

Preliminary matters

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Read this first: time limits

- 1.1 If you think you might want to bring a claim in the employment tribunal, the very first thing you need to know is how long you have to decide. Do you have to get your claim in today or tomorrow, or have you got a few weeks or even a month or two to think about it?
- 1.2 A significant number of claimants lose their claims because they miss the comparatively short deadlines involved in tribunal claims. Even if a late claim is allowed to proceed – which is the exception rather than the rule – getting it back in will involve stress and delay.
- 1.3 This means that it is important to consider the time limit immediately and to err on the side of caution. Do not regard the deadline as a target. Once you have decided to bring a claim, try to do so immediately. Even if you need to delay a little, aim to have the claim lodged at least a few weeks before the deadline. This will protect you from errors in calculating the deadline and give you a margin of safety if anything goes wrong.

Interim relief: claim within 7 days of dismissal

- 1.4 If you think you've been dismissed because of trade union activities, or for making a protected disclosure, or for a number of other specific prohibited reasons, you may be able to ask the tribunal for 'interim relief'. Interim relief is very valuable, because it stops the dismissal taking effect (at least so far as your wages are concerned) until after the tribunal has decided your unfair dismissal claim. The catch is that you have to apply for it within 7 days of dismissal. If you don't, you may still have a claim for unfair dismissal – but you won't get interim relief.
- 1.5 So if you're reading this within a few days of having been dismissed, you need to work out whether you have a possible claim for interim relief. If you do, and you want to take advantage of it, you're going to need to move very fast indeed.
- 1.6 There is guidance on what you need to do to apply for interim relief at para 1.144 below.

Other cases: 3 months plus the conciliation period

- 1.7 From some time in early 2014, other claims will be complicated by the introduction of a requirement to notify the Advisory, Conciliation and Arbitration Service (ACAS) of a claim, and wait for a while to give ACAS the opportunity to see if they can bring about a settlement,

before presenting a claim to the tribunal. This is called the ‘early conciliation period’. Bear in mind that at the time of writing this book, compulsory early conciliation is not yet in force, and the detail of the scheme could still change. We’ll put information about any changes on the blog that supports this book: www.etclaims.co.uk.

1.8 There’s detailed guidance about compulsory early conciliation at paras 2.1–2.25 below. But what you need to do urgently is work out what the basic time limit is for presenting your claim so that you know whether you are close to it.

1.9 Most claims are about dismissal, one way or another. If you are complaining of unfair dismissal, or that your dismissal was an act of unlawful discrimination, the basic time limit is 3 months less one day from the last day of your employment. The last day of your employment is normally the last day you attended work, or the day you were told that you were dismissed, whichever is later. So, for example, if you were dismissed on 26 February 2014, you need to take the first step in your claim on or before 25 May 2014.

1.10 But if you also want to complain about things that were done before your employment ended, you will mostly have 3 months less one day from the date of the act or omission in question. So, for example, if you applied for a promotion and didn’t get it because of your sex or race, you will need to take steps to start your claim 3 months less a day, at the latest, from the day on which the decision was taken.

1.11 Discrimination claims can present difficulties as there will often be allegations about 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 that argument can be complicated. The safest course is to treat the normal time limit as expiring three months after the earliest of the acts that you want to complain about. Of course, this may well be impossible – because you have put up with mistreatment for weeks, months or sometimes years before you decide that you have to start employment tribunal proceedings. If that’s the case, then once you have made that decision, you need to present your claim as soon as you possibly can.

1.12 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.

- 1.13 Give careful thought to what the relevant limitation period is for each claim separately. Sometimes the periods will coincide or overlap, but you can't assume they will all be the same.
- 1.14 If you have worked out your basic limitation period, and it ends very soon – say today or tomorrow – what do you need to do? That depends whether or not early conciliation is in force yet.
- 1.15 If early conciliation is in force, you need to submit an early conciliation request to ACAS. Here early conciliation helps you, because submitting the request to ACAS will be easy. And having done that, you can breathe again: you've got until a month after ACAS sends you your certificate of early conciliation to present your claim to the employment tribunal.
- 1.16 If early conciliation isn't in force, you need to present your claim at once. See para 2.90 for guidance on how to draft a short claim that will be sufficiently informative to start your claim.

