the employment tribunals is to deal with cases in a “just” manner. In practical terms this means that the employment tribunal must ensure that all parties are placed on an equal footing, saving expense, dealing with cases in ways proportionate to their complexity, and ensuring that they are dealt with expeditiously and fairly.

It is important to note that employment tribunal decisions have no binding authority as precedents (although they may be of persuasive value). Parties seeking to rely upon case authority to defend a claim will normally cite Employment Appeal Tribunal, Court of Appeal or House of Lords decisions. In practice, however, most cases will turn less on the authorities and more on legislative provisions seen in the light of the evidence put forward by the parties. In consequence, witness statements and documentary evidence are invariably very important.

2 Commencing proceedings

2.1 Issuing the claim

Employees have the most protections and available rights, although there are an increasing number of rights for “workers”, such as in relation to working time and unlawful deductions from wages claims. In addition, the definition of “employee” in relation to discrimination legislation is quite wide and would therefore incorporate workers as well as other individuals.

Following the introduction of mandatory Early Conciliation in April 2014, an employee or ex-employee (or worker, where appropriate) (known as the “claimant”) must now file an Early Conciliation form with the Advisory, Conciliation and Arbitration Service (“ACAS”) to attempt conciliation of employment disputes before a tribunal claim is issued.

The idea behind Early Conciliation is to try to make the tribunal system more efficient by settling more claims at an early stage. Other than in very limited circumstances, all prospective claimants are now subject to Early Conciliation. It is not necessary to go through Early Conciliation, for example, where the claimant is making an application for interim relief as there is only a very short period of time available to present the claim, making it impracticable.

Once an Early Conciliation form has been filed with ACAS, the ACAS conciliator talks through the relevant issues with each of the parties and discusses the options open to them. He or she will attempt to help each of the parties understand how the other party views the case to discover whether the matter might be resolved without the need for a tribunal hearing. The conciliator also informs each side of any proposals the other has for a settlement. Discussions are “without prejudice” and therefore cannot be referred to in any subsequent tribunal proceedings.
If an oral agreement for settlement is reached between the parties, via ACAS, it will become binding (notwithstanding that it is not in writing). However it is normal for the agreement to subsequently be recorded in a written agreement known as a COT3, which is then signed by all the parties.

If Early Conciliation is refused by either party or is unsuccessful after the one month conciliation period, the claimant is issued with an Early Conciliation certificate. The claimant will then be entitled to submit their ET1 to a regional tribunal office.

Claimants are required to include a unique reference number given to them by ACAS on their ET1 form, to demonstrate that they have undertaken Early Conciliation. If the claimant does not include the reference number (and the claim is not exempt) the claim will be rejected.

The ET1 claim form (which is accompanied by guidance notes) is available on the employment tribunal website (www.justice.gov.uk/tribunals/employment) and can either be completed on-line or downloaded. This prescribed form must be used, otherwise the claim will not be valid.

The ET1 directs the claimant to provide information about themselves and their claim. For example, it requires them to confirm whether they have found a new job and has different sections to complete depending on the nature of the claim (i.e. unfair or constructive dismissal, discrimination or some other claim).

2.2 Fees for making a claim

A fee is payable by the claimant when issuing the ET1 form. The amount of the fee will depend on the type of claim as well as the number of claimants. A simple claim such as unlawful deduction of wages will attract a fee of £160. More complex claims such as unfair dismissal and discrimination will attract a fee of £250. In certain situations, the claimant may apply for a remission of the fee on the grounds of inability to pay.

If the claimant fails to pay the fee then the tribunal will reject the claim. If the claim is rejected the claimant is able to resubmit the claim form and pay the fee again provided the time for bringing it has not expired.

2.3 Time limits for making a claim

The normal time limit for bringing a claim is three months from dismissal/the act complained of in the case of unfair dismissal and most discrimination claims and six months from the act complained of in the case of equal pay claims. However, Tribunals have discretion to extend these time limits in some circumstances.

Following the introduction of Early Conciliation, receipt of an Early Conciliation form by ACAS will 'stop the clock' for the purposes of the limitation period and time will only start to run again once an Early Conciliation certificate has been issued by ACAS and is deemed to have been received by the claimant.
The rules provide that if there is less than one month of the limitation period remaining at that stage, the claimant is given a further month from the date of deemed receipt of the Early Conciliation certificate in which to file an ET1. As a respondent may not be sent a copy of the Early Conciliation certificate, respondents will not know for sure when the limitation period expires and whether the claimant has brought their claim in time. They will need to call ACAS to confirm the date of the certificate and determine the date of deemed receipt.

2.4 Acceptance procedure undertaken by the tribunal office

On receiving the claim, the tribunal office will check to make sure that the form includes all the relevant information and that the tribunal has the power to deal with the complaint. The claim may be rejected, for example, if it has been issued by the claimant out of time (see above for information on time limits).

