

INTRODUCTION TO THE EMPLOYMENT TRIBUNAL

TRAINING SEMINAR

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A. Sources of Employment Law

1. For practitioners who are undertaking their first cases the following sources are invaluable:

1.1 For law and principles:

Harvey Industrial Relations Law (loose-leaf)

Discrimination Law Handbook (LAG publication)

1.2 For statutory materials and codes of practice:

Butterworths Employment Law Handbook

Harvey Industrial Relations Law (loose-leaf)

1.3. Case Law:

Industrial Relations Law Reports (IRLR)

Industrial Cases Reports

Tribunals Service website: www.employmenttribunals.gov.uk

EAT website: www.employmentappeals.gov.uk

Lawtel/Westlaw/LexisNexis etc

1.4 Other Sources (subscription):

Butterworths Employment law on-line

Tolleys Employment Law

Tolleys Employment Law-line newsletter

Industrial Relations Law Bulletin

IDS brief

B. Time limits for bringing complaints in the Employment Tribunal

2. An awareness of time limits and the grounds for any extension of time are essential to any employment practitioner. When first instructed by a client, particularly a would-be claimant, you should always ask yourself, 'Are they in time? When does time expire?' This is particularly important as lay clients will frequently delay taking legal advice.
3. Some of the more common time limits are set out below. For a comprehensive list see *Harvey* vol. 5 para.PI [84].

The main time limits

Type of complaint	Time limit	Date time commences
Unfair dismissal	3 months	Effective date of termination of employment ('EDT')
Sex discrimination	3 months	Date of act to which complaint relates
Race discrimination	3 months	Date of act to which complaint relates
Disability discrimination	3 months	Date of act to which complaint relates
Discrimination on grounds of religion	3 months	Date of act to which complaint relates
Discrimination on grounds of sexual orientation	3 months	Date of act to which complaint relates
Failure to consult over transfer of undertaking	3 months	Date of completion of transfer
Unauthorised deduction from wages	3 months	Date of payment of wages from which deduction made/ date payment received by employer
Refusal to permit exercise of rights or failure to make payments in respect of annual leave	3 months	Date exercise of right should have been permitted or date when payment was payable

Employee's contract claim	3 months	From EDT or last working day
Employer's contract claim	6 weeks	From receipt of the employee's claim
Equal Pay claim	6 months	From the last day of employment in a standard case

4. In discrimination cases the Equality Act 2010 provides for time to start running on "the date of the act to which the complaint relates" (s.123(1)(a)). Omissions / failures to act are included: see ss.123(3) and (4). Note certain traps to the unwary under the old legislation may well continue to bite under the new 2010 Act: for example, if the discriminatory act complained of is refusal by the employer to redress a grievance, time starts running from the date of the employer's decision, not the date that the decision is notified to the employee (e.g. *Virdi v Comm'r of Police of the Metropolis* [2007] IRLR 24); and if the discriminatory act is dismissal, time starts running on the date that the employment actually comes to an end, rather than the date of notice of dismissal (e.g. *British Gas Services Ltd v McCaull* [2001] IRLR 60). The 2010 Act also provides that "conduct extending over a period is to be treated as done at the end of the period" (s.123(3)(a)): hence the old law on 'continuous policies, rules, regimes or practices' is likely to continue to be relevant (see for example, *Barclays Bank v Kapur* [1991] IRLR 208 HL; *Cast v Croydon College* [1998] IRLR 318 EAT; *Hendricks v Metropolitan Police Commissioner* [2003] IRLR 96 CA).
5. In an unfair dismissal case you need to identify the Effective Date of Termination (known as the EDT). This will be covered in detail at the next session. See generally *Harvey* vol. 1 para. DI [701] et seq.
6. Note that various statutes extend time under some circumstances if the claimant is (or was, at the relevant time) a serving member of the armed forces (see, e.g. Equality Act 2010 ss.121 and 123(2), extending the three month period to six).