Read this second: whether to bring a claim

- 1.17 Now that you have worked out how soon you need to start your claim if you're going to, you can turn your mind to whether you should. If you're right up against the deadline, submit an early conciliation request to ACAS anyway, and then decide whether you want to take it further.
- 1.18 For a lawyer, the question whether a claim should be brought is normally approached by way of three questions:
- what are the prospects of success?
 - how much compensation will be awarded (or what other benefit will it bring) if it succeeds? and
 - what will it cost to run?
- 1.19 The prospects of success of any given case will depend entirely on its own facts, but it is possible to make some general remarks about the questions of ultimate benefit, and cost.

How much will I get if I win?

- 1.20 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 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 10.

1.21 But it is useful to say something about how tribunals approach awarding money and how much, on average, people get.

1.22 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*.¹

1.23 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 (see para 10.37). It's fairly rare that tribunals award compensation to cover more than a year or two's lost earnings – a few months' is more usual. There's now a limit of a year's pay (or £74,200 if you earn more than that in a year) on what you can recover as compensation for most types of unfair dismissal. 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.

1.24 In 2012/13, the median award for unfair dismissal was £4,832. 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 in discrimination cases – and those, of course, are the ones that hit the headlines – but they are rare.² The best way of getting a huge award is to have an extremely well-paid job

1 11th edn, 2012, OUP.

2 In any case, newspaper reports of people claiming millions of pounds are considerably more common than reports of people receiving millions of pounds.

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. If you're earning a normal salary, you won't get a large award unless your claim is of a kind to which the unfair dismissal compensation limit doesn't apply and you can show that you are likely to suffer a very long period of future loss. Because of the duty to mitigate, that's usually difficult.

How much will it cost to run?

- 1.25 You need to consider this question 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 financial costs: the biggest cost is likely to be tribunal fees, but you'll also have to factor in travel, telephone calls, postage, photocopying, fees for expert reports, etc. But you should think hard about the non-financial costs of running a case against your former employer, too.³
- 1.26 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 employment 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 can mean losing much of your reason for getting up in the morning, daily contact with people with whom you have a shared history and circle of acquaintance, your status, your self-esteem and much of your social life as well.
- 1.27 The importance of the employment relationship is not symmetrical. Most employees have a considerable emotional investment in their jobs. Employers don't as a rule have any particular emotional attachment to their employees. Although the bodies 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.
- 1.28 Both factors make litigation tempting. Being an employee can have something in common with being the child of a psychopathic

³ Most employment tribunal cases concern, one way or another, the termination of the employment relationship, so we refer to the 'former employer' here although claims are also occasionally brought against a current employer.

parent: you have a large emotional investment in a relationship with 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.

1.29 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.

1.30 Very rarely, the employer is ordered to reinstate or re-engage the employee; even more rarely is such an order obeyed. In 2012/13, out of a total of 4,596 unfair dismissal complaints upheld by the tribunals, 5 resulted in an order for reinstatement or re-engagement. The statistics don't show how many of those orders actually resulted in the employee returning to work, but our best guess is precisely none. 'To get my job back' is a bad reason to bring a claim: you almost certainly won't. (That doesn't mean it's a bad idea to try for reinstatement or re-engagement. If you intend to bring a claim anyway, it can be a very good idea: see further at para 6.37.)

1.31 The price that you will pay for these uncertain benefits is a long period in which you 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 yourself); draft or approve the claim to the tribunal; read and comment on your employer's response; correspond with the employer or its solicitor; and ultimately, unless the claim settles, undergo hostile cross-examination and listen to your employer justify its conduct during the hearing. The effect is that you must keep some kind of relationship going with your former employer, and you must allow the events surrounding or preceding the termination of employment to dominate your thoughts – and very likely your dreams too – over a period of months or years.

1.32 For all these reasons, if your employment has ended in stress and depression, litigating about it will almost certainly make it worse. Claimants often say something to the effect of: '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 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.

1.33 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.

1.34 In an earlier edition of this book 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.⁴ 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.

1.35 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.⁵ 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.

Read this third: mitigation

1.36 If you do decide to bring a claim, you're almost certainly going to be looking for compensation at the end of the case. That will feel a

4 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.

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

long way off at this point – and it may well be a long way off, because claims can easily take a year or more to get heard by an employment tribunal. But the quality of your evidence of mitigation can make a big difference to how much compensation you are awarded.