There may be circumstances where there is a valid reason why the claimant has not met the usual legal requirements, for example, it may not have been possible for them to have presented the claim within the usual time limit because of serious illness. Such reasons should be fully explained in the ET1, otherwise the claim will be automatically rejected.

In some situations the claim may be rejected in part and accepted in part. This can lead to two separate claims and defences if the claimant resubmits the rejected part of the claim once a procedural flaw is remedied. Where there are two such cases on the same facts, there will normally be a consolidation of the claims later in the tribunal process.

2.5 Questionnaires

In discrimination cases, the claimant may serve written questions on the respondent, which can be an extremely useful tool for gathering evidence which would support their claim.

While ACAS guidance encourages employers not to ignore a request for further information and states that it is important for the respondent to respond in a reasonable time, precise timelines for a response are not prescribed. An employer is under no legal obligation to answer the claimant’s questions, but the ACAS guide states that a tribunal may look at whether and how a respondent has replied to questions as a contributory factor in making their overall decision. Therefore, it would be unwise for an employer to ignore a request for information.
3  Employer’s reply to a claim

3.1  Submitting a response

Assuming that the ET1 claim form is accepted by the tribunal office, the employer (or former employer) will then be sent a copy and must submit a response form (known as an ET3) within 28 days from the date on which it was sent a copy of the complaint. If this is not done, the employer (known as the "respondent") risks losing its right to contest the claim. The ET3 response form can be downloaded from the employment tribunal website (together with notes on how it should be completed).

Respondents need to carefully consider the approach to be taken and the level of detail which needs to be included in the response. The guidance accompanying the ET3 response form makes it clear that the respondent needs to give full reasons as to why it is resisting the claim, to state on what points it disagrees with the claimant and set out the information to support the argument (although there is no need to append relevant documentation to the response form).

That said, including too much information can actually weaken the defence (whilst the defence must be truthful, there is no need to dwell on weak issues especially if not raised by the claimant) or leave the respondent open to “selective” criticism from the other side. The response is a formal pleading so the respondent's case must subsequently be conducted consistently with it, (for example, the witness statements provide the real detail but they must be consistent with the original defence).

Whatever approach is taken, the response should be clear and logical, leave open all avenues for the defence and, above all, relay the respondent's version of events in the best possible light.

3.2  Extending the period for submitting the response

The respondent may apply (within the 28 day period from the date on which it was sent the ET1 claim form) to extend the period for lodging the response. Such an extension will only be granted if the Employment Judge is satisfied that it is “just and equitable” to do so in all the circumstances. This may be the case, for example, where the person who took the decision to dismiss the claimant is abroad on holiday and the respondent lacks vital information. It should be noted that an extension will not usually be granted without a very good reason so always be prepared to submit a response before the original deadline. A solution may perhaps be to submit a defence as fully as possible but reserve your right to add to it when the key person returns to work.
3.3 Acceptance procedure undertaken by the tribunal office

The response will be reviewed by the tribunal office and will be rejected (or a default judgment issued in the favour of the claimant) if, for example, it does not contain the requisite information or is filed out of time.

3.4 Sift process

As soon as possible after the ET3 has been accepted, an Employment Judge will consider the claim to ensure there are arguable complaints and defences within the jurisdiction of the tribunal. The Judge will decide:

- whether the claim or response should be struck out, either in full or in part, because it has no reasonable prospect of success;
- whether the claim should be struck out, either in full or in part, because it does not contain complaints within the jurisdiction of the tribunal;
- if the case should proceed, what case management directions are required to get the case ready for final hearing.

In order to make these determinations the Employment Judge may request information from either party.

3.5 Dismissing the claim

If the Employment Judge decides that all or part of the claim or response should be dismissed, the tribunal will send a notice to the parties. The notice will explain the reasons for the decision and order that the claim or response is dismissed on a specified date unless, before that date, the relevant party presents written representations explaining why the claim or response should not be dismissed.

If written representations are submitted, these will be considered by the Judge who will either permit the claim or response to proceed, or fix a hearing to determine whether the claim or response should be allowed to proceed. The party not making the written representations may, but is not obliged to, participate in that hearing. If the Judge considers that all or part of the claim or response should be allowed to proceed, case management directions will be given in order to prepare the case for final hearing.

If the response is dismissed, the case will proceed as if no response had been presented. This means that the Judge will decide whether they can properly determine all or part of the claim. If necessary the Judge will fix a hearing in order to determine the claim. The respondent will be given notice of the hearing but will only be entitled to participate in the hearing to the extent the Judge considers appropriate.
4 Preliminary hearings

4.1 Preliminary hearings

Preliminary hearings are usually held at the start of a claim to discuss, and determine, administrative and substantive preliminary issues and to set a timetable for the case. A preliminary hearing may be ordered by the tribunal either on its own initiative or as the result of an application by either party.

