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EMPLOYMENT TRIBUNAL PRACTICE AND PROCEDURE: A PRACTICAL GUIDE FOR CLAIMANTS AND ADVISERS

With thanks to Michael Downing and Anastasiia Tomalcheva

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It is important to be aware, at the time of writing in May 2020, that employment law and procedure remains largely unchanged by the impact of the Covid-19 emergency. The main legislation is as follows:

- Employment Rights Act 1996
- Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004
- Equality Act 2010.

This legislation is complemented by a massive, and ever increasing, body of decided cases. My own practice includes holding monthly seminars which discuss recent employment cases. On average, there are 14 new cases each month.

It is increasingly difficult for full-time employment lawyers to keep abreast of the flow of statutes, regulations, cases and European materials. This volume of legal developments makes it almost impossible for non-lawyers, without access to source materials, to keep up to date with changes which may have crucial implications for their claims. Even the most articulate and well-informed claimant faces great difficulty in finding out exactly what the current law says.

The complex system of employment protection set out in these laws continues to apply despite the current major disruption of employment relationships.

The leading textbook on employment law is Harvey on Industrial Relations and Employment Law. This is a six-volume loose-leaf work of extreme density, priced at £1700.

Other, more accessible source books include:

- Employment Law: an adviser's handbook, 13th edition, Legal Action Group, £55.
- Employment tribunal claims: tactics and precedents, 4th edition, Legal Action Group, £38.

This Guide is aimed at claimants and inexperienced advisers. Relevant recent examples of decided cases are inserted throughout. It does not aim to set out detailed information on the content of employment law but focuses on practical aspects of employment tribunal claims with a view to increasing claimants' understanding of the realities involved in such claims.

Abbreviations

ACAS: Advisory, Conciliation and Arbitration Service
COT3: The standard form for an ACAS assisted settlement
EAT: Employment Appeal Tribunal
EC: Early conciliation
EDT: Effective date of termination
ET: Employment Tribunal
ET1: The form for starting ET proceedings
ET3: The form for the other side's response
ZHC: Zero hours contracts.

HISTORY OUTLINE

Employment tribunals (ET) were created as industrial tribunals by the Industrial Training Act 1964. Industrial tribunals were judicial bodies consisting of a lawyer, who was the chairman, an individual nominated by an employer association, and another by the TUC or by a TUC-affiliated union. These independent panels heard and made legally binding rulings in relation to employment law disputes. The jurisdiction and powers of these tribunals were very limited.

Under the Employment Rights (Dispute Resolution) Act 1998, their name was changed to employment tribunals from 1 August 1998.

When I started practice in 1970, industrial tribunal cases were a welcome change from Crown Court trials. Hearings were held in a committee room and were informal. There was very little pre-hearing case management. Procedure and evidence at the hearing was at the discretion of the chair.

The Report of the Donovan Commission in 1968 stated that the aim of the industrial tribunal (as it then was) should be to make available an easily accessible, informal, speedy and inexpensive means of resolving employment disputes.

Increased legalism has inevitably accompanied the expanded role of lawyers in the employment tribunal. This is virtually impossible to reconcile with the expressed expectation that employment tribunal hearings have always been suitable for self-representation or assistance by non-lawyers including trade union officials and advice workers.

One specific and little-known example of the excessive legalisation of employment tribunal proceedings was the emergence of advice to representatives to exchange legal authorities (reported case decisions which are relevant to the case) with the other side before the hearing. This would seem to be incomprehensible to the average claimant and does not appear to be based on any statutory authority. It is far removed from the original purpose and function of the tribunal, which was the informal resolution of employment disputes.

In 2014 fees were introduced for employment tribunal applications. This had the desired effect, from the government's point of view, of significantly reducing the number of applications. In 2017 the Supreme Court declared that these fees were unlawful. The government was obliged to withdraw the fees.

In a case heard in 2009 *(Neary v Governing Body of St Albans Girls' School)*, the judge made the following points:

- Employment tribunal proceedings were intended to be as short, simple and informal as possible
- An over-rigid approach was not required when an employment tribunal was considering an application
- We all know that that intention has not been fulfilled and that employment law and practice have become difficult and complex.

Employment tribunals remain, marginally, a maverick element of the English legal system. Despite repeated effort by lawyers to bring them into the mainstream, they continue to retain residual elements of the tribunal rather than the court, with the aim of providing a quick and cheap resolution of employment disputes. There is no dress code and lawyers do not have an advocacy monopoly. This means that claimants can be represented by people other than qualified barristers or solicitors. It is not clear for how much longer

this can continue. The role of the employment tribunal as a cheap, quick and informal means of settling employment disputes looks set to become a footnote in employment law textbooks.

The current status of the ET, as it moves closer to that of a court, is illustrated by the recent case of *Watson v Hemingway Design Ltd, in liquidation (2019).* W was dismissed by HD shortly before the company became insolvent. He had an insurance policy which would normally have covered the liability of HD, including employment tribunal proceedings. W applied to the ET to invoke third party rights under the Third Parties (Rights against Insurers) Act 2010. Section 2 of that Act allows a claim to be decided by a 'court'. The issue was whether the ET was a 'court' for these purposes. The ET found that it had no jurisdiction. W appealed to the EAT.
The appeal was allowed. The ET often has to decide questions of general law as incidental matters to an employment issue.
The question whether the ET is a 'court' depends upon the statutory context. The aim of the 2010 Act was to deal with claimants having to go to a tribunal and to a court. The way to implement that aim was to treat the ET as a 'court'.

LEGAL ASPECTS

If you think that you have been badly treated at work, for example by being dismissed, made redundant or subject to discrimination, the first step is to find out if you have a legal remedy. This will probably involve consulting experts – lawyers or advice workers – and can be expensive. Possible sources of advice are set out in the Money section below.

Important note: if you have been employed for less than two years, your protection rights are minimal. It is not unknown for workers to be dismissed by cynical employers shortly before the end of the two-year period. If employers dismiss workers before the two-year continuous employment requirement, there is little that can be done, except:

A possible claim for breach of contract, for example where the employer has failed to comply with the terms of a probationary period.

Automatically unfair dismissal. There is no two-year requirement in such cases. Automatically unfair dismissal covers a wide range of statutory rights and includes, in summary:

- pregnancy and maternity dismissals

- some domestic and family entitlements
- flexible working
- part-time working
- fixed-term workers
- agency workers
- assertion of a statutory right
- health and safety
- some trade union issues.

Discrimination: The Equality Act 2010 protects employees with protected characteristics against discrimination regardless of their length of service.

PPE AND AUTOMATIC UNFAIR DISMISSAL

Automatically unfair dismissal applies where a worker is dismissed or made redundant because she/he refuses to work in a workplace because she/he cannot reasonably be expected to avert danger which she/he believes to be serious and imminent.

This also applies where the worker takes appropriate steps for self-protection or to protect others.

Whether such serious and imminent danger exists is not relevant. The key issue is whether the worker reasonably believed that such danger existed.

There is no minimum period of continuity of employment for unfair dismissal claims in this connection.

In relation to personal protective equipment (PPE), the current Covid-19 emergency has focused analysis on this area of law.

PPE means any device or appliance designed to be worn or held by an individual for protection against one or more health and safety hazards. It must be provided where it is identified as necessary to protect the health and safety of employees. It must be suitable for the hazard against which it is intended to protect, be maintained in effective and proper working order, be replaced if found to be defective and have designated storage accommodation.

Workers must be trained in the use of PPE and given specified information and instructions. PPE must fit the worker and, so far as is practicable, prevent or adequately control the risk of exposure without creating overall risk.

In relation to legal remedies in the current emergency, the following would appear to be significant:

- Workers who are dismissed or made redundant for refusing to work because of absent or inadequate PPE may be able to complain to an ET for automatic unfair dismissal;
- Employers may be prosecuted by the Health and Safety Executive for breaches of the PPE regulations;
- Where workers suffer death or injury resulting from absent or inadequate PPE, civil claims cannot be brought for breaches of PPE regulations, but such breaches may have evidential relevance in common law negligence claims.

INITIAL QUESTIONS RAISED BY CLAIMANTS

In my experience, the most common questions asked by claimants include the following: (outline answers are given after the questions).

- Q. Do I have a legal remedy? A. Whether you have a legal remedy involves a detailed analysis of the facts of the case and the relevant legal rules.
- Q. What are my chances of success? A. Chances of success are always difficult to assess and different legal advisers may have differing estimates. In general, it is easier to assess a case as very strong or very weak.
- Q. How much will I get if I win? A. The amount of recoverable compensation is assessed according to a number of factors. It is difficult to come up with a round figure until these factors have been considered.
- Q. How much will legal representation cost? A. Legal representation is expensive. Public access barristers are generally cheaper than high street solicitors.
- Q. Can I get my job back? A. The ET has power to order reinstatement or re-engagement but this power is rarely exercised.

- Q. Can I get legal aid? A. Legal aid is not normally available in employment tribunal cases.
- Q. Can costs be awarded against me? A. Costs can be awarded against you but this is the exception rather than the rule.
- Q. Can we work on a no win/no fee basis? A. No win/no fee is possible, but beware – this is not so simple as it first appears.
- Q. What are the chances of the claim being settled? A. Most cases are settled before they reach a hearing but there is no guarantee of this.
- Q. What can I do if I win and the employer refuses to pay? A. If you win and the employer refuses to pay, you will have to take further legal proceedings.

