INTRODUCTION TO THE EMPLOYMENT TRIBUNAL

24th October 2017

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###### A. Sources of Employment Law

1. The procedural rules in relation to employment tribunals are to be found in the schedules (Schedule 1 in standard cases) to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. These new rules (“the Rules”), replacing those made in 2004, came into force on 29th July 2013. For practitioners who are undertaking their first cases the following sources are also invaluable:

1.1 For law and principles:

 *Harvey Industrial Relations Law (loose-leaf)*

 *Discrimination Law Handbook* (LAG publication)

 *IDS Brief*

1.2 For statutory materials and codes of practice:

 *Butterworths Employment Law Handbook*

 *Harvey Industrial Relations Law (loose-leaf)*

Ministry of Justice Website: <http://www.justice.gov.uk/guidance/courts-and->tribunals/tribunals/employment/index.htm

1.3. Case Law:

 *Industrial Relations Law Reports (IRLR)*

 *Industrial Cases Reports (ICR)*

EAT website: [www.employmentappeals.gov.uk](http://www.employmentappeals.gov.uk)

 Lawtel/Westlaw/LexisNexis etc

* 1. Other Sources (subscription):

Butterworths Employment law on-line

Tolleys Employment Law

Tolleys Employment Law-line newsletter

Industrial Relations Law Bulletin

**B. Early Conciliation, Fees and Time limits**

**Early Conciliation**

1. From 6th May 2014, anyone considering bringing a complaint to an employment tribunal must first contact Acas and be offered “early conciliation”. The details of the EC scheme are set out in Ss.18A and 18B of the Employment Tribunals Act 1996 (ETA), which were inserted by the Enterprise and Regulatory Reform Act 2013, and in the Early Conciliation Rules of Procedure (‘the EC Rules'), which are contained in the Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254 (‘the EC Regulations').
2. Generally speaking, the EC scheme now prevents potential Claimants presenting a complaint without a certificate from Acas. However, note that the scheme only requires that parties be *offered* conciliation. There is no obligation to engage. A certificate will be issued where either or both of the parties do not wish to engage, where agreement cannot be reached, or where the employer is insolvent. It should also be noted that, in cases where the claims are clearly related, fresh early conciliation attempts are *not* required each time an application is made to substitute a new respondent: the tribunal may exercise its discretion in this regard just as it does for any other case management direction (*Drake International Systems v Blue Arrow Ltd.* [2016] I.C.R. 445). Also the EAT in a succession of recent cases have deprecated Respondents taking technical points regarding alleged non compliance with the EC process by Claimants.
3. Where EC is engaged in, the normal time limits for presenting a complaint are extended and legislation has been amended accordingly.
4. In effect, the clock stops running when Acas receives the EC request and starts to run again the day after the potential Claimant receives the certificate from Acas. However, note that the rules allow an extension of one month from the date the certificate is received, if the time limit would have been reached at some point prior to that. A further two weeks can be allowed where the parties are actively involved in conciliation (Sch. 1, para. 6).

**Fees**

1. The 2013 Rules introduced fees for bringing employment tribunal proceedings (and for appealing to the Employment Appeal Tribunal). However, in *R (Unison) v Lord Chancellor* [2017] UKSC 51 the fees regime was declared unlawful. It is possible, but unlikely, that a replacement fees scheme will be introduced in this parliament.

**Time Limits**

1. 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.

1. Some of the more common time limits are set out below. For a comprehensive list see *Harvey* vol. 4 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 ofsexual orientation | 3 months | Date of act to which complaint relates |
| Failure to consult overtransfer 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 |

1. 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 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)). Pleading acts of continuing discrimination can thus provide an important way of escaping the apparent strictness of the statutory time-limit. However, it is important in this regard to note the difference between the continuing effect of a single discriminatory act, and a discriminatory policy or practice which continues over a period of time (see *Amies v Inner London Education Authority* [1977] 2 All ER 100).
2. In an unfair dismissal case you need to identify the Effective Date of Termination (known as the EDT). See generally *Harvey* vol. 1 para. DI [701] et seq. There are provisions for defining the EDT in different circumstances, set out in in s. 97 of the Employment Rights Act 1996 (‘ERA’). The two most common examples are (a) where a contract is terminated on notice, the EDT is the date when the notice expires; and (b) where a contract is terminated without notice, the date on which the termination takes effect. Of course, in circumstances where there has been a gradual breakdown in employment relations, those simple definitions can give rise to thorny factual disputes.
3. 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**

1. 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.
2. 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]

1. 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*).