1.37 There's guidance on this subject at paras 10.37–10.42, in the chapter about compensation towards the end of this book. But if you're are going to bring a claim you need to read it now, because the duty to mitigate arises as soon as you lose your job. If you don't think about it until a few weeks before the hearing of your claim, it will be too late to start mitigating your loss – and much harder to assemble your evidence of mitigation than if you have been collecting it systematically all the while.

Sources of employment law advice and representation

1.38 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.

1.39 If you can't 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/barristers offering public access;
- employment consultants.

Trade unions

1.40 If you are a member of a trade union, you 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.

Insurance

- 1.41 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 don't realise that they have the cover.
- 1.42 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.⁶

Voluntary sector advice agencies

- 1.43 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 if you're seeking free representation, try not to let the frustration show. Mostly 'we can't help' means just that – the organisation simply has no spare capacity, or does not do this sort of work. If there's any flexibility, human nature is as it is and charm almost always gets further than aggression.⁷
- 1.44 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 Network: www.lawcentres.org.uk;
 - Citizens Advice Bureaux (CABx): Citizens Advice: www.citizensadvice.org.uk;
 - Other advice agencies: AdviceUK: www.adviceuk.org.uk.

6 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.

7 There's a practical insight of wide application here. Even where aggression may be effective, always try charm first. The reason is that this way around, you can try both: if charm doesn't work, you can still try aggression. But have you ever started with aggression and then backtracked successfully to charm? It's tricky.

Law Centres

- 1.45 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. Some still employ an employment lawyer or specialist adviser, but these services are under severe pressure because of legal aid cuts. The Law Centres Network website currently lists 51 law centres in the UK, roughly half of which are in Greater London. Most of the rest are in substantial town or city centres.

Citizens Advice Bureaux

- 1.46 CABx tend to offer a generalist service, and only a few 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 publicly 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

- 1.47 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.⁸ 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 it on.

⁸ 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.

- 1.48 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.

LawWorks

- 1.49 LawWorks is a solicitors' pro bono organisation.⁹ Like BPBU 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

- 1.50 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 Terrence Higgins Trust provides helpline advice on HIV-status employment issues, and may be able to refer on to other agencies for casework.¹⁰
- 1.51 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.

⁹ See: www.lawworks.org.uk.

¹⁰ The websites of these organisations are: www.rnib.org.uk, www.dls.org.uk, www.pcaaw.co.uk and www.tht.org.uk.

The Equality and Human Rights Commission

1.52 The EHRC is the statutory body responsible for all aspects of equality law. That means that they cover discrimination on the ground of sex; race; disability; sexual orientation; religion and belief; pregnancy and maternity; marriage and civil partnership, gender reassignment and age. They also deal with human rights, but this is of limited relevance in the employment context.

1.53 The EHRC website provides guidance on equality rights and tribunal claims.¹¹

1.54 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

1.55 If you are eligible for public funding (ie your case is about discrimination, and you are dependent on means-tested benefits or on a very low income), 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. If your case isn't about discrimination, the 2013 legal aid reforms mean that you won't get any publicly funded advice or representation, however little money you have.

1.56 The decision to pay privately for employment law advice should be approached with great 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 you have 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

11 See: www.equalityhumanrights.com.

to advise, as a preliminary matter, on whether any insurance policy you have is capable of covering legal expenses.

Barristers offering ‘public access’

1.57 Traditionally, barristers are specialist advocates who act when instructed by solicitors; so you would instruct a solicitor first, and then, if you wanted to and/or your solicitor advised that you should, you would instruct a barrister as well – probably mainly for the hearing.

1.58 Some barristers do now accept instructions direct from the public for certain kinds of work, so you can also choose to instruct a barrister only. This can be quite an economical way of running your case, because barristers have lower overheads than solicitors, and that means they tend to charge lower hourly rates for their work. And they will still probably charge a brief fee for the hearing, so at the point where the case really starts to eat time, you do at least know in advance exactly what it’s going to cost you.

1.59 But barristers are self-employed individuals, working without the structure of a solicitors’ firm. They will be juggling the demands of your case with other court work, and they won’t as a rule be able to leave a colleague looking after your case while they are unavailable. So if you instruct a barrister, you need to be confident that you can do the administrative parts of a solicitor’s job yourself: you will probably need to handle all the correspondence, keep track of deadlines and so on.