Perhaps the best way to start off an employment-related claim is to consider options and an ideal solution. For example:

Option1: do nothing and forget about it.

Option 2: start legal proceedings. This involves the first step of identifying where the facts of the claim are covered by employment law and whether there is a proper legal basis for starting proceedings.

Ideal solution: this is normally to recover financial compensation from a wrongdoing employer.

Claimants often state that they are not interested in the money, but want justice, or an admission of liability and an apology, or their day in court. These expectations don't normally reflect the reality of ET cases, where the great majority of successful claims result in financial compensation.

If this solution is achievable, it should form the basis for the tactics and overall strategy of all future actions.

Questions before deciding course of action include:

- Has there been a dismissal?
- If so, when was it?
- Was a formal grievance lodged?
- If no dismissal, has a resignation been caused by a fundamental breach of contract?

- Was there a last straw (in general terms, a final occurrence), which forced resignation?
- Is there any evidence of discrimination, for example sex, race or disability?
- Has there been a sham redundancy? This may arise where the employer dismisses an employee for alleged redundancy reasons, but the reality is that there is no true redundancy from a legal point of view.
- Is there any medical evidence related to, for example, work-related stress?
- Has the claimant found new work?

LIMITATION PERIODS

The basic limitation period for ET claims is 3 months from the effective date of termination of employment (EDT). This is normally extended by one month when the compulsory application to ACAS for early conciliation is made. The application for early conciliation must be made within the three-month period.

The ET very rarely allows the lodging of claims after the expiry of the limitation period.

It is important to be aware that the deadline must be carefully diarised. Running cases up to the wire is pointless, causes extreme stress and may result in the deadline being missed, for example where administrative mistakes or computer issues arise.

Case examples include:

Solicitors' negligence

Pora v Cape Industrial Services Ltd (2018), where P was dismissed by C. He instructed solicitors to complain of his unfair dismissal. The solicitors were recommended by Citizens Advice. He was repeatedly assured that all was in hand. No claim was made to the ET until the time limit had expired. P submitted his claim and requested an extension of time on the basis of the solicitors' negligence. The ET ruled that it had been reasonably practicable for him to present his claim in time, and it had no jurisdiction to consider the complaint. P appealed to the EAT.

The appeal was dismissed. The ET had correctly concluded that it was reasonably practicable for P to have presented his claim in time.

Mistake of fact

Lowri Beck Services Ltd v Brophy (2019). B, who has dyslexia, was employed by L until he was dismissed for gross misconduct. B's brother, who is not legally qualified, helped him to start proceedings for unfair dismissal, wrongful dismissal and disability discrimination. The claim form was submitted out of time because of a misunderstanding as to the effective date of termination by B and his brother. The ET extended time in relation to the disability claim and the unfair and wrongful dismissal claims, on the basis that B was a vulnerable individual and his brother's mistake arose from a mistake of fact rather than an error of law. L appealed to the EAT.
The appeal was dismissed. There was no basis to interfere with the decision of the ET.

Wrong address

Rana v London Borough of Ealing and another (2018). The ET sent written reasons to the address of solicitors who no longer represented the claimants, with subsequent delays in the copies being received by the correct recipient. One claimant lost her claim for unfair dismissal and disability discrimination. In theory she was sent the written judgment on 28 April 2015. She wrote to the tribunal five times and made numerous telephone calls before finally receiving the documentation by email on 4 June. She lodged her appeal to the EAT on 15 July, which was 39 days out of time, assuming that the documentation had originally been sent to the correct address. Another claimant met the 42-day deadline but key documents were missing and were lodged out of time. The EAT judge refused to extend the 42-day deadline on the basis that a judgment and written reasons were still sent to a claimant even if they were sent to the wrong address. The claimants appealed to the Court of Appeal.
The appeals were allowed.
The tribunal had made a mistake as regards a matter of fundamental importance. The guiding principle should be that the party affected by that mistake should not be put in a worse position than if it had done its job properly.
One does not 'send' something to John Doe by sending it to Richard Roe. One does not 'send' a document to a party to litigation by sending it to the representative of another party. It seems to be wrong to say one sends something to someone by sending it to someone else.

Non-working day

Miah v Axis Security Services Ltd (2018). M's unfair dismissal claim was received by the ET one day after the expiry of the three-month time limit. The ET judge refused to accept the claim on the basis that it had been reasonably practicable for it to have been presented in time. M appealed to the EAT on the ground that the judge had failed to have regard to the fact that the day before the claim was presented was a non-working day.
The appeal was dismissed. Where there could be no receipt by the ET, for example because the office was closed and there was no letterbox, the limitation period might be extended. Where there was a letterbox, the period would not be extended.
If a claim presented on the next working day was in time, this would mean that the time limit was automatically extended in such circumstances. That was not what the regulations provided.

Discretion of tribunal

Rathakrishnan v Pizza Express Restaurants (2015). R, a diabetic employed by P, was dismissed for breaches of food safety procedures. He complained of disability discrimination. This complaint was brought 17 days outside the three-month time limit. He applied for an extension of time on the basis that the claim was late because he feared being victimised because he was still employed by P. The ET refused to extend the time limit. R appealed to the EAT.
The appeal was allowed.
A multi-factor approach was required in the ET exercising its discretion to extend time limits. In the present case, considerations of the balance of prejudice caused and the potential merits of the claim were relevant factors. The ET had not taken these factors into account.

Extension of notice period

Wallace v Ladbrokes Betting and Gaming Ltd (2015). W resigned in writing from her job. The resignation letter was unambiguous and unequivocal. She complained of unfair constructive dismissal. The ET ruled that the claim was out of time. W appealed, arguing that correspondence and discussions with her employer meant that the employer had agreed to extend her notice period for 3 weeks, which meant that the claim was in time.
The appeal was dismissed.
Once W had unequivocally resigned, she could not unilaterally withdraw or extend her notice period. There had been no agreement to withdraw the notice of termination

Ignorance of right to claim

Paczkowski v Sieradzka (2017). P was dismissed after two months employment. She was advised by the Citizens Advice Bureau, ACAS, and her trade union, that she could not bring a claim for unfair dismissal because she did not have two years continuous employment. She was later advised by a lawyer that she could bring an automatically unfair dismissal claim without two years continuity of employment if the claim was that she had been dismissed for asserting a statutory right. She then brought a claim of unfair dismissal for asserting her right to have a written statement of employment. The three-month limit for bringing the claim had expired. The employment tribunal ruled that the claim could proceed out of time because P's ignorance of her right had been reasonable in the circumstances, she had acted promptly in seeking advice after her dismissal and the claim had been lodged within a reasonable period once the possibility of a claim had been brought to her attention. The employer appealed to the EAT.
The appeal was allowed.
A claimant's ignorance of the right to bring a claim did not mean that it was not reasonably practicable to bring a claim within the time limit. When P was aware of the facts, she could be expected to take reasonable steps to obtain advice. Where a claimant consulted a skilled adviser she could not claim to be in reasonable ignorance even if wrongly advised.
The tribunal had failed to make specific findings as to the status of the advisers, the context in which the advice was given, the information provided by the claimant and the questions asked. The case would be remitted for further consideration.

Six-year delay

Higgins v Home Office and another (2015). The ET rejected a claim of constructive unfair dismissal brought six years after the date of termination of employment by H, who had a history of mental illness. The ET stated that this was an abuse of process: the claim had been brought outside the time limits, the remedies sought were not those which a tribunal could award and H did not appear to be claiming unfair dismissal. H appealed to the EAT.
The appeal was allowed.
The procedure had been carried out without a hearing and without representations from the claimant. The overriding objective required the ET to have regard to any disability which it knew of. The ET judge had taken into account wholly mistaken factors.

REDUNDANCY

The current health crisis has resulted in mass dismissals for alleged redundancies. It is not unknown for employers to get rid of workers using sham redundancy as an excuse. It remains to be seen how far the current law on redundancy dismissals will impact on these. However, the current law remains in place and it must be assumed that existing rules apply. The law dealing with redundancy is complex and includes a mass of case law. In summary, the rules are as follows:
The legal definition of redundancy involves one or more of the following:

- Closure of a business as a whole
- Closure of a particular workplace
- A reduction in the size of the workforce.

General points in relation to redundancy include:

- The right of workers to take reasonable time off to look for alternative work during their notice period
- Entitlement to statutory redundancy pay
- A possible claim for unfair redundancy dismissal where, for example, there has been inadequate consultation or unfair selection
- Employers are generally obliged to offer suitable alternative employment
- Discrimination issues may arise in relation to selection of workers for redundancy.

ZERO HOURS CONTRACTS (ZHC)

These are contracts where no minimum number of hours is guaranteed. Zero hours contracts appear to conflict with the basic principle of "mutuality" in contracts of employment, which means that employers are obliged to provide work for employees. However, courts and tribunal appear to accept zero hours contracts as valid.

Exclusivity clauses in such contracts, prohibiting workers from working under another contract, are illegal.