1. 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. The above cases also indicate that appellate courts will be slow to interfere with a tribunal’s decision not to extend a time limit.
2. 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.
3. In summary, always consider time limits as early as possible; if in doubt, issue a claim to protect your client’s position.

**Time limits for responding to proceedings**

1. The key points are to be found in Rules 16-22 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!
	* Under Rule 16, lodge your response within 28 days of the date on which you are sent the claim;
	* Under Rule 20, the respondent may apply for an extension of time either prior to or at the time of submitting its response. The application will need to explain the reason for the request, as well as (in cases where the limit has already expired) being accompanied by a draft of the response itself. The application must be copied to the Claimant, who may give written reasons for opposing it within 7 days of receipt. An employment judge may determine the application without a hearing.
	* Under the old rules, the Tribunal would consider the reason for the delay, any prejudice, and the merits of the case in determining whether to grant the extension and would only do so if it is just and equitable (see *Kwik Save Stores Ltd v Swain* [1997] ICR 49.). These considerations are likely to inform the exercise of a Judge’s discretion under the 2013 Rules.
	* Where there is a failure to file a response, an Employment Judge shall decide whether on the available material a determination can be made of the claim, and if so issue a judgment accordingly (R.21(2)). If this is not possible a hearing shall be fixed before a judge alone. At this stage the respondent shall be entitled to notice of any hearings and decisions of the Tribunal, but unless an extension is granted, shall only be entitled to participate in any hearing to the extent permitted by the judge (R.21(3)).

**C. Drafting the pleadings**

1. 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 usually referred to as an ‘ET1’ and a response as an ‘ET3’, after the form numbers. These standard forms must always be used, but when the parties are represented it is usual to attach a pleaded particulars of claim (often headed Grounds of Complaint) or defence (often headed Grounds of Resistance) setting out the pleaded grounds and facts and points of law).
2. It cannot be over emphasised 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.
3. Overly legalistic pleading is now deprecated in every area of civil practice, and this is particularly important in employment pleadings. Remember that (at least in discrimination cases) 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**

1. 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.
2. 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’.
3. 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**

1. 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 be 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 to 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, include 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. And/or:
* **Provide written closing submissions.** Some advocates choose to submit both an opening skeleton and written closing submissions. There are obvious advantages to this approach, although one downside can be that your opponent can see from the outset where you are going with your arguments. Closing written submissions will assist in ensuring you keep your arguments on point and pithy. They also help to ensure that the Tribunal members have your arguments in their thoughts when they retire to make their decision.
* **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 where there is 3 person panel (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 because often, it falls to the Respondent to do the legwork. If bundles or witness statements are your responsibility, you will need six copies in a discrimination case: 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**

1. As referred to above, the procedure for the Tribunal is set out in the *Employment Tribunals Rules of Procedure 2013,* which appears as a schedule to the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* as amended (‘the Rules’). These are available online:

[http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/employment/rules-and-legislation.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/employment/rules-and-legislation.htm%2520)

1. The Regulations provide for an overriding objective (Rule 2) to apply which is similar to the Civil Procedure Rules Part 1 *– ‘to enable tribunals and Employment Judges to deal with cases fairly and justly’*. The 2013 rules include various additional consideration under the overriding objective to the effect that dealing with cases justly includes so far as practicable “*dealing with the case in ways which are proportionate to the complexity or importance of the issues*”. A Tribunal or Judge must seek to give effect to the overriding objective at every stage, and the parties have a duty to assist in its furtherance. The Tribunal Rules have increasingly changed to look more like the Civil Procedure Rules (‘CPR’) in recent years, and other parts of the CPR can sometimes provide helpful guidance to a Tribunal in how it decides questions. But the CPR provides no more than guidance and the ET is not bound to follow them: see *Neary v St Albans School for Girls Governors* [2010] I.C.R. 473 (Court of Appeal).

**Initial Consideration**

1. Rule 26 provides as follows:

*26.— (1) As soon as possible after the acceptance of the response, the Employment Judge shall consider all of the documents held by the Tribunal in relation to the claim, to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal (and for that purpose the Judge may order a party to provide further information).*

*(2) Except in a case where notice is given under rule 27 or 28, the Judge conducting the initial consideration shall make a case management order (unless made already), which may deal with the listing of a preliminary or final hearing, and may propose judicial mediation or other forms of dispute resolution.*

**Dismissal of claims and responses**

1. Rules 27 and 28 provide for the dismissal of claims and responses (or parts thereof) following a judge’s initial consideration. Rule 27 provides as follows in respect of claims:

*27.—(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties—*

 *(a) setting out the Judge’s view and the reasons for it; and*

*(b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.*

*(2) If no such representations are received, the claim shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).*

*(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The respondent may, but need not, attend and participate in the hearing.*

*(4) If any part of the claim is permitted to proceed the Judge shall make a case management order.*

1. Rule 28 is materially identical save for the jurisdictional stipulation in Rule 27(1), and for Rule 8(5), which states that where a response is dismissed, the effect shall be as if none was presented, as per Rule 21.