Extensions of time for bringing complaints

7. In the cases of most complaints *other* than those connected to discrimination (for example, complaints of unfair dismissal, unlawful deduction of wages, trade union complaints, breach of contract claims, and working time regulation complaints), the grounds for extending time are as follows.

8. The Tribunal may consider a complaint which is brought out of time:

“within such period as [it] considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of [three] months”

[s. 111(2)(b) Employment Rights Act 1996]

9. NB the test has two limbs – (1) not reasonably practicable to issue in time, **and** (2) the actual delay was reasonable. In practice this is very difficult to overcome. The test has been formulated as follows in what remains one of the leading decisions on the subject:

“Was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?”

(Palmer and Saunders v Southend-on-sea Borough Council [1984] 1 All ER 945).

10. The fact that other, related, legal proceedings are afoot (including criminal charges against an employee relating to the matter for which he was dismissed, such as alleged theft from his employer) will not usually provide a good reason for delaying issuing a tribunal complaint until the other proceedings are resolved: *Wall's Meat Co Ltd v Khan* [1979] ICR 52.

11. In discrimination cases the Tribunal may permit complaints beyond three months within “such other period as [it] thinks just and equitable.” This is a similar test to the old legislation, and is analogous to s. 33 Limitation Act. There are numerous cases dealing with how the test should be applied; suffice it to say that in practice, it is easier to extend time under this test than that for non-discrimination claims.

12. In summary, always consider time limits as early as possible; if in doubt, consider seeking counsel's opinion, and if time will not permit this, issue a claim to protect your client's position.

Time limits for responding to proceedings

13. The key points are to be found in Rules 4, 8 and 9 of the Tribunal Rules: these are technical and must be strictly complied with. What follows is only a brief précis of the relevant principles: it is no substitute for reading the rules themselves!
 - Lodge your response within 28 days of the date on which you are sent the claim;
 - The respondent may apply for an extension of time within those 28 days but will need to explain the reason for the request. The tribunal will consider the reason for the delay, any prejudice, and the merits of the case in determining whether to grant the extension and will only do so if it is just and equitable (see *Kwik Save Stores Ltd v Swain* [1997] ICR 49.).
 - A failure to file a response is likely to result in a default judgment (Rule 8) and will result in the respondent being debarred from taking any part in the proceedings (Rule 9) save for very limited exceptions.

C. Drafting the pleadings

14. For the new practitioner, helpful basic precedents for common claims and responses (a.k.a. 'grounds of resistance') can be found in *Harvey*. A claim form is sometimes referred to as an 'ET1' and a response as an 'ET3', after the form numbers. These standard forms should always be used, but in complex claims there is no harm in filling out the substantive part of the claim or response (i.e. the pleaded facts and points of law) on a separate sheet and attaching it to the standard form; this can produce a neater result and, crucially, make it easier for the tribunal to read.

15. It cannot be overemphasised how important the pleadings are to your client's case: particularly so for claimants, where a failure to include important material may result in you being prevented from raising it later. When pleading under time pressure (e.g. where the limitation period is about to expire), err on the side of pleading relevant facts as fully as possible: better that the document is untidy than incomplete. It is generally unnecessary to cite cases in the pleadings (unless there is a 'killer' that is directly on point, in which case citing it may help to bring the other side to an early settlement), but you should refer to legislation where appropriate.
16. Overly legalistic pleading is now deprecated in every area of civil practice post the Woolf reforms, and this is particularly important in employment pleadings. Remember that two of the three people likely to end up trying your pleaded case are *not* lawyers, and draft accordingly. It remains a formal document, but it should also be readily comprehensible to the layman.

D. Drafting the witness statements

17. Naturally, these are of paramount importance. Thought should go into the contents of a witness statement at an early stage; this will help you to assess the strengths and weaknesses of your own case, which is important when considering offers of settlement. Often, the Tribunal at the case management stage will make directions for late exchange of witness statements (sometimes, as little as two weeks before the trial). Avoid the temptation to leave the drafting until the last minute. Your lay client should have ample opportunity to read, and comment on, the proposed draft long before the deadline for service.
18. Be firm with your lay client to ensure that the statement remains relevant. Some clients are very keen to include all manner of material that is wholly irrelevant to the issues in the case. Unfortunately, some contested employment disputes end up provoking varying degrees of bitterness and enmity between individuals. Old workplace tensions boil over and people want their day in court, hopeful that the Tribunal will allow them to cast all manner of aspersions on the other side. Do not allow your client to fall into this trap.