The right of zero hours workers to complain of unfair dismissal depends upon general eligibility requirements, for example whether they are, in a technical sense, employees.

If a worker engaged on a ZHC is dismissed for breaching an exclusivity clause, this is automatically unfair dismissal and there is no minimum period of continuous employment before a claim to the ET can be made.

The case of *Roddis v Sheffield Hallam University (2018)* Has given guidance on the legal status of ZHC.
R was employed by the University as an associate lecturer on a ZHC. He complained of less favourable treatment as a part-time worker. One issue in the case was whether the full-time contract of a permanent lecturer was of the same type as a ZHC for comparative purposes. The EAT ruled that it was a contract of the same type. It stated that in comparing types of contracts, tribunals should apply a broad interpretation to allow workers to lodge claims where they had been subjected to less favourable treatment.

MONEY

The key to understanding the English civil justice system including ET proceedings, is the central role of money. Almost every aspect of English law has to do with money or claims for money.
Any civil claim is best fought, not with reference to the rights and wrongs of the case, the relevant law, the strength of the evidence or the right to justice. The key issue is money. What, in financial terms, does the claimant seek to achieve? If this approach is adopted, the case is more likely to run smoothly and the chances of success are increased.
Claimants need to be aware at the outset that ET proceedings can be very expensive. I have lost count of the number of clients who have not been able to start or continue their cases because of lack of money.

Legal expenses insurance

This can work well if you have it. It may be an add-on to house insurance or other insurances. The premium is normally low. It won't apply to issues which arose before the insurance was taken out.

- The insurer will normally insist on the case being handled by their own panel of lawyers. However, if you want your own chosen lawyer to act for you, the current legal position is that you have the right to choose your own lawyer, and you can insist on this. Insurers will normally eventually agree to the lawyer of your choice.

- The insurer will also require evidence that the claim has a reasonable chance of success (normally at least 60 per cent) and this must be confirmed by a lawyer.
- If the insurer agrees to cover the cost of the case, it will issue detailed requirements to be complied with as the case develops. These include keeping the insurer fully informed of any significant developments and submitting a monthly report. It is crucially important to comply with these requirements and to make full disclosure of developments, otherwise the insurance cover may be voided. Insurance contracts are contracts which require absolutely full disclosure.

Trade unions

Trade unions can provide legal assistance but they will need to be certain that a claim has reasonable prospects of success.

No win no fee

No win no fee schemes may sound attractive, but beware and be aware of the following:

- No win no fee has been described as a grotesque over-simplification. In reality, it has developed into an impenetrable jungle of regulations and procedures, mostly concerned with insurance premiums and an element of moneylending. It has also been described as another gimmick to avoid state responsibility and to secure justice on the cheap.
- In outline, a solicitor assesses the chance of success in a case and decides on a success fee to be paid on top of normal fees if the claim succeeds. This includes the cost of an insurance policy to cover costs if the claim fails.

Voluntary agencies

- Law Centres
- Citizens Advice Bureaux
- Advice UK
- Free Representation Unit
- Bar Pro Bono Unit (now renamed Advocate)
- LawWorks

- Specialist Charities.

The websites of these organisations are listed at the end of this Guide.

My own view is that legal advice and representation should not be a matter of charity but should be provided free of charge by properly funded organisations staffed by salaried workers. This may not be realistic where government spending is not directed at the legal system.

LETTER BEFORE ACTION

There is no legal requirement to send an initial letter before action to the other side before starting ET proceedings. However, it is a useful exercise because it helps to clarify the issues and may result in a settlement deal. There are three possible responses to a letter before action:

1. It may be ignored.
2. It may result in a total denial of liability.
3. There may be an offer to settle.

It is not possible to guess in advance, with any accuracy, which of these responses will be received.

In general terms, a letter before action should set out the following:

- A deadline for a response.
- A statement that the letter should be shown to the employer's insurers.
- An outline of the claim, in enough detail to let the employer know what it is about.
- An offer to negotiate a deal.

ACAS EARLY CONCILIATION

Most claims have to go through the ACAS conciliation process before ET proceedings are started.
The first stage in the process is to lodge a notification form with ACAS. This is simple – the only necessary information is the name and contract details of the claimant and the employer.

ACAS (EC) certificate

This certificate, issued by ACAS, confirms that you have complied with the requirement to contact ACAS before starting ET proceedings. The certificate number must be quoted in the ET1.

But note the following cases:

Wrong address

Peacock v Murrayfield Lodge Ltd (2019). P lodged an early conciliation notification which stated her employer's address as a location where she had once met a director of the company. This was not the company's registered address nor its normal place of business. ACAS contacted the employer at this address and issued an EC certificate. P's advisers, without knowledge of the first application, then lodged a second form and another EC certificate was issued. ET proceedings were issued and were challenged by the employer. The issue was that if the first EC certificate were used, the proceedings were out of time.
The EAT made the following points:
1. The claimant had to show that the first certificate was invalid because of the wrong address.
2. The first certificate was valid and the claim was out of time.
3. It is sufficient to give an address where business in relation to the respondent is carried out. There is no requirement that it is the registered or normal office.

Wrong email address

Galloway v Wood Group UK Ltd (2019). G started employment tribunal proceedings and provided ACAS with his union representative's email address for issue of the EC certificate. The address missed out the full stop in the middle. The certificate was sent to the faulty address. It was not delivered but did not bounce back. By the time the error was discovered, and the certificate sent to G's personal email address, the claim was out of time. G argued that time should run when the certificate was actually delivered to him. Alternatively, the tribunal should extend the time limit because it had not been reasonably practicable for him to present his claim in time. The ET rejected these arguments. G appealed to the EAT.
The appeal was allowed. No proper email address had been supplied and the ACAS attempt to send the certificate had not been effective. The claim was not out of time.

More than one claim

Akhigbe v St Edward Homes Ltd and others (2018). A brought a whistleblowing claim against S. The claim was struck out on the basis that it had no reasonable prospect of success. He had obtained an EC certificate for the claim and he used the same number for a similar claim. The ET rejected the claim. A appealed to the EAT, which decided as follows:
1. The ET had not asked itself about the relationship between the first and the second claim.
2. If the ET had done so, it would have appreciated that it was obvious that both claims related to the same matter. The ET had misdirected itself by requiring a fresh ACAS certificate.
3. The ET decision would not be set aside because the error could not have affected the result of the claim. The second claim was clearly an abuse of process and the ET had been bound to reject it.

One month extension

Luton Borough Council v Haque (2018). H was dismissed on June 20, 2016. On July 22 he contacted ACAS. An early conciliation certificate was issued on August 22. On October 18 he brought claims of unfair and wrongful dismissal and discrimination. The ET found that the period from the day after H contacted ACAS (July 23) to the date of issue of the certificate (August 22) was 31 days and not to be counted for limitation purposes. When that was added to the primary limitation period, which ended by September 19, the time for presenting the claim was extended to October 20. LBC appealed to the EAT. The EAT dismissed the appeal and stated that a prospective claimant should always have at least one month from the end of the early conciliation period in which to bring a claim. The claim had been presented within the time limit.

Name of employer

Savage v JC 1991 LLP and others (2017). S was dismissed for alleged gross misconduct. During her employment, the name of her employer changed several times without her knowledge. She complained of unfair dismissal and entered three names for her former employer on the ET1. Her early conciliation certificate only related to two names. The ET rejected her claim against the third name on the ET1 on the basis that she had not obtained an EC certificate in relation to the third name. She appealed on the basis that the third name was not required.
The appeal was allowed.
The two EC certificates applied to three employers because two were the same entity. Noting the uncertainty as to the name of S's former employer, caused in large part by the former employer, S had tried to deal with that uncertainty by naming three respondents.

Wrong number on EC certificate

Adams v British Telecommunications plc (2017) .A complained on February 16 2015 of unfair dismissal and race discrimination. She had obtained an EC certificate on January 18 2015. Her claim was rejected on February 17 because the number of the early conciliation certificate was incomplete. On February 19, two days after the expiry of the time limit, A's solicitor presented new claims with the correct number. The ET judge rejected the claims on the basis that it was reasonably practicable for the claims to have been presented in time. A appealed to the EAT.
The appeal was allowed. The ET had been wrong to treat the fact that A had presented a first claim in time as meaning that a second claim could reasonably practicably have been presented in time.
The focus should have been on the second claim and whether there was any impediment to timely presentation of that claim.
The critical factor was prejudice. A would be deprived of any avenue for making her complaints because of a minor error in the first claim, which caused no prejudice to the respondent.

Future events

Compass Group UK & Ireland Ltd v Morgan (2017). M brought proceedings against C, her employer, alleging that she had been told to work in an alternative location in a less senior role. She entered into early conciliation in November 2014. The EC certificate was issued in January 2015 and she resigned in March 2015. She lodged an ET1 in March 2015 alleging constructive unfair dismissal. The employer argued that the claim was not valid because the requirement to undergo early conciliation had not been fulfilled because M had not been dismissed at the time of conciliation. The ET found that an EC could cover future events and on the facts of the case, the proceedings related to a sequence of events which were in issue between the parties at the time of the EC process. The employer appealed to the EAT.
The appeal was dismissed. An EC certificate obtained by a prospective claimant could cover future events.
Provided that there were matters between the parties whose names and addresses were notified, and they were related to the proceedings instituted, that fulfilled the requirements of the section. There had been a connection between the factual matters complained about in the claim form and matters that were in dispute at the time of the EC process.