**Case Management Orders**

1. Rule 29-40 of the Tribunal Rules provide for case management powers. These may be exercised at any stage of the proceedings either on application or by a judge acting on his own initiative (R.29). Applications for case management orders may be made either at a hearing or in writing. The powers are wide ranging and include:
* Disclosure of documents and information
* Requirement to attend to give evidence
* Determining ‘lead cases’
* Striking out cases
* Unless orders
* Deposit orders
* Orders following the non-payment of fees

**Preliminary Hearings**

1. Again these are provided for by the Rules:

***Scope of preliminary hearings***

 *53.—(1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the*

 *following—*

 *(a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);*

 *(b) determine any preliminary issue;*

 *(c) consider whether a claim or response, or any part, should be struck out under rule 37;*

 *(d) make a deposit order under rule 39;*

 *(e) explore the possibility of settlement or alternative dispute resolution (including judicial mediation).*

 *(2) There may be more than one preliminary hearing in any case.*

*(3) “Preliminary issue” means, as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed).*

1. A preliminary hearing may be directed by a tribunal on its own initiative, following its initial consideration, or at any time following the application of any party and will normally be conducted by an Employment Judge sitting alone (R.54). Parties may request that a preliminary hearing be conducted by a full tribunal but the decision as to whether that would be ‘desirable’ is to be taken by an Employment Judge alone (R.55).
2. Preliminary hearings replace the old dual system of case management discussions and pre hearing reviews. Together with Rules 26-28 and 29-40 they provide for a full system of case management and pre-final hearing procedure in tribunals.

**Preparation for a Preliminary Hearing**

1. Prior to Preliminary Hearing where case management is to be considered the Tribunal will send the parties a standard Agenda document. The parties should liaise with each other so that there is one Agenda which includes both parties’ respective positions. In complex cases it is useful to draft a separate list of issues.
2. 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 preliminary hearing needs to concentrate on these.
* 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;
* 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?
* Directions for trial:
	+ Disclosure of documents;
	+ Exchange of statements;
	+ Exchange of expert evidence;
	+ Dates to avoid (have these ready);
	+ Bundles, skeleton arguments and chronologies.
1. Though the preliminary hearing 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 preliminary hearing 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 hearing. If you intend asking the Tribunal 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 55.

**Specific Case Management Powers:**

1. Specific issues which commonly crop up in preliminary hearings include:

**Further particulars**

1. These are quite often ordered under Rule 26 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. Although in some case you will not want to give them an opportunity of improving a weak case.

**Amendments to pleadings**

1. 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)

**Disclosure and Inspection**

1. The Employment Judge will order disclosure under Rule 31 and will insist on an agreed bundle of documents for the final hearing. Disclosure can be ordered to be given by any third parties in Great Britain in appropriate cases.

**Witness Statements**

1. Witness statements will generally be ordered, to be served in advance and to stand as evidence in chief at the final hearing. This is the default position under Rule 43. Unlike a typical County Court claim however, witness statements will frequently be served fairly late in the timetable, and close to the final hearing. Traditionally, statements were read aloud by witnesses before the Tribunal at the final hearing. However, recent guidance from Underhill J sitting in the EAT encourages tribunals to avoid wasting time by reading aloud statements, particularly where those statements are drafted by lawyers (see Mehta v CSA UKEAT/0127/10/CEA). Whilst the question of whether statements are to be read aloud remains ultimately one for the Tribunal, the guidance encourages parties and tribunals to agree between them which statements, or parts of statements, are to be read aloud. As clients are frequently nervous about having to read their statement aloud, Underhill J’s guidance should prove useful to representatives. In recent years the invariable practice is that no statements or parts of statements are read.

**Striking out**

1. Rule 37 provides for all or part of a claim to be struck out in certain circumstances.

*37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

 *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*

*(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

 *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*

 *(d) that it has not been actively pursued;*

*(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

*(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

*(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.*

**Deposits and costs warnings**

1. 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).
2. 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.

Rule 39(1) provides:

*(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

Note that a deposit cannot be ordered until the judge has taken account of the paying party’s ability to pay (Rule 39(2)).

