

# Preliminary matters

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## Whether to bring a claim

- 1.1 For a lawyer, the question whether a claim should be brought is normally approached by way of three questions: (i) what are the prospects of success? (ii) how much compensation will be awarded (or what other benefit will it bring) if it succeeds? and (iii) what will it cost to run?
- 1.2 For a claimant, the third question needs to be considered carefully from all angles. The question how much money will need to be spent on the claim is, of course, an important one. Even if you are acting for yourself, or are lucky enough to have free representation, there will be some financial costs: telephone calls, postage, photocopying, fees for expert reports, etc. But the non-financial costs of running a case against your former employer should be looked in the eye too.<sup>1</sup>
- 1.3 The first thing to notice is just how important the employer/employee relationship can be for the employee. Obviously this varies: the 25-year-old graduate in his third job in the last four years will feel much less attachment to his employer than the fifty-something who has been with the same employer since leaving school at 16. But in many cases, losing your job doesn't just mean losing an income: it also means losing much of your reason for getting up in the morning, daily contact with people with whom you have a common experience and circle of acquaintance, your status, your self-esteem and much of your social life as well.
- 1.4 The importance of the employment relationship is not symmetrical. Most employees have a considerable emotional investment in their jobs. Employers do not as a rule have any particular emotional attachment to their employees.<sup>2</sup> Although the bodies – the companies, public authorities, charitable trusts, unincorporated associations or partnerships – that employ staff act through human beings, and those individual human beings can be kind and well-meaning, the body itself does not, whatever its mission statement or staff handbook may say to the contrary, 'care'. It simply lacks the equipment with which caring is done.
- 1.5 Both factors make litigation tempting. Being an employee can have something in common with being the child of a psychopathic parent: you have a large emotional investment in a relationship with

1 Most employment tribunal cases concern, one way or another, the termination of the employment relationship, so the 'former employer' is referred to here although can be and occasionally are brought against a current employer.

2 We apologise for any shattered illusions.

something that does not care about you at all. Litigation can seem like the only way to shout loudly enough to force the psychopath to pay attention. A significant proportion of tribunal cases are motivated as much by personal feelings of rejection and betrayal as by a realistic or well-judged expectation of winning sufficient compensation to justify the cost of the claim.<sup>3</sup>

1.6 This is not a good basis on which to litigate. Because the employment relationship is so important to an employee, its termination often causes significant distress, and not infrequently depression. One of the consequences, ultimately, of an employment tribunal claim may be that the employer has to pay the former employee some money. Occasionally this will be a large sum of money, but more often it will be modest.<sup>4</sup>

1.7 Very rarely, the employer is ordered to reinstate or re-engage the employee; even more rarely such an order is obeyed.<sup>5</sup> Because these orders are so unusual, it is almost never sensible to bring a claim in the hope of obtaining one.

1.8 The price that the employee will pay for these uncertain benefits is a long period in which he must dwell on the events surrounding the termination; study all the correspondence and associated documentation in detail; give a statement to an adviser or solicitor (or write it himself); draft or approve the claim to the tribunal; read and comment on the employer's response; correspond with the employer or its solicitor; and ultimately, unless the claim settles, undergo hostile cross-examination and listen to the employer justify its conduct in the course of the hearing. The net effect is that the employee must keep some kind of relationship going with the former employer, and must allow the events surrounding or preceding the termination of employment to dominate his thoughts – and very likely his dreams too – over a period of many months, or even a number of years.

1.9 For these reasons, if the employment has ended in stress and depression for the employee, litigating about it will almost certainly make it worse. Claimants often say something to the effect 'If I had known what this was going to be like, I would never have begun.' But here another mechanism comes into play. Litigation is a form of gambling, and gambling is notoriously addictive. Losses are part of

3 This is a wholly unscientific observation, but between us we have seen a lot of employment tribunal claims and believe it to be broadly true.

4 See generally chapter 9.

5 In 2008–09 the tribunals made seven orders for reinstatement or re-engagement, that is in only 0.2 per cent of unfair dismissal cases that were upheld after a hearing.

the reason: you may wish you had never begun, but the heavier your losses to date, the more painful and difficult it is to admit that they have been suffered for nothing. From this point it is an easy path to obsession. Litigation can seriously damage your mental health. Social lives and marriages can suffer or crumble under the strain. One point to keep clearly in mind is that on the whole, the angrier you feel about the way your employer has treated you, the higher will be the emotional costs and risks of fighting the case.

1.10 It is sensible to litigate (a) if you have to; or (b) where you have a point you want to make, but the outcome is not of enormous personal importance to you, and the financial costs are borne by someone else; or (c) if there is a fairly clear probability that the costs – emotional as well as financial – will be justified by the benefits. The first two rarely arise in employment litigation.

1.11 In the last edition we said that the conclusion to all of this is that litigation – even in the relatively informal and low-risk environment of the employment tribunals – is almost always a bad idea once you have taken into account the factors that lawyers do not concern themselves with as well as those that they do.<sup>6</sup> We still think this is broadly true, but in the current economic climate there is a greater likelihood of being effectively forced into litigation by financial need.

1.12 A middle way can be to make the decision to commence proceedings purely in order to achieve a settlement, while resolving that it will be withdrawn if not settled during the early stages.<sup>7</sup> This is like gambling with a set budget. It may require considerable firmness of purpose to stick to your original intention about how much effort and money you will commit before cutting your losses, but if you can do that it is worth considering.

## How much will I get if I win?

1.13 People bring claims for many reasons. Money is rarely the only motive, and often not the most important one. All the same, this is one of the questions you should ask before you start employment tribunal proceedings. The answer depends on the type of claim and

6 This is no criticism of lawyers. It is as reasonable to expect your lawyers to help you decide whether the emotional costs of litigation are worth incurring as to expect your priest or therapist to provide legal advice; their expertise is elsewhere.

7 The resolution has to be made privately of course: it will be futile if the employer is aware of the strategy.

a whole host of other specific circumstances. This book is not about how to calculate damages in the employment tribunal, although some practical advice is given in chapter 9.

1.14 It is, however, useful to say something about how tribunals approach awarding money and how much, on average, people get.

1.15 In most cases, the idea will be to compensate you for what you've lost because of the unlawful conduct that forms the basis of your claim. There are exceptions, but they tend to involve fairly small sums. If your employment has ended, your main argument will be about lost earnings. If your claim is for discrimination, you will be making a claim for injury to feelings as well: most awards will be of a few thousand pounds and awards over £25,000 are rare. If discrimination has caused significant injury to your health, you will be looking for an award for that, too: your starting point in assessing this is probably the Judicial Studies Board's *Guidelines for the Assessment of General Damages in Personal Injury Cases* (9th edition, OUP).

1.16 In any case where you are claiming lost earnings because you have lost your job, you will be under a duty to 'mitigate' your loss. What that means is that just because you've been dismissed, however unfair (or discriminatory) the dismissal, you can't expect to sit back and claim lost earnings until your retirement age. You are expected to try to find another job. If there are good reasons why you can't, or why any job you are likely to get will be for a much lower wage than you were earning before, you'll need to be able to explain why. You will also need evidence, and you should start collecting that evidence as soon as you decide to bring your claim.<sup>8</sup> It is fairly rare that tribunals award compensation to cover more than a year or two's lost earnings – and a few months is more usual. There's a limit, currently £66,200, on what you can recover as compensation for most types of unfair dismissal – but most awards get nowhere near that limit. There's no limit in theory to what you can get for discrimination or for a whistle-blowing dismissal, but that doesn't mean that awards have to be huge.