Later proceedings

Ellis v Brighton and Hove Golf Club (2014). E was suspended in January 2014. She was given a final warning in April 2014 and warned of possible redundancy. On May 22 she lodged an ACAS early conciliation notice. On June 16 her appeal against the final warning was dismissed. On June 22 an EC certificate was issued. On June 24 she was dismissed. On September 8 she started proceedings for unfair dismissal. The employer applied to have the claim struck out on the basis that her certificate could not cover later proceedings. The application was refused.
The application to ACAS is limited to names and addresses of parties. There is no reference to the nature of the complaint. E had been advised by ACAS that there was no need to submit a fresh notification.

Contact with alleged abuser

Cranwell v Cullen UKEAT(2014). C complained of sexual harassment. When early conciliation became an issue, she could not face her alleged abuser and did not approach ACAS. She argued that she had an exemption. The ET judge struck out her claim for lack of an EC certificate. C appealed to the EAT.
The appeal was dismissed.
A claimant does not have to confront an alleged persecutor. In similar circumstances a claimant should explain the situation to the conciliation officer. No-one can be forced to conciliate.
A litigant in person could easily make the mistake of thinking that they had to enter into conciliation and deal with the alleged harasser.

OPPOSITION

Remember that if you are up against a large employing organisation, it will probably have instructed a major firm of solicitors to represent it. You are causing the employer major expense and inconvenience, whatever the outcome of the case. Such firms may charge at least £300 per hour. Large firms of solicitors will probably be handling a large number of cases simultaneously. They may engage in high-pressure tactics which come close to bullying. These can be difficult to resist, but if the claimant has a reasonable case, such pressures may be ineffective.

Parties to ET proceedings have a general duty to co-operate. This does not mean that communication with the other side has to be deferential. In my experience, an element of pomposity and arrogance, perhaps with a few Latin words thrown in, is a good way of dealing with bullying tactics from solicitors.

ET1

Completion of the ET1 form is not particularly difficult, but care must be taken. Details of the claim can be set out in a separate document.

It is very important to note that once ET proceedings have been issued by lodging an ET1 form, you will effectively lose control of the case. As soon as the claim is issued, the ET judge's powers, which are extensive, come into play.

Communication

Don't expect communication with the tribunal to run smoothly. It is crucially important not to run deadlines to the wire. There may be problems with IT hardware or software.
Because of restrictions on the size of ET electronic mailboxes, large document files may fail to be properly delivered. This can lead to a claim being struck out by the tribunal because of documents not being delivered on time.
Documents can be sent to the ET electronically. You will normally receive a standard acknowledgment response. This does not always happen. You may then need to deliver hard copy of the documents by hand to ensure that they have been received. Be prepared to wait in line at the enquiry desk. Courts and tribunals are short-staffed. This is not taken into account by ET judges when deadlines have been missed.

Claim not able to be sensibly responded to

Trustees of the William Jones's Schools Foundation v Parry (2018). P lodged a claim of unfair dismissal and arrears of wages against T. The claim form stated 'Please see attached' in relation to the details of the claim. P's solicitors attached details of a different case. The ET accepted the claim. T asked the ET to reject the claim as being in a form which could not sensibly be responded to. The ET ruled that an application for reconsideration was only available to a claimant. T appealed to the EAT. The EAT dismissed the appeal. It stated that although the ET had been wrong to conclude that the claim could sensibly be responded to, the claims were indisputably claims which the ET had jurisdiction to consider. The ET's error was immaterial and the reconsideration appeal was rendered academic.

Email attachments

J v K and another (2019). Five minutes before the deadline for appealing against a decision of an employment tribunal, J sent an email to the EAT with an attachment containing the relevant documents. The communication failed because the attachment was beyond the capacity of the server. J re-sent the

documents in a number of smaller files which were received after the deadline. He was refused an extension of time and appealed, stating that he suffered from serious mental ill-health which affected his ability to communicate. He appealed to the EAT.
The appeal was allowed.
A guide on the government website stated that the size of attachments should not exceed 10 MB. Apart from that guide, an ordinary layman would reasonably expect that the EAT's server would be able to accept all the necessary documents as an attachment. The guide was only available if the appellant knew of its existence.
Unless and until the sever capacity was increased, consideration should be given to drawing attention to the problems rather more emphatically than was done at present.
Where mental ill-health had contributed to a would-be applicant failing to lodge an appeal in time, that would always be an important consideration in deciding whether an extension should be granted.

CASE MANAGEMENT

At some stage after receiving the ET1 and ET3, the tribunal will issue case management orders and a timetable. Typically, these comprise, for example:

- By no later than July 21 (generally about one month from the date of the case management orders) : set out in writing the remedy which the ET is being asked to award. A copy must be sent to the other side. Evidence of how the amount of the claim is calculated must be included. Information about steps which have been taken to reduce loss must be included.
- By no later than August 5: the claimant and the other side must send each other a list of the documents relevant to the case.
- By no later than November 22: the other side must prepare a bundle of documents for the hearing, subject to page number limits.
- By no later than December 5: Witness statements must be prepared and exchanged, subject to word number limits.

It is important to comply with these orders, but different ET judges have differing views on the effect of non-compliance. There is also a wide divergence among ET judges in relation to the maximum number of words in witness statements and the maximum number of pages in bundles of documents.

Number of witnesses: some witnesses who are still employed by the employer named in the case may, understandably, be reluctant to make a statement or to give evidence.

In terms of the amount of money claimed, this must be calculated and set out in a formal schedule of loss. This can be problematic and may be challenged by the opposition. In general terms, the accepted form of a schedule of loss involves the following:

- Key figures: date of birth, effective date of termination of employment, gross weekly pay and average net weekly pay
- Basic award, calculated in same way as redundancy payment
- Compensatory award: actual and future loss of earnings
- Pension loss: extremely difficult to assess
- Other losses, for example company car, mobile phone etc.

Selection of complaints

Mckinson v Hackney Community College (2011). M complained of unfair dismissal, victimisation and race discrimination. At a case management hearing, M was ordered to identify no more than three incidents of victimisation, no more than six instances of discrimination and details of every protected act relied on for the victimisation claim. M submitted that the order effectively struck out a part of his claim and was contrary to natural justice.
The EAT ruled that **t**he judge had been entitled to ask M to identify the exact nature of his complaints. It was in M's and H's interests to do so. The claim form was in narrative form and was very long.
The judge had been wrong to limit the number of instances of discrimination and victimisation which could be considered. There was no power to require a claimant to self-select which of a number of complaints which he would pursue at a final hearing.

BUNDLE OF DOCUMENTS

The preparation of the bundle of documents is normally done by the employer's representatives. Agreeing the contents of the bundle can be tricky and time-consuming. Be prepared for discussion and negotiation. If the employer is represented by a large firm of solicitors, the drudgery of preparing the bundle

may well be delegated to a paralegal or a trainee, in which case mistakes may be made. It is important to carefully check the contents of the bundle against the list of documents previously exchanged, and ensure that the maximum number of pages ordered by the ET has not been exceeded. If there are too many pages, the bundle should not be accepted, and there may be lengthy arguments about which documents should be taken out.

Dismissal of claim

Brindle v Fylde Motor Co Ltd (2015). B failed to attend the hearing of her unfair constructive dismissal claim. The employment judge dismissed the claim based on the ET1 and the respondent's documents. A bundle of documents, which included the claimant's witness statement, was not delivered. The claimant appealed to the EAT, arguing that the judge had not considered the bundle, which he knew existed.
The appeal was dismissed. The employment judge was not obliged to consider material which neither party had made available to him. Neither party had provided the bundle to the judge.

WITNESS STATEMENTS

The ET will normally order a date by which witness statements should be exchanged, and the maximum number of words.
Statements should be arranged in numbered paragraphs and must be ended with a formal statement of truth.
Witness statements are, basically, evidence by witnesses of what happened. They must be truthful and are best stated in the witness's own words, regardless of grammatical and spelling mistakes. Witnesses must not be coached as to the contents of their statements.

The following suggests how a claimant's witness statement could be formatted:

- Start with identifying self and address
- State date employment started, what was the job and where you worked
- Describe the complaint
- Refer to relevant documents
- Refer to evidence which supports the claim

- State what efforts have been made to reduce losses and to find new employment

It is important to comply with the ET order limiting the number of words for the statements, even if this appears to be an unrealistic limit. The ET may not take kindly to witness statements which exceed the limit and is unlikely to agree an extension after the statements have been exchanged.

ET practice in this area is not consistent. Some judges will not impose any limit on the length of witness statements. Case management orders with regard to witness statements must be carefully read and followed.

