

Preliminary Matters

Except for very limited circumstances, prior to submitting the claim form to the Tribunal, a Claimant will have to follow the Early Conciliation (EC) process. This process involves ACAS speaking with the parties so that the option of settling the dispute at an early stage can be explored. EC lasts for 6 weeks and there is no right of extension.

However, if the parties agree, EC can be ended before the 6 weeks' period has expired. In the event no settlement is reached during EC, ACAS issues the Claimant with a certificate which must be referenced in the tribunal claim form.

EC can last for four weeks, however should the ACAS advisor believe that settlement is likely to occur then this can be extended for a further two weeks. Other than in very limited circumstances all prospective Claimants should have to comply with the EC process prior to bringing a claim in the Employment Tribunal.

On receipt of a claim form (ET1) the Respondent has 28 days to file its defence (ET3). There are limited circumstances in which a Respondent can ask for the time limit to be extended, but it is always recommended that the ET3 is sent to the Tribunal within the 28 days.

If the ET3 is not submitted in time, it is very unlikely that the Respondent will be able to defend the claim and ultimately Judgment can be entered for part or all of the claim in full.

Preparing the Defence (ET3)

In order to properly draft the ET3, it is important that I am advised of all the relevant circumstances surrounding the case and that I am passed all relevant documentation. Simply denying a Claimant's claims is not advisable. The ET3 should set out the Respondent's version of events and provide an explanation for any facts or circumstances that the Claimant has relied on as supporting his/her case in the ET1. S

Sufficient details should be given to show how the Respondent views the facts and matters that led to the decision to dismiss or for the act(s) or omission(s) complained of. For example, a history of warnings or a number of disciplinary meetings, details should be provided here so that the Claimant knows the case on which the Respondent intends to rely. If there is insufficient information to prepare a response the Respondent can apply for an order that the Claimant provide additional information.

One golden rule is to ensure that any explanations are consistent with contemporaneous documents (which will have to be disclosed – please see below).

Once the Tribunal has accepted your ET3, it will send a copy to the Claimant.

Preparatory Steps for the Hearing

Directions

Once the Tribunal has accepted the ET3, an employment Judge will then review both the ET1 and the ET3 and either send both parties a written “order for directions”, setting out a timetable of things to be done to prepare the case for full hearing, or set a date for a “case management discussion” (CMD) to take place, either by telephone or at the Tribunal itself, to decide the appropriate directions after hearing from the parties’ representatives.

A range of non-employment judges (for example, High Court, district or circuit judges) will now be able to sit as employment judges (i.e. adjudicate employment claims), provided certain conditions are met. “Legal Officers” (to be appointed by the Lord Chancellor) now have powers - to make certain directions currently reserved for Employment Judges. These may include, for example, directions:

- to extend time for filing a response to a claim, or for complying with a case management order;
- as to whether a claim form has a substantive defect;
- to accept an agreed amendment to a claim or response;
- to dismiss a claim following withdrawal; and/or
- to adjourn hearings where both parties agree to the adjournment (the application is made more than seven days before the date of the hearing)

In most cases, the order for directions will set a timetable for the parties to do the following:

- Prepare and exchange with the other party a list and copies of all documents that they have that are relevant to the issues in the proceedings. Obtain and exchange any expert reports required.
- The employee to prepare and serve on the employer a schedule of loss setting out details of the financial compensation claimed.
- Exchange written witness statements.
- Agree the content of and prepare an indexed and paginated documents bundle. Tribunals tend to make employers responsible for the preparation of several copies of the bundle for use at the tribunal hearing.
- The directions order will usually give the dates the case will be heard by the Tribunal. The number of days set aside for the hearing will depend on the complexity of the claim and the number of witnesses that each side intends to call.
- Parties will be able to within 14 days of a direction being made by a Legal Officer, apply to have that direction looked at by an Employment Judge.

Disclosure

The importance of contemporaneous documents to support or undermine allegations made in tribunal proceedings cannot be understated. The Respondent will want to produce copies of documents that will support its case or undermine that of the Claimant and it is worth taking the time to undertake a thorough search for relevant evidence.

The process of “disclosure” involves producing a list of documents that are in the Respondent’s possession or control and that are relevant to the issues the tribunal will need to determine in this case.

The Respondent’s list of documents is then exchanged with that of the Claimant so that each party knows which documents the other has. This is usually done simultaneously.

“Inspection” is the process by which the parties see the documents held by each other. This is usually done by exchange of photocopies and/or scanned and emailed copies. However, either party can request to inspect the original of a document to check its authenticity if required.

