

**Berg Kaprow Lewis**

Employment tribunals

Although some employees and employers can now choose to follow an alternative dispute resolution procedure, most employee complaints are still heard at an employment tribunal. You need to take tribunals seriously. If you have well-thought-out procedures, and follow them, you can prepare good evidence, making it easy to defend your actions.

The interpretation of employment law is moving in favour of the employee, and awards are increasing, so it is important to understand the system and the way tribunals operate.

This briefing covers:

- The tribunal process, from start to finish.
- How to defend a case.
- How to prevent disputes arising.

1 The tribunal process

Employment tribunal hearings usually take place before a legally qualified chairman and two lay members, one nominated by an employers' organisation and the other from a union or employees' body.

Decisions can be made by majority vote, though most are unanimous.

1.1 The employment tribunal process is **impartial**, but, in an unfair dismissal claim, it does generally start by assuming that there is a case for the employer to answer.

- Tribunals try to be guided by what is reasonable. They will take into account prevailing standards and practices in your industry and recognise that special

difficulties can arise in smaller firms.

- Awards made by the tribunal are aimed at compensating the employee, not punishing the employer.

1.2 The starting point for tribunal decisions is **statute law**.

- Employers must have followed disciplinary and grievance procedures which comply with the new statutory minimum.
- The Acas Code of Practice also provides valuable guidelines, particularly in unfair dismissal cases.

1.3 The **process begins** when the applicant submits a form (ET1) to a regional tribunal office (www.employmenttribunals.gov.uk/claim_form_et1.asp). In it they explain the basis of their complaint and state whether

Directors' Briefing

a book in four pages

More than 160 briefings are
now available.

If you need further information or help,
ask the distributor of this briefing
about the services available to you.

statutory workplace dispute resolution procedures have been followed.

- You will be sent a copy and must respond (on form ET3) within 28 days of the date the form was sent out, or risk losing your right to contest the case (www.employmenttribunals.gov.uk/claim_form_et3.asp).
- What you say in your response is the case you will be putting to the tribunal, so give a considered reply.
- If you have a good reason, you can ask for an extension beyond the 28-day period.

1.4 When you are sent the **date** for the hearing, perhaps as little as 14 days ahead, you must reply within 14 days if you want it changed.

Preventing disputes

- A Procedures** can be the key to success, as long as you stick to them. The law requires you to comply with minimum workplace dispute resolution standards (see **Discipline and grievance issues**).
- B A company handbook**, distributed to everyone, lets employees know where they, and you, stand.
- C** Apart from careful recruitment, **training** is the best form of dispute prevention.
- D Performance appraisals** can help you nip problems in the bud (see **Performance appraisals**).
- E** Keep proper **personnel records**, covering absences, lateness, performance problems, and all warnings, spoken or written.
- F** To prevent problems, it helps to know what the most **common allegations** are.
- The most common are unfair dismissal claims, often based on allegations that there was no valid reason for dismissal, that procedures were not followed, or that 'natural justice' was not applied.
 - Cases involving redundancy usually revolve around unfair selection or failure to consult with employees.
 - Discrimination — on the basis of disability, sex, age, sexual orientation, race, religion or belief — generates growing numbers of claims (see **Discrimination**).

- If a date is just impossible for you, tell the tribunal, giving good reasons. (If you will be abroad, send a copy of your air ticket.)
- When you reply, tell the tribunal if you think the case is likely to be complicated.

1.5 A conciliator from **Acas** will automatically be assigned to the case, as Acas has a statutory duty to offer conciliation.

- Acas tries impartially — and often successfully — to help parties settle out of court. Well over half of all claims are settled or withdrawn before the hearing.

2 Before the hearing

When an application is made against you, it is the preparation you do before the hearing that is most likely to determine the outcome.

2.1 Check first to see whether the application is **technically flawed**.

- For example, in unfair dismissal cases, the applicant must have a year's service, except where discrimination or inadmissible reasons are involved (see **Dismissing employees**).
- The claim must be made within three months of the date of termination — except where the applicant thinks the matter is being dealt with internally, or in rare cases, at the tribunal's discretion.