1.17 In 2008/2009, the median award for unfair dismissal was £4,269; and the medians for race, sex and disability discrimination cases were about £5,172, £7,000 and £7,226 respectively. Don't let newspaper reports of awards in the hundreds of thousands, or even millions, give you the wrong idea. Tribunals do occasionally make very large awards – and those, of course, are the ones that hit the headlines

8 See para 9.38 below for guidance on how to do this.

– but they are rare.<sup>9</sup> The best way of getting a huge award is to have an extremely well-paid job to start with: if you're being paid in the hundreds of thousands every year, then you'll clock up large losses in a short period out of work. People earning normal salaries will only get large awards if they can show that they are likely to suffer a very long period of future loss. That, because of the duty to mitigate, is usually difficult.

## Sources of employment law advice and representation

- 1.18 This book is partly aimed at individuals representing themselves in employment tribunal claims. The employment tribunal process is intended to be accessible to people without specialist knowledge, and many individuals do represent themselves. Nevertheless, most people will prefer to have representation if they can find it.
- 1.19 If you cannot afford to pay substantial sums of money for representation you should consider the possibilities of free or affordable representation in this order:
- your trade union;
  - your household, credit card, car (etc) insurance;
  - a voluntary sector advice centre;
  - high street solicitors;
  - employment consultants.

## Trade unions

- 1.20 Anyone who is a member of a trade union should normally expect to be represented by the union in a dispute with his employer. Unions have different rules about which cases they will support. Often it will depend on whether they think the claim is likely to succeed. Some will withdraw support (even shortly before the hearing) if you refuse to accept what the union's lawyers think is a good offer of settlement. If you are relying on union assistance you should make sure that you understand the circumstances in which it will be withdrawn.

<sup>9</sup> In any case, newspaper reports of people *claiming* millions of pounds are considerably more common than reports of people *receiving* millions of pounds.

## Household insurance

- 1.21 Household (and other) insurance policies include legal expenses insurance surprisingly often. This tends to be a neglected source of assistance for the simple reason that many people do not realise that they have the cover.
- 1.22 It can be extraordinarily good value: the insurance may cover all legal expenses, including specialist representation at the hearing, with no claw-back even if you recover a large award. It is important to investigate this at an early stage in the dispute, however, because if you take steps in employment tribunal proceedings without the advice of an insurer-approved lawyer, you may find that you have invalidated your insurance.<sup>10</sup>

## Voluntary sector advice agencies

- 1.23 There are various kinds of voluntary sector advice agencies that may be able to offer free advice and/or representation. Almost all of them are badly over-stretched, and many claimants will spend fruitless hours telephoning advice agencies only to be told that no one can help. However, some agencies will deliver an exceptional service that rivals the best that private practice solicitors can offer, so (within limits) it is worth persevering. The process may well be frustrating, but anyone seeking free representation should try not to let the frustration show. Mostly ‘we cannot help’ means just that – the organisation simply has no spare capacity, or does not do this sort of work. If there is any flexibility, human nature is as it is and charm almost always gets further than aggression.<sup>11</sup>
- 1.24 Most voluntary sector advice agencies belong to an umbrella organisation, and that organisation’s website will often be the best starting point for finding local services. The main umbrella organisations and their website addresses are:

- Law Centres: Law Centres Federation: [www.lawcentres.org.uk](http://www.lawcentres.org.uk)
- Citizens’ Advice Bureaux: Citizens Advice: [www.citizensadvice.org.uk](http://www.citizensadvice.org.uk).
- Other advice agencies: AdviceUK: [www.adviceuk.org.uk](http://www.adviceuk.org.uk).

10 It is also worth checking motor insurance and any policy attached to credit cards, and any other membership that might include insurance. Even membership of a football club has been known to provide this type of benefit.

11 There is a practical insight of wide application here. Even when aggression may be effective, charm should always be tried first. The reason is that if charm does not work, aggression is still available as a last resort. Starting with aggression and then trying to backtrack to charm is tricky.

### *Law Centres®*

- 1.25 Law Centres® are, in effect, not-for-profit solicitors' practices that specialise in what is broadly defined as 'social welfare law' – typically housing, immigration, employment and welfare rights. Most if not all law centres operate a catchment area policy and will only advise those who live (or sometimes work or worked) in their area. Many will only accept clients who are financially eligible for public funding, and the rest are likely to impose some kind of means test on access to their services. Most employ an employment lawyer or specialist adviser. There are about 60 law centres in the UK. Roughly half are in Greater London and most of the rest in substantial town or city centres.

### *Citizens Advice Bureaux*

- 1.26 Citizens Advice Bureaux (CABx) tend to offer a generalist service, and only some employ a specialist employment adviser. CABx do not generally have a catchment area policy and will advise anyone who approaches, subject to availability of advisers. They do not generally means-test their clients except for Legal Services Commission funded work. There are around 426 CABx in England and Wales: any sizeable town centre is likely to have one. The umbrella group is called Citizens Advice.

### *The Free Representation Unit and the Bar Pro Bono Unit*

- 1.27 In London, the Free Representation Unit (FRU) can sometimes provide representation at employment tribunals, but it does not deal direct with members of the public. Cases must be referred, after a hearing date has been fixed, by a solicitor, law centre, CAB or other advice agency.<sup>12</sup> Claimants in London who are receiving advice and assistance for case preparation, but whose adviser is not able to represent them at a hearing should make sure their cases are referred to FRU as soon as a hearing date is set to have the best chance of representation. Most FRU volunteers are student or trainee lawyers who work under the supervision of a specialist employment lawyer. They choose their own cases, rather than having cases assigned to them, so FRU can never guarantee representation in any given case until a particular volunteer has offered to take the case on.

12 FRU only accepts referrals from solicitors and advice agencies that are signed up with the organisation and pay an annual subscription; for further details, and a list of subscribing agencies, see [www.freerepresentationunit.org.uk](http://www.freerepresentationunit.org.uk)

- 1.28 The Bar Pro Bono Unit (BPBU) is a charity funded by the Bar Council and others that matches clients in need of free representation with barristers willing to give their time. Because the kind of work barristers are permitted to do is restricted, BPBU is best able to assist clients who are represented by a solicitor's firm or advice agency that is willing to retain conduct of the case and instruct the barrister to do defined pieces of work – to draft a document, for example, or appear at the hearing. Like FRU, BPBU will only accept referrals from an advice agency. It will not deal direct with members of the public. Unlike FRU, BPBU puts applications for assistance through a careful sift to decide whether or not to offer help, so an application to BPBU should always be made as early as possible. BPBU itself is located in London, but its services are potentially available throughout England and Wales. As with FRU, the fact that BPBU has accepted a referral is no guarantee that it will be able to assist. The Unit's website is [www.barprobonounit.org.uk](http://www.barprobonounit.org.uk).

### *LawWorks*

- 1.29 LawWorks is a solicitors' pro bono organisation.<sup>13</sup> Like the Bar Pro Bono Unit and FRU, it accepts applications for assistance only through advice agencies. Like BPBU, it applies both means and merits tests before offering assistance. An application form can be downloaded from its website.