Equally, it is important to include everything that is likely to be relevant: there are severe restrictions on asking supplementary questions to 'fill in the gaps'.

19. If the witness statement needs to refer to documents within the trial bundle, make sure that the statement includes the relevant bundle page numbers. If this proves impossible (e.g. because the statements are exchanged before the trial bundle is prepared), then mark up your own copy with the page numbers and be ready to deploy these during the hearing.

E. Preparation for a Tribunal Hearing

20. The following are some basic points which will make a real difference both in terms of performance and the perception of the Tribunal.
 - **Prepare a basic chronology.** It will help you in preparing the case, make the Tribunal's life easier, and is indispensable in any claim involving substantial disputes of fact. It should be neutrally drafted. Try to agree it with the other side if possible. If there are disputes, reflect this in the drafting (e.g. 'Claimant says conversation with X happened on this date'). For a final hearing, paginated trial bundles will have been prepared – make use of these by including page numbers of relevant documents in the chronology.
 - **Use a skeleton argument.** Again, it will help you marshal your thoughts in preparing the case. It will allow you to structure your case in the way that is most helpful to you, and will make the Tribunal's life easier – particularly the lay members, who will be able to follow your arguments more easily. For short quotes from cases or statutes, quote these in the skeleton so the Tribunal can read them without having to reach for umpteen bits of paper. Ensure you know the source of the quote so you can take the Tribunal to the relevant document if required.

- **Always bring hard copies** of the cases or pieces of legislation on which you rely. Keep the number of cases to the minimum number required to deal with the point in question.
- **Bring enough copies.** Ensure that you copy skeleton arguments and statutes / authorities at least five times (three for the Tribunal, one for yourself and one for your opponent). The volume of paper can quickly become burdensome; it always helps to mark your own copies with your initials (particularly if you have annotated your copy of your skeleton with further notes) to avoid giving the wrong copy to someone else. The Tribunal will make directions in advance of the final hearing for trial bundles; check these directions carefully as often, it falls to the Respondent to do the legwork. If bundles or witness statements are your responsibility, you will need six copies: one sits on the witness table for witnesses' use during their evidence.
- **Familiarise yourself** with the Statutory Codes of Practice (In particular the ACAS Code of Practice on Discipline and Grievance; EOC code on Sex Discrimination; equal opportunities policies, procedures and practices in employment; The Disability Discrimination Act Guidance; CRE Code on the Duty to Promote Race Equality.).
- **Bring a good book:** a sourcebook which has all the relevant legislation in one place is indispensable to the busy practitioner: the author's personal preference is for Butterworths' *Employment Law Handbook*.

F. Case Management in the Employment Tribunal

21. The procedure for the Tribunal is set out in the *Employment Tribunals Rules of Procedure 2004*, which appears as a schedule to the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI 1861/2004* as amended ('the Rules'). These are available online:

<http://www.employmenttribunals.gov.uk/RulesLegislation/rulesThatGovern.htm>

22. The Regulations provide for an overriding objective (Reg. 3) to apply which is similar to the Civil Procedure Rules Part 1. A Tribunal or Chairman must seek to give effect to the overriding objective at every stage, and the parties have a duty to assist in its furtherance. Other parts of the Civil Procedure Rules can sometimes provide helpful guidance to a Tribunal in how it decides questions under the Tribunal Rules, but are no more than guidance: see *Neary v St Albans School for Girls Governors* [2010] I.C.R. 473 (Court of Appeal).
23. Rule 10 of the Tribunal Rules provides for case management powers: these are broad and may be exercised either on application or by a judge acting on his own initiative. You will most commonly encounter these powers at the following hearings.