Preliminary hearings will generally be conducted by an Employment Judge sitting on his or her own. However, if notice has been given that any preliminary issues are to be, or may be, decided at the hearing, a party may make a written request that the hearing be conducted by a full tribunal (where the Judge is joined by two lay persons acting as ‘wing members’). Such an application must be made in writing as early as possible before the preliminary hearing and the Judge will then consider whether a full tribunal would be desirable.

The Judge has wide ranging powers to make orders regarding the conduct of proceedings which he considers appropriate, for example, setting dates for disclosure or exchange of witness statements. Also, either party may apply for a specific “order” at any time prior to the determination of the case, provided that they make the application “as early as possible”. The most common orders are for further and better particulars of the claim or response (so that the parties can understand fully the case against them), disclosure of relevant documentation, preparation of the tribunal bundle and exchange of witness statements. An appropriate order may also be necessary where a particular witness is unwilling to attend the tribunal hearing voluntarily.

If a party wishes to make an application for a particular issue to be dealt with at the preliminary hearing it should provide the tribunal with as much notice as possible, and the tribunal must give the parties at least 14 days’ notice of the preliminary issues to be considered at a preliminary hearing. If the preliminary hearing doesn’t involve the determination of any preliminary issues and will not consider whether all or part of the claim should be dismissed, it will be held in private.

4.2 Strike out of claims

The Employment Judge may give judgment on any preliminary issue of substance relating to the proceedings, which may result in the proceedings being struck out, dismissed “or otherwise determined”, resulting in no need for a further hearing. This can only be applied in certain circumstances, for example, where the claim/response has no reasonable prospect of success or where a party has conducted the proceedings unreasonably or vexatiously.

4.3 Expert witnesses

In more complex cases, the Employment Judge may have to consider the use of expert witnesses, for example to assist the
employment tribunal to determine whether the employee is disabled for the purposes of the Equality Act. Guidance which has been issued on the use of expert witnesses makes it clear that, where appropriate, the parties should use a joint expert (or at the very least, if one party is calling an expert, the other party should have an opportunity to agree to the terms of instruction of the expert) and where there are experts on both sides, the tribunal should give directions setting out a timetable for the experts to meet to attempt to agree or at least to define the issues in dispute.

4.4 Payment of a deposit

If, however, the matter has little prospect of success but remains arguable, the employment tribunal may issue a warning that an award of costs could be made if the claim/response is pursued to an unsuccessful outcome. To this end, the employment tribunal may consider it appropriate to require the claimant/respondent to pay a deposit to allow them to continue with their claim/response (up to a maximum of £1000 in relation to each argument or allegation).

4.5 Power to convert a preliminary hearing to a final hearing

The Employment Judge may direct that a preliminary hearing is to be treated as a final hearing if he or she is satisfied neither party will be substantially prejudiced by this change and the tribunal is properly constituted.

5 ACAS Conciliation prior to the hearing

5.1 General

After the ET1 has been filed, ACAS can continue to conciliate between the parties, notwithstanding that Early Conciliation previously failed. An official from ACAS is appointed as a conciliation officer to most employment tribunal claims. ACAS takes action to assist the parties to negotiate a settlement which is acceptable to both sides, where this is possible.

The ACAS conciliator will talk through the relevant issues with each of the parties and discuss the options open to them. They will attempt to help each of the parties understand how the other party views the case to discover whether the matter might be resolved without the need for a tribunal hearing. The conciliator will inform each side of any proposals the other has for a settlement. Discussions are “without prejudice” and therefore cannot be referred to in the tribunal proceedings.

If an oral agreement is reached between the parties, via ACAS, it will become binding (notwithstanding it is not in writing). However it is normal for the agreement to subsequently be recorded in a written agreement (known as a COT3), which is then signed by all the parties.
6  The hearing

6.1  Hearing fee

If conciliation is not successful then the claim will proceed to a full hearing and a hearing fee is payable by the claimant.

The amount of the fee once again depends on the type of claim as well as the number of claimants. A simple claim such as unlawful deduction of wages will attract a hearing fee of £230. More complex claims such as unfair dismissal and discrimination will attract a hearing fee of £950. In certain circumstance, the claimant may apply for a remission of the fee on the grounds of inability to pay.

6.2  Procedural aspects

The procedure at an employment tribunal hearing is very similar to that of the civil courts, although tribunals are less formal. For example, parties are seated throughout the hearing.

Tribunal hearings are usually conducted in modern rooms (sometimes even air conditioned!) with the tribunal Judge or panel sitting at a table on a slightly raised platform, the claimant and respondent sitting at tables facing them and a separate witness table from which the witnesses give evidence.

Before the hearing starts, the parties will each be directed to a different waiting room where the clerk will speak to them in turn and will collect copies of documents and statements on which the parties intend to rely. These documents will then be given to the tribunal panel.

Hearings are generally conducted in public and may be reported in the media, although either party can apply for the evidence to be presented in private where, for example, the evidence involves a trade secret or is confidential in nature.