### *Specialist charities*

- 1.30 Some of the larger disability charities, including RNIB (Royal National Institute for the Blind), and the Disability Law Service employ specialist advisers who can advise and sometimes represent in disability discrimination cases. Public Concern at Work provides a helpline on whistle-blowing issues but does not undertake casework. The Terence Higgins Trust provides helpline advice on HIV-status employment issues, and may be able to refer on to other agencies for casework.<sup>14</sup>
- 1.31 This is not a comprehensive list, and policies and personnel can change rapidly, so it is always worth investigating carefully whether there is a specialist charity that may be able to help.

13 [www.lawworks.org.uk](http://www.lawworks.org.uk)

14 The websites of these organisations are at [www.rnib.org.uk](http://www.rnib.org.uk), [www.dls.org.uk](http://www.dls.org.uk), [www.pcaaw.co.uk](http://www.pcaaw.co.uk) and [www.tht.org.uk](http://www.tht.org.uk)

## The Equality and Human Rights Commission

- 1.32 The Equality and Human Rights Commission is the statutory body responsible for all aspects of equality law.<sup>15</sup> That means that they cover discrimination on the ground of sex; race; disability; sexual orientation; religion and age. They also deal with human rights, but this is of limited relevance in the employment context.
- 1.33 The EHRC website provides guidance on equality rights and tribunal claims. They also have a helpline.
- 1.34 In very rare cases they are able to provide representation for a case where the result would affect a large number of other individuals.

## Private practice solicitors

- 1.35 If you are eligible for Legal Services Commission funding (ie dependent on means-tested benefits or on a very low incomes) you may be able to find a solicitor who can advise and assist with preparation of the case. There is no public funding for representation at the tribunal hearing in any but the most exceptional cases, so claimants who take advantage of this scheme are likely to find that they either have to represent themselves at tribunal or pay privately for a solicitor or a barrister to represent them.
- 1.36 The decision to pay privately for employment law advice should be approached with caution. Lawyers' fees mount up frighteningly fast, and the total value of an employment tribunal claim is often too small to justify them. Some solicitors offer 'no win no fee' agreements, but the drawback to these is that, because the solicitor is taking a risk of not being paid at all, the fee if the case is successful will normally be higher than it would otherwise have been. There can also be sums that the client has to pay anyway, such as fees for medical or other experts' reports or barristers' fees. Occasionally this will be the best, or the only practical, way of running an employment tribunal claim, but if you are considering taking this course you should make sure you have had a very clear explanation of the 'worst case' outcome before making a decision. It is also worth asking solicitors to advise, as a preliminary matter, on whether any insurance policy the claimant has is capable of covering legal expenses.

15 Replacing the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission, and taking on additional responsibilities besides: see [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

## Employment consultants

- 1.37 A number of firms of employment consultants offer their services in this area and some of these market aggressively. Proceed with caution if you are thinking of using one of these organisations. Check first that they are authorised as a ‘regulated claims management service’. Anyone providing representation in employment tribunals, for profit, who is not a qualified lawyer, must be authorised by the Ministry of Justice.<sup>16</sup> If an organisation is not registered, do not use them. Unfortunately, being properly authorised is no guarantee of quality. These organisations vary widely: although some can provide a good and relatively cheap service, others are worse than useless.

## ACAS Helpline

- 1.38 ACAS run a national helpline that gives employment advice to both employees and employers. The number is 08457 47 47 47.
- 1.39 Telephone advice is inevitably limited. It is not possible to provide detailed advice during a short conversation and without seeing the relevant papers. Nonetheless, the helpline can be a good source of basic advice.

## Making the most of your adviser

- 1.40 Most of this book is written for people who are either representing a client in the employment tribunal, or are representing themselves. The underlying assumption is that if you are a claimant in an employment tribunal case who has an adviser, you can leave running the case to him.
- 1.41 That assumption is not completely accurate. If you are getting free advice, the time your adviser can spend on your case will be limited by the other demands on his time – and demand for free legal advice vastly outstrips supply, so the chances are he’s rushed off his feet. If he’s representing you by way of Legal Help, he will be operating under grossly unrealistic time limits imposed by the Legal Services Commission. And if you’re paying for legal advice, the time your lawyer can spend on your case will be limited by your budget: lawyers normally charge by the hour.<sup>17</sup> Whatever the situation, there will almost certainly be a limit, and probably quite a tight one.

<sup>16</sup> You can check at [www.claimsregulation.gov.uk](http://www.claimsregulation.gov.uk)

<sup>17</sup> And in six-minute units.

- 1.42 Case preparation consumes time at a frightening rate, so if you do everything in your power to limit the time your adviser has to spend on non-essential tasks, or tasks that he is no better qualified than you to do, you will maximise the time he has available for more difficult things.
- 1.43 One of the simplest things you can do is provide your adviser with a well-organised set of papers. Taking letters out of envelopes, removing staples and paperclips, sorting papers into chronological order, weeding out duplicates, photocopying and hole-punching are all easy tasks – but time-consuming.<sup>18</sup> You would think it mad to pay anyone £100 or more an hour to sort your laundry, but it is surprising how many people are prepared to pay their lawyers to put papers into chronological order.
- 1.44 Be as focused as possible in the information you give to your adviser, and the way you answer his questions. In ordinary conversation, a question is very often not so much a request for specific information as a polite cue whose purpose is to make space for you to talk for a bit. If it was your habit to behave in social situations like the ideal client or witness – just giving a succinct factual answer focused precisely on the question you were asked, and then stopping to wait for the next question – you would soon stop getting invitations. But your lawyer’s questions are best treated in precisely that way.
- 1.45 There are many sources of free information for people going through employment tribunal claims, so try to get the answers to your basic questions that way before paying your lawyer to tell you. We hope that this book will answer a lot of questions. *Employment law: an adviser’s handbook* will probably answer most of your questions about the substantive law. Even if you can’t find a complete answer, a little research is likely to refine your question and make it easier to understand the answer.
- 1.46 If you are trying to keep your legal costs down, you can always ask ‘Is that something I could do myself?’ or ‘Will it save time if I do a first draft?’ when your lawyer tells you that a particular piece of work needs doing. You will certainly save quite a lot of your adviser’s time if you write a good first draft of your witness statement.<sup>19</sup>
- 1.47 It is quite likely that at some stage in your case your adviser will tell you something you don’t want to hear. This may be that part, or even all, of your case is likely to lose. Or it may be that they don’t

18 In most cases it will take an hour or two, but half a day is not unusual.

19 See chapter 4 for guidance on what should go in a witness statement and how it should be organised.

think it is a good idea to run a particular argument, or call a particular witness. Lawyers are not always right, and it certainly can be worth making them defend their judgements about your case. But it is worth remembering that you went to them in the first place because you felt you needed specialist help. Ultimately, if you try to dictate to them exactly how to run the case, they are likely to point out that if you don't trust their judgement, you are free to sack them and do the job yourself.

- 1.48 Finally, bear in mind that lawyers are people. Your lawyer has a professional obligation to act in your best interests even if you are rude and aggressive, but having him whole-heartedly on your side is better. Some charm and consideration can go a long way. Your adviser is working on many other cases at the same time as yours, and there will be times when they have to give other work top priority.<sup>20</sup>

## Representing yourself

- 1.49 If you are unable to obtain representation from someone else, you will have to represent yourself. There is nothing unusual about this. The tribunal is used to it and will, to some extent, try to help you. Tens of thousands of claimants represent themselves in tribunals every year, and many of them win their cases.

