Kerseys' guide to defending an Employment Tribunal claim

1. Early conciliation

Before an individual can bring a claim in an Employment Tribunal they must first of all instigate the ACAS Early Conciliation process. This process is designed to encourage the parties to reach a settlement before a claim is issued and it lasts for a period of one month, although the parties can agree to extend it by up to a further 14 days if they wish. However, neither party is required to actively engage in the process once it has been instigated and, as such, either one of them may end the process early.

When the ACAS Early Conciliation process finishes, ACAS will send an Early Conciliation Certificate to the employee, which allows them to go ahead and issue an Employment Tribunal claim, if that is what they decide to do.

2. Responding to a claim

As and when an Employment Tribunal receives a claim it will send out a copy of it to each of the parties against whom the claim is brought, known as the Respondents. It will also send (a) a prescribed response form (called an ET3), (b) details of whether any part of the claim was rejected and (c) information on how the Respondent can respond to the claim.

Of course, a Respondent may not wish to contest the claim. If this is the case it can either admit that it is liable or just not respond to the claim at all. In each of these situations the Employment Tribunal will enter a judgment against the Respondent. If a party is planning on taking either of these courses of action it should seriously consider taking legal advice before doing so because the Respondent will not be able to 'undo' the admission or judgment at a later date.

In the vast majority of cases, it is likely that a Respondent will want to defend the claim against it. If it does, it should respond to the claim by sending a completed ET3 form by post to the employment tribunal office dealing with the claim or electronically using the online ET3 form, which can be found at https://formfinder.hmctsformfinder.justice.gov.uk/et003-eng.pdf. Either way, the Respondent must send the ET3 so that it is received by the Employment Tribunal within 28 days of the date on which the Employment Tribunal sent out the claim to that party. When t calculating this date, the Respondent can ignore the date the Employment Tribunal sent the claim out to it and start from the following day. For example, if the Employment Tribunal sent the claim to the Respondent on 1 November 2016, it can start counting from 2 November 2016, which means it would have up to the end of 29 November 2016.

If the Respondent is unable, for whatever reason, to send its completed ET3 form in time, it can apply in writing to the Employment Tribunal for an extension of time. The Employment Tribunal will then decide whether or not it should exercise its discretion to extend the time limit.

The Respondent should complete all the boxes in the ET3 form in full and also set out the basis on which it resists the claim(s) made by the Claimant. This will generally involve the Respondent telling its side of the story and dealing with each of the points raised by the Claimant. It is crucial that the Respondent gets this right because this is the basis upon which its defence of the claim will either stand or fall.

When responding to the claim, the Respondent may wish, at the same time, to put in a counterclaim, known as an "Employer's Contract Claim". It can only make such a counterclaim if the Claimant has brought a breach of contract claim and, only then, if the Claimant has breached their contract of employment in some way.

3. Case management

Once the Employment Tribunal accepts the response it will send a copy to the Claimant and then consider how it is going to manage the case. In the simplest of cases it will just send a letter out to the parties, which includes the "Case Management Orders". These orders set out the steps that need to be taken and the date by which they need to be done.

In more complex cases, the Employment Tribunal will schedule a "Preliminary Hearing" at which it will consider what case management orders are needed. At such a hearing, the Employment Tribunal may also look to (a) clarify parts of the claim, (b) decide whether all or any part or a claim or response should be struck out, (c) look at whether a party should be made to pay a deposit before they are allowed to continue with the case and (d) explore the possibility of settlement of the case and/or whether the parties agree to participate in judicial mediation.

Prior to holding a Preliminary Hearing, an Employment Tribunal will usually send out a "Case Management Agenda" to all of the parties so that they can complete it and return it to the Employment Tribunal before the hearing.

4. Disclosure and inspection

Each party is under a duty to "disclose" all and any documents which are, or have been, in their control, which:

- they rely on in support of their case;
- adversely affect their case; and
- support another party's case.

They must also disclose any documents that they are specifically ordered to disclose.

Each party is under a duty to make a reasonable search for any documents. Further, the duty to disclose is a continuing duty and it extends to the end of the case. As such, if a party obtains a new document or some sort, it is under a duty to disclose it if it is relevant to the issues in the case.

The timetable for disclosure and inspection is usually set out in the case management orders.