WITNESS ORDERS

Witness unwilling to attend

*Christie v Paul and others (2019).*C lodged a number of complaints with the ET, including sex discrimination, harassment, victimisation and automatic unfair dismissal. She applied for a witness order to compel a female colleague to give evidence. The ET refused the application without giving the respondent the opportunity to make representations. C stated that the colleague had previously stated her willingness to attend as a witness but had then refused after entering into a non-disclosure agreement with the employer. C appealed to the EAT, arguing that that the ET had been wrong in law in failing to consider the relevance of the colleague's evidence, the necessity of making a witness order and in failing to have regard to the overriding objective.
The appeal was dismissed. The ET had done nothing more than insert a permissible procedural step into its consideration of the application.
That procedural step was in accordance with the overriding objective and was consistent with a more general concern to do justice. The step was open to the ET in exercising its case management powers.

HEARINGS

ET hearings are generally recognised as being stressful and unpredictable, particularly for unrepresented claimants. In practice, employers who are represented by a solicitor or by a barrister may, paradoxically, be at a disadvantage if the claimant is unrepresented, because the ET judge may be more sympathetic to the claimant's lack of knowledge of the rules of tribunal evidence and procedure. The reality, however, is that ET hearings pose extremely significant difficulties for unrepresented claimants. These difficulties can be reduced by attending other tribunal hearings in advance and observing the way in which they function.

Lawyers do not have an advocacy monopoly in ET hearings. Claimants may be represented by a person of their choice.

Composition of the ET

The ET is composed of an employment judge and two lay members. The lay members normally have experience in employment issues. They are selected from a panel following consultation with employer and employee organisations. It is fair to say that the role of lay members has greatly reduced in significance and you should expect the hearing to be conducted by a judge sitting alone.

The clerk of the tribunal will normally provide general administrative help.

Advocacy points in general:

- The judge should be addressed as Sir or Madam.
- Hearings can be extremely boring and it can be difficult to keep up concentration, particularly on a hot afternoon.
- It is now generally accepted that the English tradition of oral advocacy involves a massive waste of time and money. This applies to a lesser extent in the ET because of case management orders and the fact that most evidence will have been read by the judge before the hearing.
- Most ET advocacy amounts to cross-examination of witnesses on their statements.
- The “art” of the advocate is often seen to be the asking of questions of such detail and complexity, endlessly repeated with hardly noticeable variations, until everyone has lost track of reality and any answer can be challenged.
- In practical terms, ET hearing advocacy depends largely on thorough preparation. If in doubt, seek the advice of the judge. If nervous, take deep breaths and sip water to deal with a dry mouth.
- Be aware that the other side (even a barrister) will almost certainly be stressed and anxious but hiding it. They may have picked up the papers for the case the night before the hearing, have had little sleep and travelled a long way to the tribunal.

- The supposed image of calm efficiency in the tribunal is very different from the chaos which can reign in reality. Documents get lost, witnesses are late or don't turn up at all. Be prepared for the unexpected.

Adjournment of hearing: disabled claimant

Leeks v Norfolk and Norwich University Hospitals NHS Foundation Trust (2018). L complained of disability discrimination. The employer applied for an order for L to provide further and better particulars (details of the claim) within 20 days and listed a preliminary hearing for a month later. L requested an extension of 11 weeks to comply with the order for particulars and for a further month for a preliminary hearing. Her request was based on her own ill-health and that of her husband. It was supported with letters from a number of doctors. The request was refused on the basis that there was no full medical report. L renewed her request and sought a telephone case management hearing. At the preliminary hearing in the absence of L, the employment judge struck out the complaint on the basis that the claim had no reasonable prospect of success and L's failure to comply with tribunal orders. He also awarded costs against L on the ground that she had acted unreasonably in bringing and conducting the proceedings. L appealed against the costs order, arguing that the tribunal judge had considered correspondence marked without prejudice save as to costs and had failed to make reasonable adjustments.
The appeal was dismissed.
The refusal of an adjournment and the decision whether to continue on the absence of a party was a case management decision.

Adjournment: mental health issues

Shui v University of Manchester and others (2018). S had a history of psychotic depression. He was able to pursue litigation and he complained of unfair dismissal and disability discrimination. Before the hearing, an issue arose as to his ability to take part. At a preliminary hearing, the judge referred to a letter from S's doctor which stated that S was unfit to attend the hearing and should apply for a postponement. The respondents stated that if S applied for a postponement, they would apply for the claim to be struck out. S chose to proceed. The ET made many adjustments to help S to participate. During cross-examination S became visibly distressed. The tribunal agreed to a submission by the respondents' counsel to proceed without further cross-examination. The claims were dismissed. S appealed to the EAT on the basis that he had been denied a fair hearing.
The appeal was dismissed.

Where litigants in person had mental health issues, employment tribunals had a responsibility to make allowances and to ensure that such litigants were in a position to make a free and informed choice as to the course of proceedings. S had been aware that he could apply for a postponement but had chosen not to do so. The tribunal had been mindful of its obligations to the claimant. Looked at overall, S's right to a fair trial had not been undermined.

Self-representation at ET hearings

The main drawback of self-representation is that it almost inevitably results in unbalanced or unequal hearings where the employer has legal representation. Case law examples include:

Significance of legal niceties

Aynge v Trickett t/a Sully Club Restaurant (2018). On October 15 2016 A's employer told her 'this is your last shift tonight' and 'that's it, we're done'. She submitted an ET1 complaining of unfair dismissal and stating that she had been dismissed on October 15. In her subsequent witness statement she stated that she was told by the employer that she was not dismissed but she was not to work a night shift again. The employer argued that she had conceded that she was not dismissed and that her claim must fail. A was unrepresented. The ET dismissed her claim. A appealed to the EAT. The appeal was allowed and the matter remitted to another tribunal. The EAT made the following points:
The employment judge had taken an unduly technical approach and had not taken enough account of the fact that A was representing herself.
As A was a litigant in person, she could not be expected to understand the significance of legal niceties.
Even if the judge was right that the ET1 could not be interpreted as involving a constructive dismissal on October 15 or a constructive dismissal on October 16, he should at least have considered allowing A to amend her ET1.

Mental health issues

Anderson v Turning Point Eespro (2019). In 2009 A brought a sex discrimination claim against her employer. The claim was successful. The remedies hearing did not start until 2012. Judgment was given in 2015. A's poor mental health was one reason for the delay. A was unrepresented and expert psychiatric evidence was needed. A appealed on the basis that she had not had a fair trial. She argued that insufficient adjustments had been made to take account of her mental health and that the ET should have sought evidence on what adjustments were necessary to achieve a level playing field.

The EAT stated that the responsibility to propose adjustments or particular measures rests with a party's representatives rather than with the court. The tribunal can expect a party's interests to be looked after by his or her representatives. There was no need for a 'ground rules' hearing in every case with a disabled claimant and no general need to obtain specific evidence on potential adjustments.

Recording proceedings

Heal v The Chancellor, Master and Scholars of the University of Oxford (2019). H stated in his ET1 that he had a disability. He requested some adjustments including permission to use a recording device at the hearing because his conditions made it difficult for him to take contemporaneous notes. The ET ordered that the application should be made at a preliminary hearing. H appealed to the EAT on the grounds that he should not have to make an application, that the tribunal erred in failing to consider the matter before the preliminary hearing and in failing to consider that H would be in contempt of court if he attempted to bring a recording device into the building before permission was granted to do so.

The appeal was dismissed. The ET was entitled to deal with the application at a hearing rather than on the papers. There was no error of law in not considering the matter in advance of the hearing although the tribunal had not precluded that course in any event.

The EAT gave the following guidance on when parties might be permitted to make an audio recording of proceedings:

- Permission to record proceedings is unlikely to be granted on a routine or regular basis. Each case will have to be determined on its own facts. However, it seems very unlikely that permission would be granted where the applicant fails to demonstrate that, for reasons related to a disability or medical condition, there is a complete or partial inability to take contemporaneous notes and that such inability would result in a substantial disadvantage.
- The risk that a recording will be used for purposes other than that for which leave is granted can be mitigated by the tribunal issuing strict limitations on other use. If a recording is permitted simply to relieve a person of the burden of taking notes, then that recording will generally have no greater status in proceedings than that of any other set of notes. In particular, Tribunals will no doubt wish to remind parties that the restriction under the Contempt of Court Act 1981 on publishing a recording by playing it in the hearing of the public would also apply to the posting of any recording or extract thereof online.

- The ET's notes of evidence would continue to be the conclusive record of the hearing before it, certainly whilst it remains the position that employment tribunal proceedings are not routinely the subject of official digital recording. The fact that a tribunal has consented to a recording being made by a party, and the undisputed content of that recording appears to conflict with the tribunal's written notes of evidence, would not mean that the recording automatically takes precedence. Whether or not it should take precedence in respect of any issue will be a matter for the tribunal to determine having regard to all the circumstances.

Member of ET alleged to have fallen asleep

Elys v Marks and Spencer plc and Others (2014). E complained of unfair dismissal and discrimination. Her complaints were dismissed and she applied for a review, alleging that a lay member of the ET appeared to have fallen asleep. The ET refused the application. It stated that it should itself decide whether there had been a procedural irregularity and it accepted the member's explanation that he had been taking medication and had been alert except for a few seconds. E appealed to the EAT.
The appeal was dismissed.
Having regard to all the material evidence, including the medical evidence, any observer would conclude that there had been no improper risk of inattention and no procedural irregularity sufficient to vitiate the decision.