- 1.50 That said, competent representation helps; and the better the representation, the more it will help. The reasons are simple, if unfair. The better the representative, the better the case will be presented. The right points will be taken, arguments will be presented persuasively and, perhaps most importantly, witnesses will be cross-examined effectively. In general, an experienced lawyer will do all of this better than a claimant acting for himself. If you are a claimant acting for yourself against an experienced lawyer representing your former employer, it is easy to feel overwhelmed.

- 1.51 But there are a few things to bear in mind. Crucially, although good representation is helpful, other factors are more important. The biggest factor in deciding the outcome of the case is what actually happened. If on learning that you were pregnant, your employer sacked you on the spot and then sent you a letter complaining of your

20 Advisers can assist with this by keeping clients informed about their other commitments. If you are about to be in court for two weeks, consider letting your other clients know, or at least arranging out-of-office announcements on your phone and e-mail.

disloyalty in putting family before your job, you will win your unfair dismissal and sex discrimination claim however good your employer's representation.

1.52 What good advocates can do is influence the odds. If the chances of winning are about 50/50, good representation might make it 60/40. Similarly, when dealing with remedy, representation might make the difference between an award of £4,000 and £7,000. This is still important, but it does mean that you should not feel defeated from the outset just because you are representing yourself.

1.53 Also remember that a lawyer's ability and experience is to a large part absorbed by dealing with things that you do not have to do. Lawyers do not deal with one case at a time. They deal with dozens, or a hundred.<sup>21</sup> A great deal of their work is mastering the facts of all these cases from a standing start. If you are acting for yourself you do not have this problem. You know the facts of your case, because you have lived them.

1.54 The tribunal will normally be more tolerant of your mistakes than they would be of a lawyer's.<sup>22</sup> They will expect to do more work themselves. They will want you to explain why you think your dismissal was unfair or how you were discriminated against. But they will do a lot of the work of translating what you say into legal language. Similarly, they will expect to have to engage more closely with the evidence, including questioning witnesses, than they would if both parties were represented.

1.55 Finally, anyone facing a lawyer with a fearsome reputation should consider this. Lawyers with fearsome reputations generally charge fearsome fees. This has two potentially helpful implications. First, the employer must be seriously worried to be spending this much defending your case. That probably means they think it is strong. Secondly, it pushes up the settlement value of the claim. If your claim is listed for a 10-day hearing and your employer has instructed a barrister who doesn't get out of bed for less than £3,000 a day, that is £30,000 they will save if case settles.

21 Where they fall on this range will depend on what sort of practice they have.

22 This double standard reflects the tribunal's belief that a lawyer ought to know what he is doing.

## Grievances and disciplinary procedures

- 1.56 Anyone who has practised employment law over the last few years will be aware of the introduction in 2004 of the statutory dispute resolution regime, which was intended to encourage early dispute resolution in the workplace and reduce litigation. Failure to comply properly with the statutory procedures meant, in some cases, being barred altogether from bringing a tribunal claim, and in others having your compensation reduced. Failures on the part of the employer could lead to an automatic finding of unfair dismissal, or to having to pay an enhanced award of compensation. Time limits were adjusted in order to allow the procedures to run their course.
- 1.57 The underlying idea took no account of how people in ordinary workplaces actually think and behave, and the provisions were a nightmarishly complicated tangle of rules, exceptions, special cases and trip-wires. The whole mechanism was repealed with effect from 6 April 2009.<sup>23</sup>

## The ACAS Code of Practice

- 1.58 In place of the 2004 regime, there is now a new ACAS Code of Practice on Disciplinary and Grievance Procedures, plus a power<sup>24</sup> in the tribunal to increase or reduce any award to the employee by up to 25 per cent if either side has unreasonably failed to comply with the Code. The obligations in the code for employees are fairly light. The main points to note are:
- If you want to (or might want to) complain to a tribunal about something other than dismissal that your employer has done or failed to do, you should raise an internal grievance about it first.
  - If your employer arranges either a disciplinary or a grievance meeting, you should make every effort to attend.
  - If you are not happy with the outcome of either a disciplinary or a grievance meeting, you should appeal.
- 1.59 The Code of Practice is still new, and it is not yet clear either how ready employment tribunals will be to reduce (or enhance) compensation because of unreasonable failures to comply with it. But

23 There are still some over-complex transitional provisions that affect cases in which some or all of the relevant events took place before 6 April 2009.

24 Conferred by a new section 207A in the Trade Union & Labour Relations (Consolidation) Act 1992.

because failure to raise a grievance in relation to a particular head of complaint to the employment tribunal will no longer deprive the tribunal of jurisdiction to hear the complaint, there will be less emphasis by employers on trying to spot aspects of the employee's claim that have not been founded by a grievance. And tribunals are unlikely to regard it as 'unreasonable' of an employee to fail to specify in a grievance every single matter of which he may later wish to complain to the tribunal.

1.60 All this means that the drafting of a grievance need no longer be nearly such an anxious matter as it was before April 2009. Make sure you have told your employer broadly what is bothering you in an internal written grievance before you start an employment tribunal claim, give them further explanations of your complaint if they ask for them, attend any meetings about the grievance that they organise, and appeal if you're not happy with the result. If you do all that, you are unlikely to suffer a reduction in your award for an unreasonable failure to comply with the Code.

1.61 One specific point that is not yet clear is whether it will still be necessary to raise a grievance about a complaint you want to raise with the tribunal even if your employment has ended. Only an 'unreasonable' failure to comply with the Code is liable to be penalised by a reduction in any award; but – arguably, at least – it will rarely if ever be unreasonable not to raise a grievance against a body that no longer employs you. No doubt at some point in the next couple of years this will be clarified by the Employment Appeal Tribunal. Until then, the safest course must be to raise a grievance even if your employment has ended. If you don't want to go to a meeting with your employer, you could suggest that they deal with your grievance on paper.<sup>25</sup>

## Outline of the employment tribunal process

1.62 An employment tribunal case begins with a formal claim on form ET1 (see para 2.1 below). Often this will have been preceded by an internal disciplinary or grievance process run by the employer.

1.63 In very broad outline, then, the process falls into four stages:

(1) the employee's formal claim and the employer's response, presented on forms ET1 and ET3 respectively;

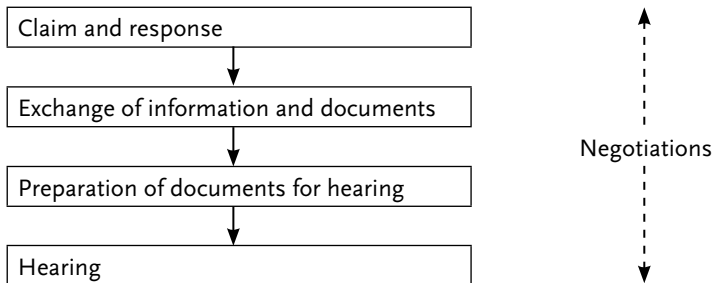
<sup>25</sup> This idea is borrowed from the 'modified grievance procedure' that was available in such cases under the old regime.

(2) requests by each side for information and documents, and requests to the tribunal for orders if these requests are not voluntarily complied with;

(3) preparation by each side of all the documents that will be required for the hearing: the witness statements, an agreed bundle of all relevant documentary evidence, any written representations, chronologies, lists of issues, etc; and

(4) the hearing itself.