The parties undertake disclosure by listing all of the relevant documents in their control and sending their list to the other side. The other side then has a right to "inspect" any documents on the other side's list. In practice, this is done by a party requesting a copy of a document from the other side's list and then the other party sending them a copy of that document. That said, a party still has the right to personally inspect an original document if they so wish. This, however, is very rare in practice.

5. Preparation of the hearing bundle

Following completion of the disclosure and inspection process, the parties will need to work towards agreeing and preparing a bundle of documents to be used at the hearing. This will usually be covered by a case management order and normally involves the parties agreeing which documents they wish to have included in the bundle.

It will then be for one of the parties, normally the Respondent, to prepare the copies of the bundle. It does this by:

(a) placing all of the documents in the following order:

- the pleadings (ET1 claim form, ET3 response, any further and better particulars, questions and replies);
- tribunal case management orders and judgments;
- any general documents such as policies and procedures; and
- any other relevant documents in chronological order.

(b) paginating the bundle of documents; and

(c) producing an index for it.

After it has done this, it will send one copy of the indexed and paginated bundle to the other party(ies) and then take 5 further copies along to the hearing.

6. Witness statements

Preparation and exchange of witness statements

A witness statement is a written document in which a person who is going to give evidence at a hearing sets out all of their evidence. This is the document in which the witness tells their story and explains their involvement in the case.

The parties should prepare a witness statement for each witness that they wish to call to give evidence on their behalf. The Employment Tribunal may not allow a witness to give evidence at a hearing if they have not prepared a witness statement beforehand.

The Employment Tribunal will normally set out in the case management orders what it wants the parties to do in respect of witness statements. The Employment Tribunal will usually order the parties to prepare a witness statement for each of their witnesses and then "exchange" them with the other side on or before a certain date. More often than not the parties agree a date and time between themselves when they will each send their witness statements to the other side. If the Employment Tribunal does not expressly set out what it wants the parties to do, then they should still go ahead and prepare and exchange witness statements ahead of any hearing where they want a witness to give evidence on their behalf.

The format and content of a witness statement

The witness statement itself should have a heading at the top that includes the case number and the names of the parties. It should then set out the witness's evidence in short numbered paragraphs. A pro-forma witness statement can be found on Employment page of the Kerseys website.

Witnesses should try to set out their evidence in chronological order, although this may not always be possible or sensible. Witnesses should try to avoid including anything which they have not seen or heard

first hand. However, an Employment Tribunal will usually allow "hearsay evidence" unless it would not be appropriate to do so.

If a witness wishes to refer to a document that is included in the hearing bundle, they should cross-reference it in their witness statement. They should explain what the document is and then include the page number(s) of the bundle in brackets. For example, "*On 23 July I wrote a letter to the Claimant setting out the reasons why I considered that she had failed to pass her probationary period (at pages 21 to 24).*"

Witness orders

If a party wants to force a witness to attend a hearing to give evidence, it can, if necessary, make an application to the Employment Tribunal for a witness order. Before a party does this, it will need to contact the individual and ask them to be a witness. If the individual either refuses to attend the hearing, or just does not respond, the party can then go ahead and make its application. The party will usually need to explain to the Employment Tribunal why the witness is needed and what evidence it thinks they will be able to give.

Expert witnesses

A party may wish to call an expert witness to give evidence on its behalf. If it does, then this should be discussed at a preliminary hearing and it should be included in the case management orders. This is because an Employment Tribunal is not obliged to hear expert evidence if it does not think that it is appropriate to do so. If the Employment Tribunal agrees to hear expert evidence, it will normally set out whether or not there should be a joint expert, who should pay for the cost of the expert and how the expert is going to be instructed.

Copies of the witness statement to be brought to the hearing

The case management orders will normally state how many copies of their witness statements each party should bring to the hearing. This will usually be six, although it will only be four if the case is to be heard by a judge sitting alone. Additionally, if, as is normally the case, (a) the hearing is held in public and (b) the witness statements alone will stand as the witnesses' evidence (i.e. the witness will not be required to read it out), then each party should bring at least one further copy of their witness statements along to the hearing and make them available to the members of the public attending the hearing.