6.3  Composition of tribunal panel

In employment tribunal hearings the Employment Judge (an experienced solicitor or barrister appointed by the Lord Chancellor, who is addressed as “Sir” or “Madam”) will usually hear the case on his or her own unless he or she directs otherwise.

If such a direction is given, the Judge will hear the case with two lay members. The lay members rank equally with the Judge, and bring with them practical knowledge and experience of employee relations. One lay member is appointed from an employer organisation (such as the CBI) and the other from an employee organisation (such as the TUC).
6.4 **Representation**

A party can choose not to be represented by a lawyer but instead conduct their own case or have other representation from a friend, trade union, CAB representative or similar person. It is estimated that three claimants out of every five have some form of representation, although respondents are more likely to be legally represented than claimants.

6.5 **Bundle of Documents**

The employment tribunal will expect an agreed bundle of documents. It should be single-sided and clearly paginated for ease of reference. All documents upon which the parties wish to rely should be included in the bundle. Although the duty to prepare the bundle falls on the claimant (unless otherwise directed by the tribunal), the respondent invariably has to assist and sometimes may take on the responsibility, for example where the claimant has no legal representation. The tribunal will not see the bundle until the day of the hearing.

Often hearings are listed to include (to the extent it is necessary) time for discussion about remedies so, if this is the case, a schedule of loss should be included in the bundle along with evidence relating to mitigation (or lack of it). A chronology is often helpful and a written skeleton argument is normally appreciated by the tribunal.

Original documents should be brought to the tribunal where clarity or authenticity is a possible issue. Typed copies of handwritten notes are sensible (though the original handwritten note should also be included in case the accuracy of the typed version is disputed).

Without prejudice correspondence and documents which are privileged (for example, because they were created in the course of legal proceedings) should be excluded (unless privilege is waived).

6.6 **Opening submissions**

Occasionally, the parties may be invited to briefly summarise their case before evidence is presented, particularly if the claim is complex. However, this is at the discretion of the Employment Judge.

6.7 **Evidence of witnesses**

(i) **Order in which evidence is given**

The party who has the burden of proof will normally begin the proceedings by giving their evidence through the witnesses. In unfair dismissal claims, for example, the burden will be on the respondent to establish that the dismissal was fair. In discrimination cases, the burden lies with the claimant unless a prima facie case for discrimination can be established in which case the burden passes to the respondent.
(ii) **Evidence in chief**

Witnesses are examined on oath or affirmation (depending on whether they opt to swear on a religious book or not). They give their evidence seated at a table. A written witness statement should always be prepared in advance.

Witness statements are “taken as read” (in other words the tribunal will read the statement themselves, rather than asking the witness to read it out, unless the tribunal directs otherwise). This is known as giving evidence in chief.

(iii) **Cross-examination**

Following evidence in chief, the witness is then open to “cross-examination” by the other side (or his representative, if he has one) and questions from the tribunal panel (normally asked after cross examination but occasionally, for clarification, during evidence). Searching questions, to test the evidence which has been given, the reliability of the witness and to deal with any omissions, should be expected during this process.

(iv) **Re-examination**

The representative for the witness will then be given the opportunity to ask a few final questions which may arise from cross-examination. This is usually to clarify certain points. This is known as re-examination.

(v) **Note of evidence taken by the Employment Judge**

The Employment Judge is required to keep a full note of the evidence given; this is normally done in longhand. The notes are important, not only to assist the employment tribunal in reaching its decision (especially if the hearing is adjourned part-heard, or the decision is reserved) but also for the basis of any appeal on the judgment given by the tribunal. It is therefore extremely important for witnesses to speak slowly and clearly when giving their evidence.

6.8 **Closing submissions**

The parties are given the opportunity to summarise their cases before a decision is taken by the employment tribunal. On occasion, the tribunal may request that written submissions are lodged. A written summary is usually helpful in any event. Copies of any case law referred to should be handed to the tribunal (three copies should be provided for the tribunal and one for the other side). Whoever starts the case (i.e. the party who has the burden of proof) ends the submissions.

7 **Tribunal Judgment**

After the submissions, the Employment Judge (and, if sitting, the lay members) retire and consider the evidence which has been presented to them. The Judge will often come back and give the judgment that day, together with oral reasons for the decision.
However, the Judge can reserve the decision instead, and may do so in long or very complex cases or if they are running out of time. Written reasons are only sent out automatically in the case of a reserved decision. In all other cases written reasons are not provided unless the parties request them at the hearing or within 14 days of the judgment being sent out.

Where a full tribunal panel is sitting it may reach a unanimous or majority decision. In the rare cases in which the tribunal panel is composed of only two members (for example, because of the illness of a member part-way through the proceedings), the Employment Judge has the casting vote. If there is a minority view on any point this is (or certainly should be) set out very carefully to avoid ambiguity and/or a possible appeal.