1.64 There may be negotiations at any of these stages. The parties are normally referred to as the claimant (the employee who brings the claim) and the respondent (the employer, who responds to it).



1.65 Note that negotiations can take place at any point during this process. The best time for them is early on, before either side has committed a great deal of time and energy (and probably money) to the case. Often, though, neither side really focuses on negotiations until the hearing is close.

## Sources of employment law

1.66 There are two sources of law in the employment tribunals. One is legislation: the law passed by Parliament. The other is case-law, some of which consists in the courts' interpretations and explanations of legislation, and some of which is what is called 'common law' – law that doesn't come from legislation at all, but has been developed over the years by the courts.

1.67 Non-lawyers need to be aware that legislation and case-law are not static. Most of the major employment statutes have been regularly updated since they came into force. This means that some care needs

to be taken to ensure that you are referring to the current law.<sup>26</sup> Similarly, case-law is in a constant state of development as the courts reach new decisions. Normally this is a relatively gentle process of refining what has gone before, but there are occasional sudden shifts.

1.68 Most tribunal cases are brought under a cause of action created by a statute. For example, claims for discrimination on the ground of sex are brought under the Sex Discrimination Act 1975. The reason that such claims are possible is that the SDA says such discrimination is unlawful and gives the employment tribunals jurisdiction to deal with those cases. What is unlawful and what the tribunal can do about it is set down in the Act.

1.69 At the heart of the employment relationship is the contract of employment. Contract law is what is called a common law subject: that is, its main principles are to be found in previously decided cases rather than in statutes.<sup>27</sup>

1.70 Employment tribunals must apply common law principles where appropriate as well as the relevant statutory rules. Contract law is one example of this, but there are many others.

1.71 To complicate matters further, there is a substantial body of European employment law; and the European Convention on Human Rights, applied in the UK by way of the Human Rights Act 1998, also has many applications in this area.

1.72 Whether the tribunal is considering a statutory or a common law rule, cases that have been decided in the past by the Employment Appeal Tribunal (EAT) or higher courts set precedents that must be followed by the employment tribunals. Courts and tribunals are generally bound to follow the decisions of higher courts: so, for example, the employment tribunals must decide cases in a way consistent with the previous decisions of the EAT, the EAT must follow the rulings of the Court of Appeal, and the Court of Appeal must follow its own previous rulings and the rulings of the Supreme Court

26 The *Butterworths Employment Law Handbook* by Peter Wallington is a comprehensive (and annually updated) collection of employment statutes which most lawyers will take with them to the tribunal, and the tribunal will always have available for its own use at the hearing. The government has recently created [www.statutelaw.gov.uk](http://www.statutelaw.gov.uk), an online database of legislation. This is also updated, but was still being brought up-to-date at time of writing.

27 The standard practitioners' textbook is *Chitty on Contracts*, 30th edition, Sweet & Maxwell, 2008. *Chitty* is very comprehensive, but is likely to be forbiddingly technical for anyone without a legal training. The important point, for non-lawyers, is simply to be aware that there are two different kinds of law operating in this field.

(previously the House of Lords).<sup>28</sup> Sometimes the argument between the parties will focus on whether or not the facts of the case are similar in the relevant way to the facts of a previously decided case, so that the result in the earlier case is binding on the tribunal that decides the later. The party seeking to apply the result in a previous case will say that the two cases are alike in all relevant respects; the other party will argue that there is a material difference between the cases that means that the earlier case need not be followed.<sup>29</sup>

- 1.73 The only way to gain a proper understanding of this process of reasoning is to read reports of cases. Employment cases are reported in two monthly series, the *Industrial Case Reports* (ICR) and the *Industrial Relations Law Reports* (IRLR), both of which should be available in any law library.<sup>30</sup> The standard method of referring to a case reported in one of these, or similar, series follows the pattern: *Party v Other Party* [2004] IRLR 382. This indicates that the report of the case will be found at page 382 of the 2004 volume of the *Industrial Relations Law Reports*. In addition, more recent decisions of the Employment Appeal Tribunal, the Court of Appeal and the Supreme Court are all available online.<sup>31</sup>

## Books

- 1.74 A great many books are published on employment law, and the following represent a tiny sample of what is available. *Employment Law: an adviser's handbook* by Tamara Lewis is published by Legal Action Group, 8th edition, 2009 (ELAH 8). This is an excellent and accessible short guide to the substantive law. The same author has also written *The Claimant's Companion*, which can be downloaded as a pdf from the [www.londonlawcentre.org.uk](http://www.londonlawcentre.org.uk). *Harvey on Industrial Relations and*

28 Unlike the Court of Appeal, the EAT is not technically bound by its own previous rulings, but will normally be reluctant to depart from them.

29 The latter kind of argument is often referred to as 'distinguishing' the earlier case.

30 In London, the Hammersmith, Holborn and Westminster Public Libraries maintain a specialist law collection, and the Supreme Court Library at the Royal Courts of Justice on the Strand is open to the public. Any university law school will have a law library and some will allow members of the public to use reference facilities in some circumstances: inquiries should be made of the local law school.

31 Key websites are BAILII (British and Irish Legal Information Institute) at [www.bailii.org](http://www.bailii.org), the EAT website at [www.employmentappeals.gov.uk](http://www.employmentappeals.gov.uk), the Court Service website at [www.hmcourts-service.gov.uk](http://www.hmcourts-service.gov.uk) and the Supreme Court website at [www.supremecourt.gov.uk](http://www.supremecourt.gov.uk)

*Employment Law* (Butterworths), is a large loose-leaf publication in several volumes that explains the law in great detail and is updated regularly throughout the year.<sup>32</sup> If a difficult question arises to which the answer cannot be found in one of the shorter books it will be worth consulting.

## Key employment cases

- 1.75 There are certain decided cases that determine points of such fundamental importance to employment law that all those advising in the area need to be aware of them, and preferably to have read them. No two employment lawyers would compile the same list, and the decision whether to list 10, 50 or 100 cases is arbitrary. With those reservations, the following is offered as a selection of some of the fundamental cases – divided into broad subject areas – that advisers should be familiar with.

### *Unfair dismissal*

- *Post Office v Foley* [2000] ICR 1283, CA.