7. The final hearing

Layout of the tribunal building and the hearing room

The hearing will take place at one of a number of hearing centres across the UK. The hearing centres are all different but they will normally have one or more hearing rooms, at least one Claimants' waiting room and one or more Respondents' waiting rooms.

When they arrive, the parties, their witnesses and their representatives will normally need to make themselves known to reception before going and waiting in the appropriate waiting room.

The layout of a hearing room can vary but generally there will be a slightly raised platform at one end of the room with a long table on it. This is where the three members of the tribunal (or just the Employment Judge if they are sitting alone) sit facing into the room. There are then likely to be two tables (often pushed together) facing the platform at which the parties and/or their representatives sit. It is usual for the Respondent to sit on the left side and the Claimant to sit on the right side as the parties face the front. There is normally a further table, which is usually either between the parties' tables facing the platform or

to the side of the room between the parties' tables and the platform. This is where each witness sits when giving their evidence and being questioned on it. More often than not, there are also rows of chairs behind the tables where the parties are sitting. These are for witnesses and for general members of the public who have come in to watch the hearing.

Composition of the employment tribunal

Tribunal cases are usually heard by an Employment Judge and two lay members: one from the employers' panel (often a manager, a director or an HR professional) and one from the workers' panel (often a current or former union representative).

In certain specified types of case (typically more straightforward cases or cases where the parties have consented in writing), an Employment Judge may sit alone.

The parties should address the members of the Employment Tribunal as "sir" or "madam" as appropriate.

The procedure at the hearing

The Employment Tribunal has a very wide discretion as to how it conducts hearings. However, most hearings will start with introductions followed by a short period during which the Employment Tribunal will look to clarify a few preliminary issues. At this stage, the Employment Tribunal may also discuss the order in which it will deal with matters.

The next stage will be for the parties to present their evidence. Nowadays it is rare for a witness to have to read out their statement. Instead, the Employment Tribunal will adjourn after the initial discussions and go away and read all of the witness statements. Once it has read all of the witness statements, it will reconvene the hearing. Then, each witness in turn will be asked to sit at the witness table and either swear or affirm that they will tell the truth. They will then be cross-examined, which is where the other side asks the witness a series of questions, which may be leading but must be relevant to the issues in the case. It is usual for the party that has the initial burden of proof to present its evidence first. So, for example in most constructive dismissal, breach of contract and discrimination cases, this will be the Claimant. In most unfair dismissal cases where the respondent has accepted that it dismissed the Claimant, the Respondent will go first. Witnesses are not usually made to wait outside the room until they have given their evidence. As such, witnesses going later will usually have heard a large bulk of the evidence before they are required to give their evidence.

The Employment Judge and tribunal lay members (if there are any) may ask the witness questions at any stage, although they typically wait until the end of cross-examination before they do this.

Next, a party, or its representative can "re-examine" one of their own witnesses. This is where they ask the witness further relevant questions in an attempt to clarify a point or patch-up a hole in their evidence. The questioner is not allowed to use leading questions and they can only ask questions about areas which have been touched on during cross-examination.

Once all the evidence has been given and the cross-examination completed, the parties will each have an opportunity to sum-up their case and make submissions on the legal points of it. It is common for parties to prepare legal submissions or an outline argument, known as a skeleton argument, and give this to the Employment Tribunal and the other side before making their submissions. They can then work through it as part of their submissions.

Once all the parties have made their closing submissions, the Employment Tribunal will adjourn to go and make its decision. If there is time, the Employment Tribunal will reconvene the hearing and give its judgment there and then. If not, then it will reserve its judgment and send it to the parties in writing at a

later date.

8. Reconsideration and appeal

If a party is dissatisfied with a judgment, it may ask the Employment Tribunal to reconsider its judgment. If a party is going to take this route, it must make its written application within 14 days of the date the Employment Tribunal sent out the written judgment or written reasons for its decision.

A party can also appeal against a decision to the Employment Appeal Tribunal. It can do this in certain circumstances, for example if the Employment Tribunal (a) got the law wrong, (b) did not apply the correct law, (c) did not follow the correct procedure, (d) had no evidence to support its decision and/or (e) it was unfairly biased towards the other party. Any party wishing to do this, should do so within 42 days of date the decision (or the written reasons if they were not given at the hearing or the party asked for them within 14 days of the date the decision) is sent to them.