G. Case Management Discussions

24. These are provided for in the Rules:

Schedule 1, rule 17 of the 2004 rules

- (1) *Case management discussions are interim hearings and may deal with matters of procedure and management of the proceedings and they may be held in private. Case management discussions shall be conducted by a chairman.*

H. Pre-hearing reviews

25. Again these are provided for by the Rules:

Schedule 1, rule 18 of the 2004 rules

- (2) *At a pre-hearing review the [employment judge] may carry out a preliminary consideration of the proceedings and he may -*
- (a) determine any interim or preliminary matter relating to the proceedings;*
- (b) issue any order in accordance with rule 10 or do anything else which may be done at a case management discussion;*

(c) order that a deposit be paid in accordance with rule 20 without hearing evidence;

(d) consider any oral or written representations or evidence;

(e) deal with an application for interim relief made under section 161 of TULR(C)A or section 128 of the Employment Rights Act.

I. Preparation for a CMD or PHR

26. There is no power to strike out any part of a claim or response at a CMD, which will invariably be before an employment judge sitting alone. Expect to encounter an interventionist judge who will put pressure on you to identify or narrow the relevant issues. What follows is a non-exhaustive list of what is likely to be discussed: any advocate attending a CMD needs to concentrate on these.

- Identifying the 'real' issues. For example:
 - In a disability discrimination case, is 'disability' admitted?
 - Who are the correct comparators in a discrimination case?
 - What type of discrimination is alleged?
 - Is it accepted the employee was dismissed?
 - Are there any time limit issues?
 - Are there any allegations of breach of contract?
- Whether further particulars are required.
- Whether expert evidence is required and, if so, what for?
- Whether any amendments are required.
- Whether any other parties are to be joined.
- Whether interpreters are required.
- Are witness orders required?
- Is a PHR required?
- Directions for trial:
 - Disclosure of documents;
 - Exchange of statements;

- Exchange of expert evidence;
- Dates to avoid (have these ready);
- Bundles, skeleton arguments and chronologies

27. A PHR (usually, but not always, an Employment Judge sitting alone) will deal with interim or preliminary matters. The aim is to weed out weak claims or defences and to deal with preliminary issues. For example, a PHR may deal with the following:

- Whether the claim was brought in time;
- Whether the Claimant is a 'worker' so as to be entitled to protection from employment legislation;
- Whether the Claimant has sufficient continuous employment in an ordinary unfair dismissal case;
- Whether the Claimant is disabled.

28. Though the PHR can resolve issues of fact, it will only do so in relation to preliminary legal points. It will not conduct a trial on the substantive issue in the case; for example, expect a tribunal to refuse to conduct a PHR on the issue of whether a claimant affirmed a repudiatory breach of contract through delay, in a constructive dismissal case. Except in the clearest of cases, such issues will only be resolved at a final trial. If you intend asking the PHR to deal with a preliminary issue which involves a dispute of fact, consider asking for the employment judge to sit with lay colleagues as a full tribunal. Such a request needs to be made in writing: see Rule 18(3).

29. Specific issues which commonly crop up in case management hearings and PHRs include:

J. Further particulars

30. These are quite often ordered to remedy the shortcomings in a pleading, for example an uninformative ET1 from a litigant in person. Tactically, it is often helpful to pin the other

side down to a specific set of facts rather than leave the case open to chance at the final hearing.

K. Amendments to pleadings

31. Amendments which seek to give a new legal label to an unchanged set of pleaded facts are unlikely to prove controversial. Where an amendment is proposed that would appear to be adding a wholly new claim, more care is required. The Tribunal will consider:

- Merits of the proposed amendment
- If made out of time, should an extension be granted?
- Delay in applying
- Balance of prejudice

“the paramount considerations are the relative injustice and hardship involved in refusing or granting the amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision”

(Selkent Bus Co. v Moore [1996] IRLR 661)

L. Disclosure and Inspection

32. The Employment Judge will order disclosure and will insist on an agreed bundle of documents for the final hearing. Disclosure can be ordered to be given by third parties in appropriate cases.