COSTS

Costs are not automatically awarded in the ET against a losing party. The tribunal may award costs where it is satisfied that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably, or any claim or response had no reasonable prospect of success. "Vexatious" means bringing proceedings without sufficient grounds, for the purpose of causing trouble or annoyance to the respondent. Whether or not costs should be awarded is entirely a matter for the discretion of the ET.
It is fair to say that, if your case has a reasonable chance of success and the ET regulations are fully complied with, there is only a small chance that costs will be awarded against you.

Claimants need to be prepared to receive a costs warning letter from the other side, often stating that the claim has no chance of success and that an application for costs will be made. This is meant to frighten claimants and it may well succeed in doing so. The current wisdom is that a costs warning has become a standard practice by large firms of solicitors acting for employers. If

you have a realistic claim, there is little chance of costs being awarded against you. But note the following recent cases:

£170,000 costs order

Brooks v Nottingham University Hospitals NHS Trust (2018). B made 18 protected disclosures. He complained that he had been subjected to a number of detriments by the employer as a result of having made those disclosures. The complaint was rejected by the ET because B had not established that any of those detriments were because of the disclosures. The employer applied for costs on the basis that B's allegations were so weak as to have no reasonable prospects of success and B had acted unreasonably in pursuing them. The ET allowed the application and ordered B to pay the employer's costs, estimated at £170,000. B's appeal to the EAT was unsuccessful.

Costs limited to amount of compensation

Kuwait Oil Company (KSC) v Al-Tarkait(2019). A was dismissed by K for gross misconduct. He complained of disability discrimination, unfair dismissal and notice pay based on wrongful dismissal. The unfair dismissal claim succeeded. A's basic award was reduced by 80 per cent for contributory conduct. The ET then dealt with rival costs applications. It decided that the costs awarded to K should be limited to the amount of compensation awarded to A and the costs awarded to the A, on the basis that K should not have incurred any costs in excess of that amount, and it was a reasonable level at which to set costs, taking account of A's financial resources. K appealed, arguing that the ET had erred in making the orders limiting the costs recoverable by K.
The appeal was dismissed. The order made was sufficiently clear to meet the requirement that it must specify the part of K's costs payable by A. However, orders such as this one were not to be encouraged. A cap consisting of an exact amount would be much better, and an exact amount could easily have been stated here.

Possible deterrence

Smolarek v Tewin Bury Farm Hotel Ltd (2017). The ET ordered S to pay £5200 costs towards the respondent's costs of £29,000. It found that S had unreasonably pursued claims with no reasonable prospect of success. The amount of costs was based on S's ability to pay and would cause her to consider carefully before bringing any further claims. S appealed to the EAT. The appeal was allowed. The award of costs had been partly based on deterrence. This was an improper consideration. The real issue was the appropriate level of award

without any consideration of deterrence. The issues were remitted to the tribunal for further consideration.

Amount of costs

Herry v Dudley Metropolitan Council and another (2017). H, a teacher at a community school, complained of race, sex and disability discrimination based on dyslexia and stress. All the complaints were dismissed. In relation to disability, the employment judge found that H had worked effectively as a teacher for more than two years before taking a long period of sick leave. This indicated that he had developed coping strategies to reduce the effect of any impairment. While stress might have occasionally exacerbated his dyslexia, he had failed to show that either the dyslexia or the stress had a substantial adverse effect on his ability to carry out normal day-to-day activities.
The respondent applied for costs. The tribunal found that H had proceeded with his complaints despite costs warnings from his union and two legal advice centres that his claims had no reasonable prospects of success. The tribunal took account of H's means and found that although he was impecunious and unable to work, his future earnings prospects were good. He was ordered to pay the whole of the costs which amounted to £110,000. H appealed to the EAT.
The appeal against the costs order was allowed. The ET had been justified in making the order on the basis that H had acted unreasonably and the respondents had acted reasonably. However, the ET failed to explain sufficiently why its award was reasonable and proportionate, or to consider whether it should award a proportion of the costs or cap the amount payable, having regard to H's ability to pay. The matter would be remitted to the ET to consider the issues.

Costs compensatory not punitive

Oni v Unison (2015). O's claims to the ET were dismissed. The ET ruled that, by pursuing her claims after a deposit order (explained below) , had been made, she had acted unreasonably and was ordered to pay the whole of the respondent's costs as assessed by the county court. O appealed to the EAT.
The appeal was allowed.
The ET had not considered whether, despite O's unreasonable behaviour, it was appropriate and proportionate to make the costs order sought, leaving aside means, but by reference to all the circumstances of the case. Costs orders needed detailed and reasoned consideration. Costs were compensatory and not punitive.
The fact that a party was unrepresented was a relevant consideration.
The means of a party might be considered twice: in whether to make an award and in deciding how much was to be awarded. The tribunal had a broad

discretion in making an award of costs but it had to be exercised judicially and reasons ought to be given.

Ability to pay

Flint v Coventry University (2015). F was refused an adjournment and withdrew his ET claim. The tribunal dismissed the claim and ordered him to pay £9000 costs, having considered his ability to pay. F appealed to the EAT.
The appeal was allowed.
The means of a party to pay costs should be considered at two stages: first, if an award should be made, and second, the amount of the award. It was not compulsory for a tribunal to consider means.
The tribunal had failed to take into account relevant matters which went to the ability to pay. Alternatively, it had taken into account irrelevant matters or simply reached a perverse conclusion on the evidence before it.

Risk warning

Hussain v Nottinghamshire Healthcare NHS Trust (2016). During the hearing of a claim by H, the tribunal judge warned him that the apparent weaknesses in his case were such that a costs award might be made against him. After the case was adjourned, H lodged a complaint that the tribunal was biased. This was rejected. On the determination of the employer's application for £100,000 costs, the tribunal noted that the employer had written to H three times pointing out the weaknesses in his claims and putting him on notice that it would seek costs against him. It awarded costs of 85 per cent of the total claimed. H appealed to the EAT which stated that tribunals have to give guidance to parties as to how their case might be viewed and the risks they might be taking if they continue down a particular path.
The EAT decided that the tribunal had not made up its mind early on. It had simply warned H of the risks. The tribunal had not adequately explained why it had made an order for 85% of the costs. This point was remitted to the same tribunal.

PREPARATION TIME ORDERS

Claimants who represent themselves or who are represented by a non-lawyer may be able to claim compensation for the time spent preparing the case. The discretion of the tribunal to make a preparation time order is exercised in the same way as for costs. Preparation time is paid at a fixed hourly rate, currently £40 per hour.

DEPOSIT ORDERS

Where an ET decides that a complaint has little reasonable prospect of success, it can issue a costs warning and order the claimant to pay a deposit of £1000 for being allowed to continue with the claim. To continue with a claim after a deposit has been ordered has been described as an act of reckless folly.

Case examples include:

Arthur v Hertfordshire Partnership University NHS Foundation Trust UK 2019). A was dismissed from her employment with H. She argued at the ET that she was dismissed because she had made earlier protected disclosures, while it was H's case that the reason for the dismissal related to her conduct. The ET considered the public interest disclosures relied on by A and concluded that the claims had little reasonable prospect of success. It therefore struck out the claims and said that, if it had not struck out the claims, it would have ordered deposits of £500 to be paid. A appealed on a number of grounds, including that the ET erred in finding that two of the disclosures could not amount to protected disclosures on the basis that H had already been aware of the information disclosed, and that the ET only provided perfunctory reasons for making the deposit orders.
The EAT held that the ET's conclusion to strike out the claims had been reflective of its view of the evidence – as to the likelihood of success – rather than the "no reasonable prospect" test that it was bound to apply, and it had therefore been applying too low a test.
As to the making of the deposit orders, the ET's decision would stand.
Accordingly, the ET's decision in relation to striking out the claims would be set aside and replaced by the alternative finding that deposit orders should be made.

Use of deposit order process

*Tree v South East Coastal Ambulance Service HNS Foundation Trust UK 2017).*T complained of disability discrimination. At a preliminary hearing the ET made a deposit order of £1000. T appealed to the EAT. The order was set aside and an order of £500 substituted.
The EAT stated that, when making a deposit order, an ET needed to have a proper basis for doubting the likelihood of a claimant being able to establish the facts essential to make good their claims.
It was not apparent that the ET had regard to the way in which T's case was being pursued when reaching its decision on the deposit order.
If there was a problem identifying the claim, the deposit order process should not be used as a substitute for case management orders, for example ordering further particulars.

Ability to pay

Hemdan v Ishmail and another (2017). H alleged that she was brought to the UK from Egypt by the respondents and was employed by them in circumstances amounting to slavery. She complained of race discrimination. The respondents were prosecuted in the criminal courts and were acquitted. They applied for deposit orders. H stated that she had been recognised by the Home Office as a victim of trafficking, that she was unable to work because of illness, that her income was £125 a week employment support allowance and that if she was ordered to pay deposit orders she would not be able to continue with her claim. The ET ordered a payment of £75 for each of her allegations. The employment judge stated that it was not an inappropriate use of the power to make a deposit order which a claimant would find it difficult but not impossible to pay. H appealed to the EAT.
The appeal was allowed. H would be ordered to pay £1 per allegation.
The purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims. The purpose is emphatically not to make it difficult to access justice or to effect a strike out through the back door.
An order to pay a deposit must be one which is capable of being complied with. A party without the means or ability to pay should not be ordered to pay a sum he or she is unlikely to be able to raise.
In the present case the amount of the order was set at so high a level as to impede the claimant's access to justice.