8 Reconsideration and appeals

8.1 Reconsideration

In limited circumstances where, for example, a new material fact emerges within 14 days of the judgment or there has been an administrative error, then the claimant/respondent may apply for a review.

Any application for a review must be made to the relevant tribunal office (stating the grounds) within 14 days of the judgment being sent to the parties (or within such further period as the Employment Judge considers is just and equitable in all the circumstances). It must identify the grounds of the application in accordance with the tribunal rules.

Reviews are normally undertaken by the Employment Judge or tribunal panel who made the original decision and decisions can be confirmed, varied or revoked following the review.

8.2 Appeals

The claimant or respondent may apply for reconsideration of any judgment of decision made by the tribunal where it is ‘in the interests of justice to do so’.

Any application for reconsideration must be made to the relevant tribunal office (stating why reconsideration is necessary) within 14 days of the judgment being sent to the parties (or within such further period as the Employment Judge considers is just and equitable in all the circumstances).

There are no specific grounds on which an application for reconsideration must be based. As long as the party has reasonable grounds to believe reconsideration is necessary an application may be made, although typically this would be in situations where there has been an administrative error, for example. Decisions can be confirmed, varied or revoked following the reconsideration.
If a party is applying for reconsideration after a final hearing then an application fee will be payable.

(i) General

Appeals can only proceed on a point of law. It is not possible to appeal on the basis that the tribunal misunderstood or misapplied the facts (unless it can be shown that the finding of fact was perverse or wholly unsupported by any evidence). Many disgruntled employers who lose their cases and vow to “appeal” are therefore often advised not to do so because their concern is more about the actual result rather than how it was reached.

An issue fee of £400 is payable when presenting an appeal to the Employment Appeals Tribunal (EAT) and a hearing fee of £1,200 is payable when the EAT directs that an appeal should proceed to an oral hearing.

(ii) Appeals to the Employment Appeals Tribunal (“EAT”)

An appeal from the decision of the employment tribunal is heard by the EAT. All appeals in the EAT will be heard by an Employment Judge sitting alone, unless the Judge directs otherwise. In such cases, lay members may be appointed who are generally very senior and well respected in their fields. The judicial members are High Court or Circuit Judges.

The person bringing the appeal is known as the “appellant” and the defending party is the “respondent”.

(iii) Time limits for appeals to the EAT

Appeals must be lodged within 42 days of the employment tribunal’s judgment. If the decision was relayed to the parties orally at the end of the hearing, “judgment” will be the date of the last day of the hearing. If the decision was reserved, judgment will be the day on which the decision is reached and sealed by the employment tribunal (which means that any delay in sending the decision to the parties on the part of the tribunal office will eat into the 42 day period).

There is a prescribed form which must be used (known as “Form 1”). This is available on the EAT’s website (www.justice.gov.uk/tribunal/employment-appeals). It should also be noted that the EAT office shuts at 4.00pm so any documents filed after this time are considered as being submitted the next working day.

(iv) Preliminary hearings to weed out weak cases

In order to weed out weak or spurious applications, the EAT reviews all notices of appeal. If they consider that there are no reasonable grounds for bringing an appeal or that the appeal is an abuse of process, the appeal is not registered and the EAT notifies the appellant. The appellant may either do nothing, submit a fresh appeal or request a preliminary hearing, known as a “Rule 3(10) hearing”. At this hearing, the onus is on the appellant to try and convince the EAT that there are reasonable grounds. The respondent to the appeal does not usually attend. Many appeals flounder at this preliminary stage. If the appeal survives the sift, a full hearing will then be listed.
(v) Possible decisions of the EAT

Prior to the full EAT hearing the parties need to agree a bundle of documents for use during the hearing and submit skeleton arguments.

It is possible for the EAT to reverse the employment tribunal’s position but more commonly they will remit it for a further, but differently constituted, employment tribunal hearing to the extent the matter is not settled in the interim period. Alternatively, they may of course uphold the original decision of the tribunal and dismiss the appeal.

(vi) Further appeals

In rare cases following an EAT hearing, the issues may be referred to the Court of Appeal and eventually perhaps even to the Supreme Court. Leave to appeal is needed in both cases. Where questions arise about the interpretation of European law, it is also possible for cases to be referred to the European Court of Justice.

If the case is appealed, it will be the employment tribunal’s original decision, and not the EAT’s decision, which is scrutinised. Again this puts a great emphasis on the parties preparing fully in the first place.

9 Costs and expenses

9.1 General

Unlike most civil courts (where legal costs are paid by the losing party) the general rule in an employment tribunal is that each side pays their own costs regardless of the outcome of the case. However, to aid the employment tribunal in managing the conduct of parties and their representatives, it may in certain circumstances make an award for costs to be paid. These include where a party:

- has acted vexatiously, abusively, disruptively or otherwise unreasonably during the proceedings;
- made any claim in the proceedings which had no reasonable prospect of success;
- has failed to comply with an order.