M. Witness Statements

33. Witness statements will generally be ordered, to be served in advance and to stand as evidence in chief at the final hearing (usually by being read aloud by the witness). Unlike a typical County Court claim, witness statements will frequently be served fairly late in the timetable, and close to the final hearing.

N. Striking out

34. The rules provide for claims to be struck out in certain circumstances. For example:
- Failure to comply with an order (Rule 13)
 - The claim is “scandalous, or vexatious or has no reasonable prospect of success” (Rule 18(7)(b)).
 - See Rules 13 and 18(7) for further examples of where strike out (and ‘unless’) orders may be made.

O. Deposits and costs warnings

35. In practice, it is more difficult in the Tribunal to get a claim struck out on the merits than in the civil courts (especially where the claimant is a litigant in person).
36. A useful alternative remedy is for the Tribunal to order the claimant to pay a deposit as a condition of continuing with the proceedings, and to be warned that by continuing the complaint to a final hearing he may be at risk as to costs. In those circumstances if the proceedings are dismissed, the Employment Judge will decide whether to make a costs or preparation time order against that party on the ground that he conducted the proceedings relating to the matter unreasonably in persisting in having the matter determined (see Rules 20 and 47(1)).

Rule 20(1) provides:

- (1) *At a pre-hearing review if a [employment judge] considers that the contentions put forward by any party in relation to a matter required to be determined by a tribunal have little reasonable prospect of success, the [employment judge] may make an order against that party requiring the party to pay a deposit of an amount not exceeding £500 as a condition of being permitted to continue to take part in the proceedings relating to that matter.*

Note that a deposit cannot be ordered until the judge has taken account of the paying party’s ability to pay (Rule 20(2)).

P. The Structure of a Typical Unfair Dismissal Case

37. Practice differs enormously in tribunals so you will, to some extent, be guided by the judge.

- **Opening:** often you will not get the chance to open your case as the Judge will be seeking to define the issues from the outset. If you do open make it brief, to the point and going into excessive detail of fact, in case your witness(es) fail to come up to proof.
- **Who goes first?** It depends on the burden of proof. In many cases there will be no dispute that there has been a dismissal, in which case the employer goes first because he has the statutory burden of establishing the reason for the dismissal. In constructive dismissal cases the employer will be arguing there has been a resignation not a dismissal and therefore the claimant has the burden of proving there has been a dismissal. Similarly, sometimes there will be an argument as to whether the claimant has worked for a sufficient period of time to qualify for the right to bring an unfair dismissal claim in which case the burden lies with the employee to prove that he has.
- **Examination, cross examination and re-examination** (see below).
- **Remedy.** In the event that the claimant is successful will the Tribunal also deal with remedies? Ask at the outset. You need to have evidence ready in case. A number of permutations are possible. Sometimes the case will follow the usual civil trial format – all evidence adduced in one go. Sometimes the Tribunal will hear evidence as to liability, determine that issue and then go on to determine quantum, either at that hearing or at an adjourned hearing. If against a litigant in person who has a weak case, it can save everyone a lot of time if you suggest to the Tribunal that it considers quantum after liability – though do not say that the reason is because you are confident of your case!

Q. Tactics For Examining Witnesses

38. Some particular tactical issues arise in the Tribunal which may not be so apparent in other jurisdictions. This section deals with some of these difficulties and suggestions are given as to how to deal with them.

Issue: No examination in chief permitted

Tactics: Pre-trial - Careful drafting of statements

At trial - Effective use of documents

39. Usually witnesses will be asked to read their statement aloud. Always explain this to clients in advance as, occasionally, they will tell you that they are unable to read; or they may have difficulty with spoken English because it is not their first language. Either scenario requires a tactful approach and you need to avoid your client the embarrassment of the issue only being ventilated after they have been sworn. If necessary, tell your opponent and explain the problem to the judge in the absence of the client.

40. Examination in chief is generally not permitted. This can present particular problems if, following a conference with witnesses at court, there are plainly important matters which need to be added, or further explanation given. Be wary of your relevant professional conduct rules prohibiting the coaching of witnesses.