STRIKING OUT

The ET has the power to strike out a claim where it decides that the claim is scandalous, vexatious, has no reasonable prospects of success or that the way in which the proceedings are conducted is scandalous, vexatious or has no reasonable prospect of success. Appeal tribunals and courts have repeatedly stated that striking out is a draconian step and should not be lightly invoked.

Case law examples include:

Background of litigant

Mbuisa v Cygnet Healthcare Ltd (2018). M, a litigant in person, did not have the necessary two years' continuous employment for an unfair dismissal claim. He complained of automatically unfair dismissal on health and safety grounds. It was not clear what he was trying to argue in his pleadings. The ET struck out

the claim on the basis that M had not shown that any factor related to his leaving work had health and safety implications. M appealed to the EAT.
The EAT allowed the appeal and made the following points:
M was trying to say that because of his health and safety complaints the employer had allowed a situation to arise in which these things could happen. The ET had not engaged with this.
The better course of action would be to clearly establish what M was trying to say and to make a deposit order if necessary.
Particular care should be taken where a case is badly pleaded by a litigant in person, especially where the claimant's first language is not English or where the litigant comes from a background such that they would not be familiar with having to express complex arguments in written form.

Pressure of resources on ET

Chadwick v Sainsbury's Supermarkets Ltd (2018). C complained of constructive unfair dismissal. He was unrepresented at the ET. After he had presented his case the ET struck out the claim of its own motion on the basis that it was bound to fail because the last straw doctrine did not apply on the facts. The last straw doctrine means that if a worker resigns because they can no longer stand the job, there must have been a "last straw" which forced them to resign. The ET gave, as the reason for the strike out, the pressure of resources on the ET. This decision was upheld at a reconsideration hearing. C appealed on the basis that the ET had erred in its consideration of the last straw doctrine and that no reasonable tribunal could have reached the conclusion that the threat of disciplinary action against C had been an entirely innocuous act.
The appeal was allowed. The high threshold required to establish perversity on the part of an ET had been crossed. The matter should be reheard from the start, either by the same or a fresh ET.

Draconian nature of strike out

Baber v The Royal Bank of Scotland plc (2018). In 2013 B complained of unfair dismissal and disability discrimination. The ET made two "unless orders", warning that unless the orders were complied with, the claims would be struck out. The complaints were struck out for non-compliance but then reinstated. The complaints were again struck out after B failed to comply with case management orders which were not unless orders. B appealed to the EAT.
The appeal was allowed.
The ET had not recognised the draconian nature of a strike out decision and the importance of not too readily exercising the strike out jurisdiction.
There had been no recognition of the need to consider whether the sanction of strike out was a proportionate response in the particular circumstances of the

case, including reference to the question of whether a fair trial remained possible, or a lesser sanction was available.

Evidence

Kwele-Siakam v The Co-operative Group Ltd (2017). KS complained of race discrimination. His claim was struck out by the ET on the basis that, on the evidence heard by the judge and the documents produced, there was no reasonable prospect of success. The claim was lacking in substance and there was no evidence that any tribunal could find as amounting to race discrimination. KS appealed, arguing that the ET had erred in determining the strike out application in a way which was a full hearing. KS had given evidence and was cross-examined for two days. The ET judge had reached his conclusion without hearing evidence from the employer or allowing KS to test that evidence. The ET had conducted a mini-trial without the expected balance of a full hearing.
The appeal was allowed.
The ET had been wrong to proceed on the basis that the facts before the tribunal were largely not disputed.

Claim with no reasonable prospect of success

Ahir v British Airways Plc (2017). A was dismissed after an anonymous letter was sent to BA, his employer. The letter stated that there were discrepancies in A's CV. A complained that his dismissal was an act of victimisation related to previous complaints, including a complaint of racial harassment. A's case, essentially, was that BA had sent itself the letter with the aim of triggering an investigation. This could not be proved by A, nor was there evidence of BA sending itself the letter. The ET struck out the claim as having no reasonable prospect of success. This decision was upheld by the EAT. A appealed to the Court of Appeal. The appeal was dismissed.
There was no reasonable prospect of an ET accepting the basis of A's claim. This was because of its inherent implausibility. In a case where there was on the face of it a straightforward and well-documented innocent explanation for what occurred, a case could not be allowed to proceed on the basis of a mere assertion that that explanation was not the true explanation, without the claimant being able to advance some basis for the assertion.

Core issues of fact

Mechkarov v Citibank NA (2016). M, a Bulgarian national employed by C in London, complained of race discrimination. At a preliminary hearing an employment judge heard oral evidence from M and two witnesses. Without

seeing any contemporaneous documents, the judge struck out the claim on the basis that it had no reasonable prospect of success. M appealed to the EAT.
The appeal was allowed.
A discrimination claim should only be struck out in the clearest case as having no reasonable prospect of success, taking the claimant's case at its highest.
If a claimant's case was conclusively disproved by, or was totally and inexplicably inconsistent with, undisputed contemporaneous documents, it might be struck out.
Where there were core issues of fact which turned on oral evidence, they should not be decided without an oral hearing, but the tribunal should not conduct an impromptu mini-trial of such facts. By determining the application to strike out on the basis of oral evidence, the employment judge had impermissibly conducted a mini-trial and had done so without the production of contemporaneous documents.

Disabled claimant

Galo v Bombardier Aerospace UK (2016). G suffered from Asperger's syndrome. He was dismissed for gross misconduct and complained of unfair dismissal and disability discrimination. He was not represented throughout the proceedings and failed to provide information as required by the tribunal. All his claims were struck out or dismissed. He appealed to the Northern Ireland Court of Appeal.
The appeal was allowed. The requirements of procedural fairness had not been met. The case should have been recognised as one involving a person with a mental health disability. Inquiries should have been made as to whether reasonable adjustments were necessary.
There were clear indications of observed agitation and frustration on G's part. These should have put the tribunal on notice of the need to investigate the precise nature and diagnosis of his condition.

Proportionate response to unreasonable conduct

Harris v Academies Enterprise Trust and Others (2015). H was a teacher who suffered from anxiety and depression. He brought claims of public interest disclosure and disability discrimination against his employer. The ET gave directions for the exchange of witness statements by 12 days before the hearing. The respondents failed to deliver all 13 witness statements before the hearing. H applied for the response to be struck out. The application was refused. The ET stated that, although the conduct of the case by the respondents' solicitors had been unreasonable, intentional and contumelious, there was no evidence that the solicitor had been acting on instructions. As a strike-out would probably result

in a judgment against the respondents, the prejudice to them outweighed the prejudice to the claimant. H appealed to the EAT.
The appeal was dismissed.
The power to strike out was not to be too readily exercised.
A strike out had to be a proportionate response to unreasonable conduct which had either taken the form of deliberate and persistent disregard of required procedural steps or made a fair trial impossible.
In many cases an unless order, in general terms, directing a claimant to comply with an order unless the claim would be struck out, would be granted before there was a strike out.

SETTLEMENT

Most claims settle before they come to a hearing. Settlement avoids the stress, inconvenience and expense of a hearing and achieves the object of a payment to the claimant. Settlements can be made at any stage of the proceedings, even up to the door of the tribunal courtroom. Much has been written about the skills of negotiating a deal. In fact, there is no magic to this. The overall aim is to get as high a payment as possible. Perhaps decide on a minimum acceptable amount and double it as an opening offer. There can then be further negotiations until a deal is reached. It should be noted that a counter-offer by either side will normally cancel any previous offers. It is worth remembering that if the employer has started negotiations, even with a derisory offer, then the employer wants to do a deal to close the case down. Negotiations can be stressful but are often exciting and can be very satisfying if a decent deal is done.

There are two basic ways in which a formal, binding settlement can be made:

- By a formal agreement between the parties, normally in the form of a downloaded template. The claimant must be advised by an independent legal adviser before signing the form. This advice is normally paid for by the employer.
- By a COT3 form authorised by ACAS.

The standard form of a settlement agreement essentially binds a claimant to sign away most, if not all, employment rights, in return for a cash payment. There are strict legal requirements for the contents of settlement agreements. The agreement normally contains a non-disclosure clause. It is important to be aware that the agreement is, in law, a binding contract. If either side fails to keep to the terms of the deal, civil court proceedings may follow.

Scope of COT3

Department of Work and Pensions v Brindley (2017). B complained of disability discrimination on the basis that her employer had refused to allocate her a parking space after a reorganisation, and this had worsened her disability. In April 2014 she was issued with a final warning for sickness absence and in November 2014 another for attendance. In December 2014 B signed a COT3 form which settled her claim and all other relevant claims arising from the facts of the proceedings up to and including the date of the COT3.
B then brought another claim arguing that, by giving her another final written warning in November 2014, the employer had again discriminated against her by reason of her disability. The employer argued that this fresh claim was barred by the COT3.
The ET found that the fresh claim could proceed. The new circumstances referred to in the claim were not part of the COT3 settlement. The fresh claim was a separate claim about a different warning in a different time frame.
The employer appealed to the EAT.
The appeal was dismissed. The COT3 agreement only covered the specific factual matrix of the proceedings of the original claim and not a later one, even if the facts were similar.