Documents are not limited to paper, but include anything on which information can be stored or recorded. Therefore documents created and stored on computers will be covered, as will any video or tape recordings or photographs. In some instances it may be appropriate to have the computer used by the Claimant forensically examined – advice should be taken in such instances.

The Duty to Disclose - While different Tribunals word their orders for disclosure in slightly different terms, the effect is the same. Both parties are under a duty to disclose all those documents which are in your possession or control which are relevant to the issues in the proceedings. To comply with that duty each party must:

- Make a reasonable search for relevant documents in its possession or under its control. Advice should be taken where there is uncertainty surrounding disclosure obligations.
- Do not destroy documents recovered when dealing with this element of the process.

The issues in the claim brought by the Claimant determine the documents to be disclosed. The following is a checklist of which I will go through with you and advise which of them will be subject to disclosure in each case.

- The appointment and employment of the Claimants.
- The terms and conditions of their employment.
- The workplace policies and procedures that applied to them.
- Their sickness absence record and any reports or correspondence obtained regarding their medical condition.
- The grievance(s) raised by them and the subsequent procedure and internal investigation(s) carried out.

- The disciplinary OR capability OR redundancy procedure followed by you prior to their dismissal.
- The termination of the Claimant's employment and any appeal against that decision.
- The remedy the Claimant is seeking.
- Appreciate that "relevant" documents include not only those that support the Respondent's case or undermine the Claimant's, but also those that support the Claimant's position or undermine your own
- Disclose both documents in your possession (that are in existence throughout your organisation and which you can ask members of your staff to find) and documents under your control (which, while held by third parties, you can require the third party to return to you, for example, financial documents from the company you outsource your payroll function to).

Clearly, when asking staff to undertake any search in connection with these proceedings, they will need to be informed that they must keep the nature and purpose of the search request, as well as anything they do in consequence, confidential.

The duty to disclose documents remains in force throughout the proceedings. Therefore, if further relevant documents are found or are created while the claim is ongoing, they should be disclosed.

Likely places to check for documents – include:

- Personnel files (can be one or more central files).
- Staff Handbooks or manuals, company notice boards or the intranet site.
- Training records and monitoring forms;
- Relevant Staff – There could be relevant internal communications between staff held in both paper and electronic files HR officers, managers and supervisors, who might have sent or received memos or emails or written notes of meetings or discussions with or about the employee (and which have not been copied onto the employee's).
- Personnel File Each relevant member of staff should also be asked if they are aware of any documents that they no longer have, but which they sent to colleagues (who can then be asked to search for them). Similarly, they should be asked for information about any emails that have been archived or other documents that they have stored electronically, but which they cannot retrieve, so that your IT department can attempt to search electronically for them.

Confidential Documents

The fact that documents are marked "confidential" is not enough to exclude them from the disclosure process. However, it may be possible to provide the information they contain in a manner that does not involve a breach of confidence. One way of doing this is by redacting (covering up) irrelevant or identifiably confidential parts of documents or by substituting anonymous references for specific names. Redaction should be undertaken with care and on advice.

Examples of documents likely to contain information that should be redacted include recruitment documents such as references, minutes of meetings (which deal in part with relevant matters, but also refer to other issues and individuals which are not) and medical documents.

Letters and communications between a party and their legal adviser are privileged and do not have to be disclosed as long as they are written for the purpose of obtaining and providing legal advice or assistance. This includes correspondence (paper and electronic) between the Respondent and its lawyer(s) and any notes taken by the Respondent's officers in preparation for and during the course of meetings or telephone calls when legal advice was taken.

"Without prejudice" communications passing between parties who are in dispute and which are made in a genuine attempt to negotiate a settlement or resolve that dispute do not have to be disclosed.

Failure to Disclose Documents

In addition to the provision for general disclosure of documents, Tribunals have the power to order "specific disclosure" of documents requested by a party to proceedings.

If, on consideration of a list of documents, either party considers that the other has failed to give full disclosure of all their relevant documents, they may make an application to the Tribunal. They will have to explain which document or category of documents they consider has been omitted, why those documents are relevant and ask the Tribunal to order specific disclosure of those documents.

Failure to comply with an order for disclosure can carry harsh penalties. In addition to exercising their power to make an order for one party to pay the costs incurred by the other as a result of a failure to comply with disclosure duties, Tribunals can strike out the whole or part of an ET1 and ET3.

Orders for disclosure are increasingly being issued with "unless orders", providing that unless the order is complied with, which includes compliance by a specified date or deadline, the ET1 and ET3 will be struck out without further consideration of the proceedings. Advice should always be obtained in the event an "unless Order" is served on a party.