### *Conduct dismissal*

- *Burchell v British Home Stores* [1980] ICR 303, EAT
- *Linfood Cash & Carry Ltd v Thomson* [1989] IRLR 235, EAT

### *Procedural fairness*

- *Polkey v AE Dayton Services* [1987] IRLR 503, HL

### *Redundancy dismissal*

- *Williams v Compair Maxam* [1982] ICR 156, EAT
- *Murray v Foyle Meats* [1999] ICR 827, HL
- *W Devis & Sons Ltd v Atkins* [1977] IRLR 314, HL

### *Constructive dismissal*

- *Western Excavating v Sharp* [1978] ICR 221, CA

### *Trust and confidence term*

- *Eastwood v Magnox Electric plc* [2004] ICR 1064, HL

32 It is also available as an online subscription service.

### *Who is an employee?*

- *Ready Mixed Concrete v Minister of Pensions* [1968] 2 QB 497, CA
- *Carmichael v National Power* [1999] ICR 1226, HL

### *Discrimination*

- *Igen v Wong* [2005] ICR 931, [2005] IRLR 258.
- *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL
- *King v Great Britain-China Centre* [1992] ICR 516, CA
- *Nagarajan v London Regional Transport* [1999] IRLR 572, HL
- *Chief Constable of West Yorkshire Police v Khan* [2000] ICR 1169, HL
- *Glasgow City Council v Zafar* [1998] ICR 120, HL
- *Vento v Chief Constable of West Yorkshire* [2001] IRLR 124, EAT<sup>33</sup>
- *Lewisham London Borough Council v Malcolm* [2008] 1 AC 1399

### *Mitigation of loss*

- *Wilding v British Telecom* [2002] IRLR 524, CA

### *Appeals*

- *Anya v University of Oxford* [2001] ICR 847, CA
- *Meek v City of Birmingham District Council* [1987] IRLR 250, CA
- *Kumchyk v Derby City Council* [1978] ICR 1116, EAT
- *Yeboah v Crofton* [2002] IRLR 634, CA
- *Barke v SEETEC Business Technology Centre Ltd* [2005] ICR 1373

## **The tribunal's powers**

1.76 The tribunals operate under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, and in particular under Schedule 1 to these Regulations, the Employment Tribunal Rules of Procedure.<sup>34</sup> These are referred to throughout this book simply as the 'procedure rules'.

33 See also *Da'Bell v National Society for Prevention of Cruelty to Children* UKEAT/0227/09, 28/09/2009.

34 SI No 1861.

- 1.77 It is worthwhile to read through the Regulations and the procedure rules at an early stage in proceedings so as to be broadly familiar with the scope of the tribunal's powers.<sup>35</sup> Particular provisions to note are the interpretation provisions at regulation 2, the overriding objective at regulation 3 and the guidance on calculation of time limits at regulation 15. Rules 1 to 48 of the procedure rules are the main rules that govern most types of proceedings, and rules 10 (case management), 11 (applications), and 37 to 48 (costs and preparation time orders) are of particular practical significance.
- 1.78 The President of the employment tribunals has power to issue practice directions giving detailed guidance about how cases should be conducted. So far such directions have been used to manage situations where large numbers of claims are brought on the same issue or against the same respondent. For example, there are a number of directions dealing with equal pay cases brought against local authorities, which involve hundreds or in some cases thousands of claimants. These only affect litigants involved in those cases. The President could issue a direction with considerably wider impact, but there is no sign he intends to do so.
- 1.79 The procedure rules will not be the only material informing the tribunal in its procedural decisions. Tribunals are very often guided – sometimes, but not always, consciously – by principles and procedures that operate in the ordinary courts, often drawn from the Civil Procedure Rules (CPR) which apply there. If the tribunal criticises you for some failure to observe 'obvious common sense' or 'basic good practice' in some aspect of the conduct of proceedings on which neither your own common sense nor the procedure rules provide any guidance, the chances are that this is what is going on. The chairman has absorbed principles from the CPR or rules of conduct or etiquette in the ordinary courts, and is treating them as self-evident.
- 1.80 For this reason, some familiarity with the CPR is, although not essential, certainly helpful for employment advisers – partly so that they are not taken by surprise when the tribunal borrows from the CPR, and partly so that they are in a position either to warn the tribunal against automatic adherence to rules devised for a more formal (and unequivocally adversarial) setting, or sometimes to propose that the manner of dealing with particular practical problems set out in

35 A detailed read-through is not recommended: just a quick skim so that you know roughly how the rules work, and what to find where.

the CPR should be adapted for the employment tribunal.<sup>36</sup> The CPR can sometimes provide helpful insights into the thinking behind the tribunal procedure rules. In many instances, the latter are a simplified version of the former; sometimes, on the other hand, it is clear that a deliberate distinction has been made between the tribunal rules and the CPR.<sup>37</sup>

- 1.81 The up-to-date CPR can be found on the Ministry of Justice website.<sup>38</sup> This should be regarded as a recommendation only for advisers who will run a substantial number of cases for clients, however: grappling with the fairly forbidding CPR will rarely, if ever, be the best use of time for anyone representing himself in a single case.

## General note on correspondence

- 1.82 Much of your correspondence with the tribunal or the other side will have a secondary tactical motive as well as the purpose it has on its face. Remember that any correspondence may in some circumstances be read by the tribunal, so always maintain a calm and co-operative style. This rule will not invariably be followed the respondent or its advisers, but resist the temptation to be abrasive or sarcastic even if sorely provoked.<sup>39</sup> This can be particularly important if there is a costs application by either side. If there is unavoidable delay, or if there has been a misunderstanding, an apology costs nothing and can help avoid unnecessary conflict with the other party. A well-placed and graceful apology may even help tip the tribunal away from making a costs award if otherwise there are grounds for one.

- 1.83 There are good reasons in any event to keep relations with the respondent as calm as possible. Many aspects of the preparation of

36 Legal systems are often divided into ‘adversarial’ systems where the judge’s only task is to listen to the case put by each side and to make a decision based on what the parties have put before him or her; and ‘inquisitorial’ systems where the decision-maker has a duty to investigate. Employment tribunal hearings are broadly adversarial, but because parties are not necessarily expected to be represented, the tribunal also has an inquisitorial role expressed in the duty at rule 14(3) of the procedure rules to make such enquiries of persons appearing before them and of witnesses as they consider appropriate. Once again, because tribunals are dominated by lawyers who are used to a wholly adversarial system, this duty often gets overlooked.

37 For an example, see *Kopel v Safeway Stores plc* [2003] IRLR 753, EAT.

38 [www.justice.gov.uk](http://www.justice.gov.uk)

39 Letters from the other side may well reflect an adviser’s wish to demonstrate to his own client that he is conducting the litigation vigorously.

the case will go more smoothly if there is co-operation between the parties.<sup>40</sup> Both sides are likely to encounter certain difficulties along the way, and will sometimes need the other side's indulgence when they are unable to meet deadlines, etc. If the tone of the proceedings has been quarrelsome from the start, each side may waste a great deal of time (and in some cases their client's money too) scoring every possible point off the other. It is far better to be flexible about things that do not matter, and conserve energy for the few battles that will win or lose the case. If you are acting in person against a represented employer, it is worth making a real effort to remember that the lawyer on the other side is simply doing the job he is paid to do in representing the respondent's interests, and is not a personal enemy.<sup>41</sup>

1.84 Letters should make their point plainly and in as few words as possible. Normally if you write to the other side or the tribunal, it is because you want them to do something: tell you something, send you a document, order the other side to do something, postpone the case, etc. Say what it is you want them to do, and why, as simply and clearly as you can, and then stop writing.

1.85 If you get a long quarrelsome letter from the other side, try not to be drawn in. Pick up a highlighter and highlight the bits of the letter that actually ask you to do something. Decide whether or not you are prepared to do whatever you are being asked to do. Write a short letter back telling them what you have decided, and explaining briefly why. Ignore the rest of the letter.

1.86 Avoid fancy type-faces. Use headings and numbers to add clarity, but don't use underlining, bold, capitals or italics for emphasis. Type your letters if you possibly can.