Breach of conditions of agreement

Pertemps Medical Group Ltd v Ladak (2020). L was employed by P as its CEO. When his employment was terminated he entered into a settlement agreement which included a clause stating that he would not make adverse or derogatory comments about P and would not do anything to bring it into disrepute. P alleged that L was in breach of this agreement. It obtained an interim injunction preventing L from acting in breach of the agreement. L argued that he had made protected disclosures and had acted as a whistleblower. P alleged that L had been in breach of the injunction.
The High Court ruled that, on the evidence, it was likely that P would succeed in establishing a breach of the settlement agreement.
P was entitled to an injunction.

Power to set aside
Glasgow City Council v Dahhan (2016). D's claims of race discrimination were settled before they were heard. The claims were dismissed. D then informed the ET that he had lacked capacity to instruct his solicitor and to make decisions at the time the settlement was agreed. He asked for the ET judgment to be reconsidered. The ET set the judgment aside. The employer appealed to the EAT.
The appeal was dismissed.

Tribunals have the power to ensure that purported settlement agreements are valid. They can set aside agreements involving an absence of consent by one of the parties because of misrepresentation, economic duress or mistake.
This power includes the power to set aside an agreement on the ground of invalidity if one of the parties did not have the requisite capacity to enter into it at the time of signing.

Withdrawal of claim

When a settlement is achieved, the claim must be formally withdrawn. But note the following case:

Paul v Virgin Care Ltd (2019). Ms P was dismissed for misconduct. She brought a number of claims in the ET, including automatically unfair dismissal. She represented herself at a hearing because she could not afford legal representation. She withdrew the automatically unfair dismissal claim and the tribunal made an order dismissing that claim. She appealed to the EAT, arguing that the ET had failed to take care to ensure that she had a free and informed choice when she withdrew the claim and had exerted undue pressure on her.
The appeal was dismissed. The EAT stated that the withdrawal of the claim had been clear, unambiguous and unequivocal.
The ET had acted properly with a view to clarifying and understanding the way in which Ms P was putting her case. Ms P had been given the opportunity to consider whether or not to withdraw that part of her claim. No unfair pressure had been put on her.

Withdrawal of claim: medical evidence

Campbell v OCS Group UK Ltd and another (2017). C, a claimant in person, withdrew her claim on the first day of an ET hearing on medical advice. The ET dismissed the claim. Two days later C asked the judge to reconsider the decision to dismiss. The judge ruled that there was no reasonable prospect of the tribunal revoking its judgment. C appealed to the EAT.
The appeal was allowed. C had produced medical evidence showing that she was under stress and unwell. She withdrew on medical advice and not on the merits of the claim. Within a very short time she had second thoughts. It might be that if she had been legally represented she would have applied to adjourn.

Withdrawal of claim: properly considered decision

Drysdale v Department of Transport (2014). D complained of unfair dismissal. He was represented at the ET by his wife. She became upset when she was told

that the case would be postponed as part-heard. She made an oral application to withdraw the claim. The respondent's representative made an oral application for the claim to be dismissed. This was granted and an order was made for D to contribute to the respondent's costs. D appealed to the EAT which dismissed the appeal. D then appealed to the Court of Appeal.
The appeal was dismissed.
The ET had not failed to take adequate steps to ensure that D had taken a properly considered decision to withdraw his claim.
The ET did not have a duty to enquire into the health of D's representative. She had authority to withdraw the claim and the ET was entitled to determine the question of dismissal without a written application.
The determination of the appropriate level of assistance or intervention in relation to litigants is a matter for the judgment of the tribunal.

ENFORCEMENT OF AWARD

It is reported that a high number of employers do not pay ET awards. The ET has no enforcement powers.

If employers do not pay you can ask to have them fined and named online by the government. You can also ask a court to force them to pay.

A penalty enforcement form should be sent to the Department for Business, Energy and Industrial Strategy.

The employer will initially get a warning notice telling them that they may be fined and named online by the government. If they do not pay the compensation within 28 days of the notice they will be fined and may be named online by the government.

Court proceedings to recover ET awards

You can use the Fast Track scheme by completing a Fast Track Enforcement form, to send a High Court Enforcement Officer - similar to a bailiff - to demand payment from the employer. This costs £66, which is recovered from the employer when they pay.

Alternatively, you can apply to your local county court by completing an application to enforce an award form to send an enforcement officer to get the money from the employer. This costs £44.

APPEALS

Appeals from the Employment Tribunal to the Employment Appeal Tribunal (EAT) can only be brought on a point of law. Appeals to the EAT are not for the fainthearted and involve lengthy and complex procedural and administrative steps and a trip to London if the matter comes to a hearing. Notice of an appeal must be received by the EAT within 42 days from the date when written reasons for the ET decision were set to the parties.

What is a "point of law"? This issue has given rise to a mass of decided cases.

The general principles would seem to be as follows:

- That the ET misdirected itself in law, misunderstood or misapplied the law; or
- The ET misunderstood or misapplied the facts; or
- The ET decision was "perverse", that is, plainly wrong; or
- The ET did not follow correct procedure; or
- The ET hearing was improperly conducted.

It is fair to say that it is extremely difficult for an unrepresented person to carry out a successful appeal to the EAT.

Time limits for appeal

Haydar v Pennine Acute NHS Trust (2018). H brought proceedings against P. The ET upheld his claim for unfair dismissal, with a 50% deduction for contributory conduct, and dismissed his claims of discrimination. H wished to appeal the judgment.
He had until 27 May 2014 to appeal. He lodged a valid notice of appeal on 12 May 2014 but there was no record of the appeal being received by the EAT, and H received no acknowledgment. Five weeks later H realised he had heard nothing. He telephoned the EAT, and was told they had not received the appeal paperwork. H resent the appeal paperwork, and it arrived on 7 July 2014. This was out of time and H applied for an extension.
This was refused and H appealed to the EAT. The appeal was dismissed and H was referred to a booklet called *'The Judgment'* available online. This explains the appeal process, and the strict time limits. The booklet states as follows:
'If you have not received an acknowledgment from the EAT within seven days of posting the notice of appeal, you should contact the EAT to confirm they have received your appeal.'
H appealed to the Court of Appeal. The appeal was dismissed.

H had not sought to obtain a copy of the booklet. He had made several appeals previously to the EAT, and was conversant with the process. The loss of the paperwork was a good reason for an initial delay, but there came a point where the onus was on the litigant to take the initiative and check that the package had been received.

BREACH OF CONTRACT

It has been reported that lawyers acting for employers are already preparing defences of frustration of contract and/or *force majeure*, related to the Covid 19 pandemic, in response to breach of contract claims in general, including claims to the ET.

Frustration of contract

The doctrine of frustration of contract means, in general terms, that a contract (including a contract of employment) may be discharged when events occur which make its performance impossible. There is a mass of case law on the effects of illness in relation to impossibility. The current position appears to be that temporary illness does not frustrate a contract of employment. It will only frustrate the contract where it is so serious as to bring an end to the possibility of performance in a business sense, for example by making resumption within a reasonable time a practical impossibility.
Dealing with a frustration defence will involve legal arguments which may pose significant difficulties for unrepresented claimants.

Force majeure

The literal meaning of this is “superior force". It is a common clause in contracts that essentially frees parties from liability when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, epidemic or an event described as an *Act of God*, for example hurricane, flood, earthquake or volcanic eruption, prevents one or both parties from fulfilling their obligations under the contract.

There is no reported case law on the relationship between force majeure and pandemics or epidemics.

Force majeure does not apply as a matter of general law but depends upon clauses in specific contracts. Contracts of employment do not generally include such clauses, but they may do.

Again, dealing with a force majeure defence is likely to involve detailed legal arguments which will pose difficulties for unrepresented claimant.

WEBSITES

www.legislation-gov.uk/ The official home of UK legislation.

www.bailli.org/ Free, comprehensive access to case reports.

www.citizensadvice.org.uk/work/ The Citizens Advice website dealing with employment issues.

www.lawcentres.org.uk/ The website of the Law Centres Network. Law Centres defend the rights of people who cannot afford a lawyer.

www.adviceuk.org.uk/ A registered charity supporting the UK's largest network of independent advice services.

www.thefru.org.uk/ The website of FRU (the Free Representation Unit) which provides representation in ET hearings. FRU only takes cases from referral agencies.

www.weareadvocate.org.uk/ Advocate (formerly the Bar Pro Bono Unit) is a charity which finds free legal assistance from volunteer barristers.

www.lawworks.org.uk/ The website of LawWorks, a charity working to connect volunteer lawyers with people in need of legal advice who are not eligible for legal aid and cannot afford to pay.

www.gov.uk/employment-tribunals/make-a-claim/ Government information about making a claim to an employment tribunal.

www.gov.uk/employment-tribunals/if-you-win-your-case/ Government information about how to enforce an ET award if the employer does not pay.