In practice costs orders will rarely be made when the claimant’s only fault is that the case “had no reasonable prospect of success” assuming he or she is (in such circumstances) acting in good faith. Equally, as financial means can be taken into account claimants with no or limited wealth are also unlikely to have a costs order made against them.

The amount of any order will depend on the circumstances of the case. The bulk of costs typically relate to legal fees.
There is no longer a limit of £20,000 on costs orders that can be made by an Employment Judge. Now, the Judge can carry out a detailed assessment of costs rather than having to refer the matter to a county court.

In 2012–13, the median costs award was approximately £1,842 and only about 651 such orders were made. Even where a costs order is made, it is usually far less than the actual fees incurred.

### 9.2 Preparation time orders

Even if a party has not been legally represented, they might still have incurred significant personal costs, including time spent in making or responding to a claim. The tribunal can therefore make a “preparation time” order, in which time spent on the case can be reimbursed at an hourly rate (currently £34 per hour, although this increases annually in April by £1), up to a maximum of £20,000. Preparation time cannot include time spent at any hearing.

### 9.3 Wasted costs orders

The tribunal has an additional power to make a “wasted costs” order against the legal representatives of one party if they have acted improperly, unreasonably or with negligence. However, these are, in practice, rarely made.
Practical considerations

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Practical considerations

1 Avoiding a claim

1.1 Introduction

Even before a claim is brought, there are various steps which can be taken to prevent disputes from arising which include:

- Ensuring that appropriate policies are distributed to all employees so it is clear what is expected in the employee/employer relationship. Such policies should not however normally be incorporated into the employee’s contract of employment as having policies with contractual effect is likely to be too inflexible for the employer.

- Ensuring that the procedures for dealing with discipline and grievance issues are clearly set out and followed properly.

- Training staff, which is vital and is the best way in which to prevent disputes from arising. Managers should be trained to ensure they are competent to deal with disciplinary and grievance procedures and are aware of (and follow!) the terms of any equal opportunities and anti-harassment policies.

- Using staff appraisals to deal with any performance issues or problems which may have arisen.

- Ensuring that detailed written personnel records are maintained on issues such as warnings, absences and performance issues.

- Taking early advice before a claim is made to ensure procedural flaws are avoided. Delay in getting such advice is often a false economy.

1.2 Settlement negotiations

Employers should consider making an attempt to resolve the dispute prior to the issue of proceedings. It is worth bearing in mind that even a simple case can take months to be resolved and the resultant cost in disruption and management time can be considerable. A case can also damage the morale and credibility of a business. However, that said, employers may consider that some cases are worth defending to signal their resolve to other employees.

The party making an offer of settlement should make it clear that it is being made on a “without prejudice and subject to contract” basis. Genuinely without prejudice correspondence cannot usually be brought to the attention of the tribunal panel at the hearing. However, offers will only be treated as such if there was a “dispute” between the parties at the time the offer was made. It is also worth emphasising that internal communications (unlike advice from a solicitor) are not privileged and many cases are lost on the back of prejudicial internal emails disclosed at the hearing.

It is worth bearing in mind that in circumstances where there is no genuine dispute, so the “without prejudice” badge does not apply, the employer may be able to use a “pre-termination
protected conversation”. In certain circumstances, an employer can make an offer to an employee or have a conversation with them about their departure from the company and the employee will not be able to refer to this in any unfair dismissal proceedings unless there has been improper behaviour. However, note that the employee can refer to the conversation if they have any other type of claim, so employers should be wary about relying on this.

Unless a claim has been made and ACAS is involved, it is advisable to record the terms of any settlement in a legally binding “settlement agreement” (in respect of which the employee or former employee will need to take independent advice). This is a formal agreement in which the claimant agrees to waive their employment claim, usually in exchange for a sum of money.

1.3 Early conciliation

Please see paragraph 2.1 of ‘The Tribunal Process’ for details.

ACAS Arbitration

ACAS offers an arbitration service which can be used by parties involved in a simple unfair dismissal claim or flexible working dispute. ACAS helps the parties to settle the dispute in an arbitration hearing, rather than at an employment tribunal hearing. Arbitration is usually more informal, quicker and therefore cheaper.

It is also confidential as discussions are conducted in private (unlike a hearing which is public). In order to participate in the arbitration scheme, both parties must agree and each must sign a waiver confirming that they no longer wish to pursue the claim in the employment tribunal. At the arbitration hearing, the arbitrator will listen to each party’s view and then reach a decision. Compensation, if any, is calculated in the same way as in the employment tribunal.

Judicial mediation

This relates to race, sex and disability discrimination claims where the parties are offered the opportunity of a mediation hearing conducted by a Judge prior to the employment tribunal hearing taking place. The mediation is held in private and the details of the discussions remain confidential (so the content of the discussions cannot be referred to in any subsequent employment tribunal hearing, should one be necessary). It is hoped that the mediation will allow the parties to reach a solution to their dispute and so avoid the need for a full tribunal hearing.