41. If the fee-earner drafting statements is not going to represent the client at the final hearing, then an early conference/advice from the advocate before statements are drafted (and his/her input into those statements) will go a long way to avoiding these difficulties. It is helpful in this respect to seek a late deadline for service of statements.

42. Once at the final hearing, a tried and tested method of eliciting evidence in chief is to ask the tribunal to permit you to invite the witness to identify key documents and correspondence, either as he reads the statement, or at the conclusion. This will enable

you to use the documents as a springboard for questions. Be wary of pushing this too far.

Issue: Opponent's case not put

Tactics: Effective use of re-examination

43. Acting for an employer respondent, you will often appear against litigants in person, or semi-skilled advocates. As a result, the claimant's factual case may not properly be put to your witnesses. Since you will have had limited opportunity to insulate your witnesses in examination in chief, this may present a difficulty.
44. The tribunal in those circumstances is likely to be sympathetic to an attempt by you to deal with the principal allegations in re-examination (which will have its own advantages by leaving your side with the last word). An alternative strategy is to invite the tribunal to explain to the litigant in person the principle of putting one's case. If having been given the opportunity to put his case the litigant then fails to do so, the tribunal will have less difficulty with allowing you to treat the alleged fact as no longer being in issue. If in any doubt, ask the tribunal at the end of your opponent's cross examination whether it wishes for an issue to be dealt with in re-examination.

Issue: The long-winded statement

Tactics: Avoid a debate over irrelevant issues.

45. Claimants' witness statements can frequently be extremely verbose, consisting of a long critical review of their employment history. Keep firmly in mind what the tribunal needs

to decide – e.g. in a constructive dismissal case, why did the claimant decide he had to leave? Many allegations in a witness statement may have no bearing on the fundamental issues.

R. Some do's and don'ts ...

Do address the judge as “Sir” or “Madam” and the ‘wingers’ where necessary as “Your colleague(s)”.

Don't stand up when speaking.

Do make a note of the names and job titles of your witnesses (and instructing solicitor!) – and thereby avoid embarrassment when asked by the clerk before going in.

Don't expect the Tribunal to have read or considered any document you have not explicitly asked them to during the hearing.

Do paginate any supplementary documents to synchronise with the main bundle.

Do tell your lay client not to smirk laugh or groan when evidence is adduced.

Don't go too fast, either in evidence or submissions. Watch the tribunal's pens.

Do invite the Tribunal to read documents/ correspondence for themselves quietly as you go along. Pause to allow them to do so.

Don't be patronising to the Tribunal.

Do appear reasonable even when advancing the most unreasonable case.

S. Dealing with Litigants in Person

46. Litigants in person are more common in the Tribunal than in the civil courts generally. Most tribunals also make great efforts to ensure that the litigant in person feels they have had a fair hearing. Caution should be exercised when dealing with litigants in person outside the tribunal and if possible any discussions should be in the presence of your instructing solicitor. Make sure any authorities, skeleton arguments etc. are given as early as possible. As an advocate you must not either take advantage or appear to

take advantage of the litigant in person. Para 708(c) of the *Bar Code of Conduct* is of particular importance:

A barrister must ensure that the Court is informed of all relevant decisions and legislative provisions of which he is aware whether the effect is favourable or unfavourable towards the contention for which he argues;

On some rare occasions the tribunal when explaining matters of law to a litigant in person may fail to take account of recent changes in the law. In such circumstances this should always be drawn to the attention of the tribunal so that it may be corrected.