1.87 Inexperienced advisers sometimes feel that they ought to act the part and write legalese. This is never a good idea. Opening and closing gambits like 'I write further to our conversation [/my letter] of [date]' or 'I write in relation to the above-mentioned matter and refer to your letter of [date]' or 'I look forward to hearing from you at your earliest convenience and thank you for your attention' are redundant. The heading indicates the subject-matter of the letter, and 'thank you

40 Litigation is very like a formal game with a serious outcome. To win any game, it is necessary to co-operate sufficiently with the other player to complete it. Angry squabbling about when exactly witness statements should be exchanged, who prepares the bundle for the hearing, whether the hearing is likely to last for three days or four etc is as futile and as little likely to affect the outcome as a dispute between two chess players about whether the 12-inch or the 18-inch chessboard should be used.

41 This is good advice for lawyers too.

for your letter of [date]' is ample to provide the link to the letter being answered. If there is a particular need for an urgent answer, it is sensible to spell that out, but otherwise there is not normally any need to ask for a reply.

1.88 Letters can be sent in the in the conventional manner, either first or second class. There is no requirement for recorded or special delivery.<sup>42</sup> Fax and e-mail correspondence is also common and perfectly acceptable.

1.89 Many solicitors still routinely duplicate faxed or e-mailed correspondence by post. This is unnecessary and causes the tribunal and the other party additional work. If the other party finds it at all difficult to deal with correspondence (by reason of a visual impairment, for example, or dyslexia) it is particularly unhelpful and time-wasting. The tribunals positively request that parties should not do it. If it is essential to ensure that a document arrives by a certain date, the sensible thing is to fax it and then follow the fax with a telephone call to confirm arrival. An attendance note of that conversation, identifying the person spoken to, should be ample proof of delivery if the point arises subsequently.

1.90 If an e-mail does not seem to give the right degree of formality, you can attach a letter as a separate document. The main danger of using e-mail for this purpose is that the speed of e-mail exchanges can escalate a difference of views into a quarrel very quickly, and e-mails leave a permanent record that may later be shown to the tribunal. E-mails need to be drafted with the same care as any other correspondence, and should always be calm and reasonable.

1.91 It is sensible to get into the habit of removing information about previous drafts, etc from any e-mailed attachment. This can be most simply done by selecting and copying the text and pasting it into a new document before attaching to an e-mail. Sending a witness statement to the respondent with recoverable information about previous drafts could be very damaging.

1.92 All letters to the tribunal should be copied to the respondent. Many advisers will routinely copy all correspondence with the other side, other than 'without prejudice' correspondence, to the tribunal, but this is unnecessary.<sup>43</sup> It is preferable to copy correspondence to the

42 In fact, sending letters recorded delivery can be an effective way of delaying them: the demand for a signature on delivery means that if the recipient is not at home or doesn't hear the doorbell, the letter is taken back to the sorting office for collection later – or possibly never.

43 See glossary for 'without prejudice'.

tribunal only if it is relevant to something that the tribunal is being asked to do. So, for example, it is not necessary to copy a request for additional information to the tribunal when it is first made; but if the respondent refuses to comply with the request, then it should be copied to the tribunal with the request for an order. If there has been an extended wrangle over some aspect of case preparation, the tribunal will only need to see the relevant correspondence if and when it is asked to arbitrate on the wrangle, or if one party seeks costs on grounds of the other party's unreasonable conduct. At that point the whole correspondence can be copied to the tribunal, or collated into a bundle to support a costs application at the hearing.

1.93 Thought should be given at all stages to the convenience of both the other party and the tribunal. A history of conspicuously considerate letters will be one of the best defences if there is an application for costs at any stage. So, for example, if you are unable to meet a deadline that has been set by the tribunal or agreed with the other side, the tribunal and/or the other side should be informed of the difficulty as soon as you become aware of it, and you should propose a realistic revised timetable. If you seek to amend your claim, then it is likely that the respondent will need time to amend their response to deal with the new points. The letter requesting permission to amend should recognise this and propose suitable arrangements.

1.94 It is conventional to address letters sent to the tribunal to 'the Regional Secretary', with a request, where appropriate, to refer the letter or the application to a judge for his or her attention. The regional secretaries are the administrative heads of the employment tribunals; the regional chairmen are the judicial heads. Similarly, correspondence with the Employment Appeal Tribunal is addressed to the Registrar, who is the administrative head of the EAT. At the time of writing the Registrar at the EAT and many, possibly the majority, of the regional secretaries are women. The examples in this book use the salutation 'Dear Madam' throughout.

1.95 Letters are drafted in the first person in this book because this gives the writer personal responsibility for the content. 'We' is too often an excuse for pomposity. The form of address 'Dear Sirs' is still in common use but can cause irritation, so letters are either addressed to the individual with conduct of the case ('Dear Mr Bean', 'Dear Ms Marrow', 'Dear Madam') or else solicitors' firms and other organisations are addressed by name – as for example 'Dear Carrot & Marrow', 'Dear NaffTat plc', 'Dear Camden Council'.

1.96 Documents other than letters are given formal headings showing the parties' names, the tribunal, the case number and the title of the

document laid out in a conventional pattern.<sup>44</sup> These headings are not compulsory and are far from universal in employment tribunal litigation; it is largely a matter of personal taste whether or not to use them. They may, marginally, help to convey a sense of competence and professionalism to the tribunal and the other party.

## Telephone calls

1.97 The choice between writing a letter and making a telephone call to the tribunal or the respondent will often be obvious. A formal request for disclosure of documents or an application for permission to amend the claim or postpone the hearing must be made in writing. If the respondent has faxed a letter, part of which is illegible, the only sensible thing is to pick up the telephone to them straight away and ask them to re-send it.

1.98 Between these extremes there will be many communications for which either will do. To a large extent the choice will be a matter of preference, although those who are not used to conducting litigation probably tend to make their task harder than necessary by dealing with almost everything by letter. For this reason it is worth suggesting that as a rule you should keep letters to a reasonable minimum and use the telephone instead where possible.<sup>45</sup> This will save time and energy, and will also tend to encourage co-operation with the other side.

1.99 It is also worth remembering that both tribunal staff and lawyers acting for the respondent can be a valuable source of background information about how things are usually done or what the tribunal's expectations will be, and this kind of information is much easier to tap into in a fairly informal telephone conversation than in an exchange of letters.<sup>46</sup>

44 See for example P2.12.2 on page 47 below.

45 Provided clear file notes are made promptly after all conversations and filed with the rest of the papers.

46 Note too that the forces that encourage professional representatives to write quarrelsome letters do not operate in the same way when they speak on the telephone. This explains the solicitor who writes consistently abrasive letters but is charming and co-operative on the telephone. It is not a fiendish plot to disorientate you, just a consequence of the fact that he sends his client copies of his letters but not tapes of his telephone calls.

## File and diary management

- 1.100 Running an employment tribunal case requires habits that are second nature to solicitors, and to many others whose normal work requires them to handle correspondence files over months or years. For others they will be unfamiliar and need to be learned.
- 1.101 The first point is that the papers relating to the case should be kept together in a ring-binder, lever-arch file or cardboard wallet file. Which is most convenient will probably depend on the volume of papers. Copies of all documents sent out or received should be filed. Handwritten originals should be retained on the file – even if subsequently typed up.
- 1.102 A brief attendance note should be made promptly of any telephone conversation or meeting. The question ‘was that phone call worth recording?’ does not arise. If the conversation was short and seemingly trivial, the time taken to decide whether or not there could be any circumstances in the future in which it might be important to have a record of it will be greater than the time taken to record it. If it was of any length, it is bound to need a record. In case of a subsequent application for a costs or preparation time order, it is also sensible to record the time spent.