The main difference between mediation and arbitration is that a mediator does not decide who is right and who is wrong. Instead the mediator’s role is to facilitate discussions to help the parties reach an amicable solution. It is therefore often particularly useful where the employment relationship is ongoing.
‘Rapid resolution’

The government also announced in the Chancellor’s Autumn 2011 statement that it was considering a ‘rapid resolution’ scheme to provide quicker, cheaper determinations in low value, straightforward claims (such as holiday pay), which may be introduced as an alternative to the Tribunal system. No further details have been provided at this stage.

2 Prior to the hearing

The following points should be considered:

- First, you should check to see whether the other side’s claim (or response, if appropriate) is technically flawed, for example whether it is in time. If so, an application should be made to strike out the claim. These are preliminary issues and can best be dealt with at a Preliminary Hearing though a tribunal may sometimes have to be persuaded not to deal with this as a preliminary point at full hearing (however frustrating this is, given the consequences for case preparation).

- Consider requesting further and better particulars of any elements of the claim or response which are not clear. Alternatively, a request for further information can be made about issues relating to the case, for example, about the claimant’s efforts to mitigate his losses. An application to the tribunal for an appropriate order should be made if such particulars/information are not forthcoming.

- Request a schedule of loss (if this has not already been provided or ordered by the tribunal) and details of steps which have been taken by the claimant to mitigate his loss. Employers should also collate evidence of available jobs (which the claimant could have applied for) from the outset.

- Weigh up the merits of the claim, the likely cost of any award and the likely cost of pursuing and defending the claim. This helps you to plan your strategy going forward.

- Avoid any bullying tactics, false accusations, unreasonable claims or defamatory conduct. Any unreasonable behaviour invites a costs order being made against you.

- Ensure all or any possible witnesses have the hearing dates in their diary. It will be almost impossible to get a postponement once hearing dates are fixed. Usually, the opportunity to avoid certain dates for listing the full hearing comes as/after the ET3 is presented so forward planning is needed. The tribunal will expect witnesses to prioritise the hearing over other commitments.

- If a request to postpone the hearing has to be made, make this as early as possible to minimise disruption to the tribunal. Also, ensure that the application is supported by full documentary evidence (such as plane tickets showing that a witness is not able to attend). Postponements are only granted in exceptional cases.
Consider whether an attempt should be made to settle the claim, whether through ACAS during the Early Conciliation period or later, directly with the other party or their representative or through mediation. Any such offer should be made on a without prejudice basis.

It is advisable to prepare a case strategy based on the strengths of the case. For example, in an unfair dismissal case employers may decide to admit a claim, but then to focus efforts into establishing mitigating circumstances (for example, employee contributory fault), a failure to mitigate, or that a fair procedure would have been a waste of time. The tribunal may then reprimand the employer by making a judgment against them but decide to award little or even no compensation.

Evidence should be gathered to show the background to the case and to prove what happened. Examples of such evidence will include documents such as employment contracts, policies, training records of managers/supervisors, staff handbooks, contemporaneous notes of relevant meetings and statements from witnesses.

The parties should try to agree a bundle of documents which includes those to be relied on by both sides (and the tribunal may make an order to this effect). If there is an “agreed” bundle this means that the authenticity of the documents is not disputed, but not that their relevance or accuracy is necessarily conceded. The bundle should be paginated and indexed.

Research into relevant case law is often essential in order to generate and strengthen legal arguments. Copies of the main cases relied upon should be made available to the tribunal panel and the other side.

3 During the hearing

Witnesses should be encouraged to keep calm, give a considered response to questions, direct their evidence to the tribunal panel and to not speak too quickly so that the Employment Judge can make a note of the evidence which is being given. In general, “less is more” (particularly on cross-examination) to avoid unintended “mistakes”, but equally witnesses should avoid giving simple yes or no answers when an explanation would assist the Tribunal.

Wherever necessary, the tribunal should be referred to relevant documents in the bundle and given adequate time to read them.

It is often helpful to prepare a chronology of events and statement of issues to assist the tribunal. If possible, this should be agreed with the other side.

Aggravating the tribunal or the other side (for example, overrunning on allocated time, badgering a witness or interrupting without good cause) is of course unhelpful!
4 Dealing with litigants in person

Tribunals go to considerable lengths to ensure that unrepresented parties are not prejudiced by their lack of representation. For example, the Employment Judge may explain the tribunal procedure, the relevant law and assist them in the presentation of their case in a way which they will not do for represented parties (even where they are represented by a non-lawyer).

When dealing with unrepresented parties, you should bear in mind the lengths to which tribunals will go to assist and adjust your conduct accordingly. For example, aggressive questions are discouraged and the extent to which further and better particulars can be requested from unrepresented parties may be less extensive in scope than for a party who is represented by a lawyer.