T. Settling Claims at the Tribunal

47. Many claims settle before the hearing. Often the settlement will be through ACAS and the agreement will be embodied in a COT 3 form. Any compromise agreements settled prior to the tribunal must comply with the relevant legislation (namely, ERA s 203(1); TULRA s 288(1); *Equality Act 2010* ss.144 and 147) in order to comply with those statutes' anti-contracting out provisions. (Note that the Equality Act has introduced an apparent hurdle to such compromise agreements, in that now the independent adviser cannot be the person who acts for the complainant: see s.147(5)).
48. Here we are concerned with settlements at the Tribunal. If the case is settled by consent as opposed to the Tribunal making an order for the payment of compensation this can have advantages to both the employer and the employee as the recoupment provisions of the *Employment Protection (Recoupment of Jobseekers' Allowance and Income Support) Regulations 1996* (1996 / 2349) do not apply. This means the employee avoids having to have his award deducted to take account of any unemployment benefit or jobseekers' allowance or income support and the employer avoids having to pay this sum to the DSS.
49. If a consent order is entered into it becomes final absent fraud or misrepresentation (see *Times Newspapers v Fitt* [1981] ICR 637) and it cannot be set aside on the grounds that the agreement does not comply with the contracting out provisions. The reason for this

is that the contracting out provisions protect the claimant *before* the claim is disposed of by the tribunal. A consent order disposes of the claim.

50. A number of methods can be used to dispose of claims by consent and in some cases the tribunal will insist on a particular method. The claimant can simply withdraw his complaint under rule 25(1). If this occurs the Respondent should apply for the claim to be dismissed pursuant to rule 25(4) to avoid the claim being resurrected in the future.
51. If the claimant simply withdraws his complaint then the agreement reached will be enforceable as a contract in the civil courts. Once a claim has been dismissed in circumstances where there was a clear intention to abandon the complaint it cannot be restored. This course is not the most desirable for claimants, not least because pursuing the contract in the civil courts will be costly and time consuming. A better course is to have the complaint stayed on agreed terms. This is similar to a Tomlin order in civil proceedings and is permitted by rule 10(2)(h) of the Rules. If this is the case and the terms are not carried out then the party seeking to enforce the agreement can either sue in separate proceedings in the county court on the agreement, or apply to the tribunal to lift the stay (see *Milestone School of English v Leakey* [1981] IRLR 3). The tribunal will be unwilling to grant an open ended stay and it will be limited in time. For example, suppose an agreement is reached for the Respondent to pay the Claimant £3,000 within 14 days. The Tribunal may order that complaint be stayed for 28 days until a given date and thereafter the complaint be dismissed on withdrawal by the Claimant with the parties having liberty to apply within that 28 day period. This has the effect of giving the Claimant 14 days to apply to have the stay lifted in event that the money is not paid within the 14 days.

U. Costs

52. The key points to remember are:
 - Cost do not generally follow the event;
 - Costs may be awarded if, in the opinion of the tribunal a party has in bringing the proceedings, or a party or its representative has in conducting the proceedings,

acted vexatiously, abusively or otherwise unreasonably, or the bringing or conducting of proceedings was misconceived. (Rule 40(3));

- The Tribunal has to have regard to the ability to pay (Rule 41(2)).

53. There are three types of costs order (Rule 41): (a) the tribunal may assess costs up to £10,000 (by way of a summary assessment); (b) it may award a sum that the parties have agreed or (c) it may make an order that the whole or part of the costs be assessed in the County Court under the detailed assessment procedure in the CPR (CPR 47; PD47).
54. There are specific provisions in the rules for awarding costs in cases where a hearing has been postponed or adjourned (see Rule 40) This does not depend on unreasonable conduct (*Ladbroke's Racing Ltd v Hickey* [1979] IRLR 273).
55. Any application for costs should be made promptly; preferably during a hearing where oral argument can be heard, although it can be made in writing up to 28 days after the issuing of the judgment determining the claim, and (exceptionally) later if in the interests of justice (Rule 38(7)). It is not necessary to link precisely the conduct complained of to additional costs incurred (*Vaidynathan v Milton Keynes Council* (EAT unreported 18/12/03)). In practice, costs orders are likely to be rare, but there is usually no harm in seeking them, and indeed your client is likely to expect you to do so. The likely non-recoverability of costs should always be something on which you advise your clients at the outset of employment litigation, to avoid the risk of Pyrrhic victories. Realistic assessments of the value of the claim, and the costs likely to be incurred in fighting it, are vital at an early stage.

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