### P1.102 Attendance note

*Attendance notes do not need to follow any particular format, and a handwritten note (provided it is legible) is perfectly adequate.*

**Client: Phelps**

**Date: 14 August 2009**

T/C<sup>47</sup> to client to let her know that ET has listed a CMD. Explained function of CMD; agreed she need not attend.

5 minutes

- 1.103 Papers should be subdivided into logical categories. The following categories are suggested: (i) correspondence and attendance notes, with the most recent item on the top; (ii) statements of case and orders – the claim, the response, any directions from the tribunal, the decision; (iii) documentary evidence; and (iv) statements. These sub-files can be enclosed in a folded sheet of paper to keep them separate from each other, or separated in a ring binder or lever arch file with tabbed divider cards. A running list of the telephone and fax numbers of all the people

<sup>47</sup> Telephone call.

who may need to be contacted in connection with the case on the outside cover of the file is a useful time-saving device. It is also a good idea to keep a prominent note of key dates somewhere on the file cover.

## Time recording

- 1.104 Because the tribunals have power in certain circumstances to make ‘preparation time orders’ to compensate parties for the time they have spent preparing the case, it is prudent to get into the habit of keeping a running record of the time you spend on the case. Preparation time can mount up to a surprising extent: it is much easier to demonstrate this convincingly by showing the tribunal a record of this kind than by looking back at the work done weeks or months after the event and trying to estimate long after the event how long it would have taken. If you are representing yourself remember to record time that a lawyer might not have to spend – such as time travelling to a library or to a local print shop to fax a document. A note of any expenses, and itemised telephone bills, should also be kept.
- 1.105 Probably the simplest method of keeping a rough account of the time spent on a file is to keep a sheet or two laid out along the lines of the following precedent at the front of the file, and to try to remember to complete it at the end of each telephone call or session of work on the case.

### P1.105 Time sheet

Date	Activity	Time spent	Expenses
4/10/09	t/c to EOC helpline	20 mins	
4/10/09	Trip to library for research (incl travel)	4 hours	£1.40 fare £5.20 copying
5/10/09	t/c to EOC helpline	5 mins	
5/10/09	Drafting grievance letter	1 hour	
24/10/09	Considering E’s response	20 mins	
8/11/09	Trip to library for research	3½ hours	£1.40 fare £2.00 copying
9/11/09	Drafting ET1	3 hours	
9/11/09	t/c to EOC helpline	20 mins	
9/11/09	Redrafting ET1 in light of advice	1½ hours	

Date	Activity	Time spent	Expenses
9/11/09	Trip to print shop to fax ET1	40 mins	£2 fare £1.20 fax
13/11/09	Drafting questionnaire	2 hours	
13/11/09	T/c to ACAS	5 mins	
13/11/09	Reading letter from E's solicitor	20 mins	
13/11/09	t/c to CAB	5 mins	
14/11/09	Drafting letter to E's solicitor	30 mins	

## Key dates and time limits

- 1.106 It is particularly important to establish a reliable habit of noting key dates in such a way that it is impossible to forget them. There are many ways of setting up automatic reminders, though an old-fashioned diary will still be the most effective for many people. Whatever method is chosen, there is a pit-fall to be avoided at each end of the process. The first is to forget to make the initial entry. If you are busy when you are first consulted by a new client you may be tempted to postpone the task of calculating and noting key dates until a calmer moment. This is always a mistake: a calm moment may not present itself for some time, and by the time it does the task may have been forgotten. If you don't have time to calculate and record key dates at once, you don't have time to take on a new case.
- 1.107 The second pit-fall is to set up the reminder, but then to fail to register it when it falls due. There is no point noting key dates in a diary that is rarely opened, or setting up a reminder on an e-mail account that is not accessed every day. It is far better to link reminders to existing habits than to try to establish completely new habits: if you already check an e-mail account daily, you will do better to set up an automatic reminder on your e-mail package than to resolve to buy a desk diary and look in it every day. If you already have and constantly use a desk diary, you will be better served by an entry in that.
- 1.108 It is beyond the scope of this book to discuss time limits in detail, but two calculations need to be second nature to employment advisers.<sup>48</sup> The first is the end of the normal time limit for presentation of the claim, which for the great majority of claims over which the tribunal has jurisdiction is three months less one day from

<sup>48</sup> For a detailed discussion of time limits, see ELAH 8 paras 20.21–20.32 and 21.13–21.32.

the date of dismissal (in complaints about dismissal) or from the act complained of (in the case of most other complaints). So, if an employee is dismissed on 4 August 2009, most claims must be received on or before 3 November 2009.

1.109 Discrimination complaints can present difficulties as there will often be allegations of a number of discriminatory acts on different dates. Sometimes it will be possible to argue that these all form part of the same continuing act, but this argument can be complicated. The safest course is to treat the normal time limit as expiring three months after the earliest of the acts complained of. Often this will be impossible because the client will have put up with mistreatment for weeks, months or sometimes years before seeking advice; in that case the claim should be presented as soon as it can be drafted.

1.110 The second crucial calculation is the last day for presentation of an appeal to the Employment Appeal Tribunal, which is 42 days from the date when the employment tribunal's judgment or order is sent to the parties. This means that if the judgment is sent to the parties on Thursday 13 August 2009, then the notice of appeal together with forms ET1 and ET3 and a copy of the judgment appealed must be received by the Employment Appeal Tribunal before 4 pm on Thursday 24 September 2009.

1.111 In either case, it is essential – especially if the deadline is close – to make sure that the document has arrived, and was complete on arrival. This last cannot be over-emphasised: there is no method of delivery that is 100 per cent fail-safe, and a missed deadline for presenting a claim or an appeal is the kind of error most likely to get an adviser sued for negligence.<sup>49</sup> If a claim or appeal in the last few days is unavoidable, the best course is to fax the document, print and retain a transmission confirmation on the file, telephone the tribunal to check that each page has arrived and is complete, and to make and retain on the file a note of this conversation and the name of the individual spoken to. This is prudent even where the expiry of a time limit is not imminent: if a new claim is posted four weeks before the deadline but lost in the post, the deadline may have passed by the time you wonder why you haven't yet received an acknowledgement from the tribunal. A document lost in the post will not usually provide a sufficient excuse for a late claim or appeal, so you should either make a diary note to chase if you haven't received

<sup>49</sup> Not even hand-delivery: for a cautionary tale see *Gdynia American Shipping Lines v Chelminski* [2004] IRLR 725, CA. See also *J R Beasley v National Grid* [2008] EWCA Civ 742 in which a claim delivered 88 seconds late was held to be out of time.

an acknowledgement within a reasonable time (but still within the limitation period); or else simply fax the document and double-check safe arrival at once.

## **Multiple claims**

- 1.112 Multiple claims (in the sense of cases where the claimant has a number of different complaints against the employer) are very common: they are probably the rule rather than the exception. Most complaints about dismissal are accompanied by a wages claim, or a contract claim; many are accompanied by a discrimination claim as well. Discrimination claims may be against both the employer and the individual colleague who has discriminated.
- 1.113 Give careful thought to what the relevant limitation period is for each claim separately. Sometimes the periods will coincide or overlap, but that is not to be assumed.