Legal aid is not available for employment tribunal claims (except in Scotland), but it is available for EAT appeals. Organisations such as the Citizen’s Advice Bureau, Free Representation Unit and the Bar Pro Bono Unit can assist parties in the absence of legal aid by providing free advice and representation in tribunal cases.

The remedy available to a successful claimant will clearly depend on the type of claim which has been brought.

5 Introduction to remedies

The remedy for certain simple claims (such as unlawful deductions of wages claim) will be obvious in most cases. Compensation for other claims, such as a statutory redundancy payment, is calculated in accordance with a statutory formula, having regard to the employee’s age, length of service and weekly pay (subject to any statutory maximum – currently £464 per week, although this amount increases from April each year).

The rules relating to some other claims specify the amount of the award (for example 90 days’ pay in the case of a failure to consult on a collective basis during a redundancy situation), although usually the employment tribunal has the power to substitute a lesser award if it considers that it is just and equitable. Remedies of this nature are known as “protective awards”.

6 Unfair dismissal

In unfair dismissal cases, the employment tribunal will consider whether reinstatement or re-engagement is appropriate, although it rarely is in practice. More commonly, employees will be awarded compensation comprising two elements, namely a “basic” and “compensatory” award.
Basic award

The basic award is calculated in a very similar way to a statutory redundancy payment, with the maximum award currently standing at £13,920 (although this increases slightly every year from April). It is not awarded where, following a dismissal by way of redundancy, a redundancy payment has already been made in full.

Compensatory award

The compensatory award is determined by the employment tribunal on “just and equitable” grounds and is designed to compensate the employee for immediate and likely future loss (including the loss of any benefits, such as pension) as well as giving a more nominal amount for loss of statutory rights (because the employee will have to work another year before having the right not to be unfairly dismissed again), normally £300.

In certain circumstances, the compensation which would otherwise be awarded is reduced by the employment tribunal where, for example, the employee has contributed to his dismissal by virtue of his conduct (more commonly known as “contributory fault”) or where the employee has failed to mitigate his loss by making reasonable efforts to find alternative employment. However, the barriers to showing contributory fault or failure to mitigate are high for the employer and careful preparation is needed if these arguments are to be run successfully.

The current maximum compensatory award is £76,574 (again increasing from April each year) but will be greater if a reinstatement or re-engagement order is made and ignored.

7 Discrimination

Unlike unfair dismissal, compensation for discrimination claims is potentially unlimited. The principal element of the awards is calculated by reference to the financial loss suffered and likely to be suffered by the claimant, in the same way as a compensatory award under the unfair dismissal regime. However, there is no statutory cap on the amount of compensation that can be awarded.

Additionally, the claimant will also be eligible for compensation for injury to feelings caused by the fact that he has been discriminated against. This is assessed as follows:

(i) £750 to £6,000 for isolated or one-off incidents or low level discrimination or harassment;

(ii) £6,000 to £18,000 for more severe cases or acts extending over a longer period of time, and

(iii) £18,000 to £30,000 for the most serious cases, for example where there has been a sustained campaign of deliberate discrimination or harassment.
Further “aggravated damages” may be awarded where the respondent’s behaviour has been malicious or insulting (perhaps where the employer has failed to investigate complaints of discrimination) and an award to compensate for personal injury (for example, psychiatric harm) can also be made.

8 Increases to or reductions in awards

Tribunals are also empowered to increase or decrease compensation in a wide range of claims where the employer or the employee, respectively, has unreasonably failed to comply with their obligations under the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Tribunal will only make an increase or decrease in the compensation if it is just and equitable for it to do so. The increase or decrease can be of up to 25% of the overall award.

9 Penalties for employers who lose at tribunal

The government has introduced financial penalties for employers who are found to have breached employment rights (payable to the Exchequer) but Judges have discretion as to whether to use this power, so that employers are not penalised for inadvertent errors. The amount of such penalties is half of the total award made by the Tribunal, subject to a minimum of £100 and a maximum of £5000 (although this will be reduced by 50% if paid within 21 days).

10 Remedies hearings

Compensation is normally determined by the employment tribunal in a remedies hearing, during which both parties will be given the opportunity to comment on the proposals for compensation and justifications put forward for any reduction or uplift. Often, remedies hearings follow on immediately after the merits hearing and judgment by the employment tribunal. It is therefore vital for all parties to be prepared to make submissions on remedy. Claimants must have a schedule of loss and evidence of mitigation to hand whilst respondents should ensure they have asked the claimant to provide details of approaches to recruitment agencies, prospective employers and the like and have carefully investigated the response.

On occasions, it may be necessary to call an expert (such as a recruitment consultant engaged in a particular field) to give evidence on the future loss which is likely to be suffered by the claimant together with the likelihood that such loss could be mitigated. Again, this requires forward planning.