Preparing the List of Documents

Once you have all your documents in order you will need to:

- Arrange and then list the documents chronologically.
- Read the documents in order to identify:
- any documents containing information that requires redaction, and;
- any documents that are cross-referenced but not included.
- Instructing Counsel

Once a hearing has been fixed, a barrister will usually be booked to attend final hearing unless of course the parties are acting as litigant in person.

Evidence

You should ensure that any officers identified as potentially needing to give advice on behalf of the Respondent put the hearing dates in their diaries and keep those dates free. Tribunals are increasingly strict about hearing dates and will not change dates unless there is, in their view, a very good reason to do so.

You will then need to consider who of those officers should give witness evidence to support the Respondent's case. You will need to meet with each potential witness in order to obtain further information from them so that you can draft their written witness statements.

Trial Bundle

From the List of Documents produced by each party a decision will be taken by the parties regarding which of these will be referred to at the hearing; these documents will then be collated and will form the paginated trial bundle. Generally, the Tribunal will direct that the Respondent is to be responsible for this task.

Settlement

Even if you have a strong defence to the claim, you may wish to consider whether an "economic settlement" of the claim might be in the Respondent's best interests; for example, making a modest financial payment and, perhaps, agreeing the wording of a reference for the Claimant might be an attractive option when assessed against the amount of money and time that you will invest in defending his/her case.

Clearly, economic settlements are more likely to be achieved at an early stage and before Counsel's fees are incurred, when costs are at their lowest.

In addition to the costs of bringing or defending an employment case, there are a variety of additional factors, such as the time it can take up, the stress it can cause, the risks and uncertainty of litigation and the impact of publicity, that may make settlement an attractive option for either party. The vast majority of employment cases do in fact settle before full hearing. There are two possible means of settlement:

- Through ACAS (EC) ACAS receives a copy of the ET1 and ET3 in each Tribunal case and a conciliation officer then contacts the parties, offering to assist in facilitating a settlement. ACAS officers do not express opinions on the merits of claims and do not provide legal advice, their role is that of a knowledgeable go-between.
- By means of an agreement negotiated by direct discussion between the parties' representatives.

Terms of settlement frequently include the payment of some financial compensation to the employee and, in return, the withdrawal of the claim from the Tribunal and an agreement that

both parties will keep the terms of the settlement confidential. In some cases, settlement can include non-financial aspects, such as agreeing the wording of a reference letter.

The Hearing

A hearing can be listed as soon as the Tribunal receives an ET1 as long as it falls 14 days after the ET3 is due. Employment Tribunals are less formal than the High Court and County Courts. For example, no one wears wigs or gowns. The overriding objective of the Tribunal is to deal with cases fairly, in good time and proportionately, minimising expense while keeping the parties on an equal footing. In the Tribunal, the parties are known as the “Claimant” (the party bringing the claim) and the “Respondent” (the party defending the claim).

Tribunal claims are usually heard in public by either a Judge sitting alone or a panel of three: a legally qualified employment Judge and two lay members, one who is drawn from employers’ organisations and the other from employee organisations (although each member of the Tribunal is impartial). In light of the current global pandemic Judge Barry Clarke has issued a letter confirming that currently most hearings will be held remotely.

The Tribunals Decision

Depending on how long the hearing lasts, it is probable that the Tribunal will “reserve” its decision. How long you will then have to wait for the written decision will depend on the Tribunal’s workload, but it can be several weeks or months before a decision is issued.

Once the written reasons for the Tribunal’s decision are sent to the parties, the unsuccessful party has 14 days to apply for the Tribunal to review its decision and 42 days to appeal. The grounds on which a Tribunal can be asked to review its decision are limited. Appeals are only allowed on points of law (and not because a party disagrees with the Tribunal’s decision) and are made to the Employment Appeal Tribunal (EAT).

If the Claimant is successful, but the Tribunal has only dealt with that issue in its decision, it is likely to fix a further hearing to consider the question of compensation.

Legal Costs

It is unlikely that, even if the Respondent successfully defends the claim, the Tribunal will make an order requiring the Claimant to pay the Respondent’s legal costs. This is because the Employment Tribunal will only order that one party pay the other party’s costs in limited circumstances, usually where it considers that a party or their representative has acted “vexatiously, abusively, disruptively, or otherwise unreasonably”, or that they have been “misconceived” in bringing or defending the proceedings. It is rare for the Tribunal to make any costs order.

This factsheet is designed to give general guidance on the process. Advice should therefore be sought in any specific instance.