**The Structure of a Typical Unfair Dismissal Case**

1. Practice differs enormously in tribunals so you will, to some extent, be guided by the judge.
* **Opening**: you will rarely have the opportunity 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 avoid 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 remedies after liability – though do not say that the reason is because you are confident of your case!

**Tactics For Examining Witnesses**

1. 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

1. Examination in chief is generally not permitted. This can present particular problems if, following a conference with witnesses at the tribunal, 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.
2. 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.
3. 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

1. 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.
2. 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.

1. 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.

**Some dos 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.

**Dealing with Litigants in Person**

1. Litigants in person are common in the Tribunal. Most tribunals 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 witnessed e.g. the solicitor and barrister should speak to the Claimant together. 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. For barristers rC3 of the new *Bar Code of Conduct* is of particular importance:

*You must take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions.*

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.

Settling Claims at the Tribunal

1. 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 settlement agreements (formerly ‘compromise agreements’) reached 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.
2. 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 DWP.
3. 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.
4. Formerly there were a number of methods that could be used to dispose of claims by consent and in some cases the tribunal would insist on a particular method. Staying a claim on agreed terms was often a preferable outcome for Claimants. Under the Rules, however, subject to any costs application made by the Respondent, where a Claimant withdraws a claim, it is to be automatically dismissed under Rule 52 – unless the Tribunal is satisfied either that there is a legitimate reason for the Claimant to be permitted to bring a further claim raising the same or substantially the same complainant, or that to dismiss the claim would not be in the interests of justice. This is potentially important because under the case law, mere withdrawal does not give rise to an estoppel of the claim, whereas dismissal constitutes a judicial decision, and will therefore result in a Claimant being debarred from bringing a claim based on the same facts (see, inter alia, *Barber v Staffordshire County Council* [1996] ICR 379).

**Costs**

1. 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 (or that party’s representative) has in bringing the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or any claim or response has no reasonable prospect of success;
* The Tribunal has to have regard to the ability to pay (Rule 84).
1. There are now five types of costs order (Rule 78): (a) the tribunal may assess costs up to £20,000 (by way of a summary assessment); (b) 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); (c) it may order the paying party to pay the receiving party specified amount as reimbursement of all or part of a Tribunal fee paid by the latter; (d) it may order the paying party to pay another party or a witness an amount in respect of necessary and reasonably incurred expenses; or (e) it may award a sum that the parties have agreed.
2. There are specific provisions in the rules for awarding costs in cases where a hearing has been postponed or adjourned (see Rule 76(2) and (3)). This does not depend on unreasonable conduct *(Ladbrokes Racing Ltd v Hickey* [1979] IRLR 273).
3. Any application for costs should be made promptly, and in any event within 28 days after the issuing of the judgment determining the claim (R.77). 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.

**G. Reconsideration and Appeals**

1. Under Rule 70, a Tribunal may, whether on its own initiative or on the application of a party, reconsider any judgment where it is in the interests of justice to do so. Unless made during the hearing, an application for reconsideration is to be made in writing within 14 days of the date the decision was sent to the parties. Tribunals are likely to exercise this power only in exceptional circumstances.
2. Appeals to the EAT are to be made by issuing a Notice of Appeal within 42 days of the date the decision appealed against was sent to the parties by the Tribunal. For representatives who intend to appeal, it is important to note that where a decision is given orally by a tribunal, parties have 14 days from the date of the sending of the written decision to the parties to request written reasons (i.e. a written judgment).
3. If having received a decision from an ET you are unsure why they have reached the decision that they have done, perhaps because the reasons simply do not make sense, or they contain significant errors that might suggest that they have not taken into account something important, then the EAT has directed that the advocate should seek a review of that decision by the ET and they should not leave it until an appeal to challenge the reasons: *Bansi v Alpha Flight Services* [2007] ICR 308, §22:-

*In our opinion it is certainly good practice where parties are legally represented in Employment Tribunals, for advocates to ask the Tribunal to amplify its reasoning where it is considered that there has been a material omission in its findings of fact or in its consideration of the issues of fact and law before it. Where reasons are given extempore the application should be made at the time. If reasons are given in writing the request should be made as soon as possible after the reasons are received. We would encourage advocates to seek clarification from the ET promptly in any case where there might otherwise be an appeal based on alleged insufficiency of reasons. It is much easier for Tribunals to deal with requests for clarification when they are fresh in their minds and the amplification of insufficient reasons and finding will save the parties time and expense and may in some cases obviate the need for an appeal and subsequent remission of the case.*

**JEFFREY JUPP**

7 Bedford Row

 24th October 2017