If the claim is invalid on technical grounds, write to the tribunal. Ask for a preliminary hearing to get the claim thrown out.

2.2 Investigate the issue again, to make sure of your ground before getting into a fight.

- The manager responsible may have been misleading you.

2.3 Resolve the claim amicably, or settle (see **6**), if it arose from a genuine misunderstanding.

- For example, explain the reasons why an expected promotion was not given.

2.4 If you think the claim is almost certain to fail, request a **pre-hearing review**.

- The tribunal will look at relevant documents (but not hear witnesses).

2.5 If you go ahead to a hearing, be clear about the **costs** and **benefits** of fighting the case.

► Employment law is complex and is changing rapidly. This briefing reflects our understanding of the basic legal position as known at the last update. Obtain legal advice on your own specific circumstances and check whether any relevant rules have changed.

“A change in the last two or three years is the use of witness statements, which are handed over in advance. In the past, you prepared 'proofs of evidence', but these were not handed over to the other side. You've got to get everything right first time.”

**Christine O'Brien,
Baker
& McKenzie
solicitors**

- Even a fairly straightforward case can drag on for months.
- The cost in disruption and management time can be considerable. A case can also damage the credibility of your business.
- Some cases are worth defending to signal your resolve to other employees.

2.6 Prepare a realistic **case strategy**, based on your strengths.

2.7 Prepare **evidence** to show the background to the case and to prove what happened.

- General evidence provides the background — contracts of employment, employee handbooks and your HR policy statements.
- Specific evidence relates to the case itself.

2.8 As part of your preparation for the hearing, you can seek further **particulars** of the claim from the other side.

For example, are there any further allegations that will be made against you?

- If you need more information, ask for it. If it is not handed over, write to the tribunal to make your request, compelling the applicant to give you the information.
- You must respond reasonably to requests for information from the other side. If you are on the receiving end of a request that you think is silly or goes too far, ask the tribunal to vary it.

Your legal costs

Compared with going to court, the legal costs of going to tribunal are low. Depending on the case and your experience in these matters, you may not even require a solicitor.

A Each side generally pays its **own legal costs**, regardless of who wins the case.

- A party warned at a pre-hearing review that the claim had little prospect of success might have to contribute to the other side's legal costs.
- If either party (or its representatives) behaves abusively, disruptively or unreasonably during the case, it can be ordered to pay costs of up to £10,000.

B A straightforward **unfair dismissal** claim might cost £1,500 to £2,000 to defend.

C A **discrimination case**, which by its nature is complex and uncertain, could cost £15,000.

2.9 You will usually need to **exchange documents** in advance of the hearing.

- You must prepare witness statements beforehand (see **3**) and agree a 'bundle' of relevant papers with the other side.
- Witness statements and the bundle (good photocopies, with the pages numbered) must be handed over. You will need at least six copies, one each for the three members of the tribunal, both parties and the witness.

3 The hearing

Employment tribunal hearings are less formal than the courts. The running order is not necessarily fixed and belligerent questioning will be stopped. But the hearing will still be purposeful, with an emphasis on clarity, evidence and the merits of the case.

3.1 The **hearing** is public and open to the press.

- The employer generally goes first in an unfair dismissal case and the applicant goes first in a discrimination case.
- If you do not turn up, the case is likely to go against you. If ill, send a medical certificate and ask for an adjournment.

3.2 Tribunals have their own **rules**, quite different from those in the courts.

- Evidence is assessed on the balance of probabilities. You do not have to prove anything 'beyond reasonable doubt'.

3.3 When it comes to the main evidence in the hearing, tribunals prefer **witnesses**, who can be questioned under oath, to written statements on their own.

The tribunal will itself generally question witnesses, in an informal manner.

- Do not have too many witnesses. Use your witness statements to establish straightforward facts.
- Provide witnesses to the main events.
- If you are cross-examined, remain cool, factual and polite.
- Bring in a senior company representative to explain your employment policies.
- Expert witnesses are rare in tribunals. Use one if the case turns on a technical point.
- In general, avoid character witnesses.
- Witness orders can be used by either side to compel witnesses to attend.

“You are on show all the time. Even when you are not giving evidence, the tribunal may be watching and drawing its own conclusions from your attitude and demeanour.”

David Hewitt,
Citation

“One of the biggest traps for employers is to rush a disciplinary or dismissal procedure because it is so unpleasant. Careful thought and planning are essential if any tribunal claim is to be successfully defended.”

Paul Lambdin,
Stevens & Bolton
solicitors

3.4 The two sides usually pay their own **costs** (see box, page 3).

- Applicants cannot obtain legal aid, except to help in preparing a claim.
- If the applicant belongs to a trade union, it may advise and represent him or her.

4 The decision

4.1 The **decision** will usually be announced at the end of the case or a few days later. In some complex cases, however, the delay can stretch into weeks or even months.

4.2 Both sides are sent a **written decision**, with the reasons for it in summary or full form.

- Ask for full reasons if an appeal is possible.

4.3 If you do not like the tribunal's decision, you can ask it to **review** the case. This must be done within 14 days of the decision.

4.4 You may want to **appeal** to an Employment Appeal Tribunal.

- Appeals must be made within six weeks and be based on a point of law. Few succeed.

5 Awards

5.1 For **unfair dismissal**, the amount is made up of two elements.

- A basic award, calculated on a fixed formula, taking into account age and service. This award is capped at £9,300.
- A compensatory award based on the loss of past and future earnings and how unfair the dismissal was.
Compensatory awards are capped at £60,600 — although they can be higher in certain cases (eg whistleblowing or health and safety claims).

In rare cases, the tribunal may insist that an employee is reinstated.

5.2 Breach of contract awards in tribunals are capped at £25,000.

- Alternatively, an applicant can make an unlimited claim in the ordinary courts.

Typically, this might happen if a director claims substantial compensation under the terms of an employment contract.

5.3 Discrimination case awards are unlimited.

- As well as loss of earnings, applicants can claim damages for injury to feelings.

6 Agreed settlements

Reaching a settlement, without waiting for the tribunal, may well be in your best interests.

In discrimination cases, where awards can be large and hard to predict, an agreed settlement removes the risk of a shock result.

6.1 A **settlement** may include a cash sum and other negotiable elements.

- The settlement usually involves money and a reference, with agreed wording, if the employee has been dismissed. This reference is a key bargaining counter. No-one can usually oblige you to give a reference that does anything more than confirm the dates of employment, and the employee may need more than that.
- A confidentiality clause may be a valuable part of the deal — something you cannot get from a tribunal, even by winning. Realistically, though, details of the settlement may still leak out. Bear in mind the impact of this on other employees.

6.2 There are two main **routes** to reaching a settlement.

- Conciliation through Acas can frequently lead to a legally binding agreement, known as a COT3 settlement.
- You can use a 'compromise agreement', under which the employee receives independent legal advice and can then waive his or her statutory employment rights, in return for an agreed settlement. These agreements are legally binding and can be drawn up before or after a claim has been brought. The employer usually pays the employee's legal costs.

7 Getting help

7.1 Acas, besides conciliating in specific cases, provides publications and training courses.

7.2 You may need **legal advice**, from either a solicitor or a specialist consultant.

7.3 Consider using **employment consultants** who can help you get workable records and procedures set up, and train your managers.

Expert contributors

Thanks to **Alexandra Davidson** (Berwin Leighton Paisner solicitors, 020 7760 1000); **Richard Pettinger** (University College London, 020 7209 6245); **Penny Christie** (Bird & Bird solicitors, 020 7415 6000); **Kelvin Cheatle** (Broadmoor Hospital Authority, 01344 754012); **Tim Russell** (Employment Law Consultant and part time Employment Tribunal Chair, 07767 646 656).

Further help

There are other Directors' Briefing titles that can help you. These briefings are referred to in the text by name, such as **Dismissing employees**.

© BHP Information Solutions Ltd 2007. ISSN 1369-1996. All rights reserved. No part of this publication may be reproduced or transmitted without the written permission of the publisher. This publication is for general guidance only. The publisher, expert contributors and distributor disclaim all liability for any errors or omissions. Consult your local business support organisation or your professional adviser for help and advice.