Employment consultants

1.60 A number of firms of employment consultants offer their services in this area and some of these market aggressively. Proceed with caution if you’re 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.¹² If an organisation is not registered, don’t use it. 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.

12 You can check at www.justice.gov.uk/claims-regulation.

ACAS Helpline

1.61 ACAS run a national helpline that gives employment advice to both employees and employers. The number is 08457 47 47 47.

1.62 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

1.63 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 her.

1.64 That assumption is not completely accurate. If you're getting free advice, the time your adviser can spend on your case will be limited by the other demands on her time – and demand for free legal advice vastly outstrips supply, so the chances are she's rushed off her feet. If she's representing you by way of Legal Help, she will be operating under grossly unrealistic time limits imposed by the Legal Aid Agency. 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.¹³ Whatever the situation, there will almost certainly be a limit, and probably quite a tight one.

1.65 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 she's no better qualified than you to do, you will maximise the time she has available for more difficult things.

1.66 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. 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.

13 And in minimum six-minute units.

- 1.67 Be as focused as possible in the information you give to your adviser, and the way you answer her 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’d soon stop getting invitations. But a legal adviser’s questions are best treated in precisely that way.
- 1.68 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*¹⁴ 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 put you in a better position to understand the answer.
- 1.69 If you’re 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’ll certainly save quite a lot of your adviser’s time if you write a good first draft of your witness statement.¹⁵
- 1.70 It’s 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 she doesn’t think it’s a good idea to run a particular argument, or call a particular witness. Lawyers aren’t always right, and it certainly can be worth making them defend their judgments about your case. But it’s also 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 judgment, you are free to sack them and do the job yourself.
- 1.71 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 her whole-heartedly on your side is better. Some consideration can go a long way. Your adviser is working on many other cases at the same time as yours, and there

14 Tamara Lewis, 10th edn, LAG, 2013.

15 See chapter 5 for guidance on what should go in a witness statement and how it should be organised.

will be times when she has to give other work top priority, or is just unavailable because she's on holiday.

Representing yourself

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

1.73 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're a claimant acting for yourself against an experienced lawyer representing your former employer, it's easy to feel overwhelmed.

1.74 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 disloyalty in putting family before your job, you'll win your unfair dismissal and sex discrimination claim however good your employer's representation. If you're an airline pilot who turned up for work drunk, and you were dismissed after a textbook disciplinary process, you'll lose even if you're represented by the best lawyer on the planet.

1.75 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. When dealing with remedy, representation might make the difference between an award of £34,000 and £37,000. These differences matter, but not so much that you should feel defeated from the outset just because you're representing yourself.

1.76 Remember, too, that quite a lot of what the other side's lawyer will be doing with her ability and experience isn't about your case at all. Lawyers don't deal with one case at a time. They deal with dozens, or a hundred.¹⁶ A great deal of their work is mastering the facts of

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

all these cases from a standing start. If you're acting for yourself you don't have to do that: you know the facts of your case, because you've lived them. The tribunal will normally be more tolerant of your mistakes than they would be of a lawyer's. 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 should be willing to translate what you say into legal concepts. Similarly, they will expect to have to engage more closely with the evidence, including questioning witnesses, than they would if both parties were represented.

- 1.77 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, your 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 £2,000 a day, that's £20,000 they will save if case settles even before you take solicitors' fees into account.

Outline of the employment tribunal process

- 1.78 In very broad outline, the process falls into five stages: (1) the early conciliation period; (2) the employee's formal claim and the employer's response, presented on forms ET1 and ET3 respectively; (3) requests by each side for information and documents, and requests to the tribunal for orders if these requests are not voluntarily complied with; (4) 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 (5) the hearing itself.
- 1.79 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). 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

1.80 There are broadly 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 of 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. (There's also European law, but for the most part that takes effect by way of UK legislation.)

1.81 Legislation and case-law change all the time. Employment law is one of the most political areas of the law; successive governments can't stop fiddling with it. Most of the major employment statutes have been regularly updated since they came into force.

1.82 Case-law too 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. This means you need to take some care needs to ensure that you're referring to the current law.¹⁷

1.83 Most tribunal cases are brought under a cause of action (see glossary for an explanation of this term) created by a statute. For example, claims for discrimination on grounds of sex are brought under the Equality Act 2010. The reason these claims are possible is that the Equality Act says such discrimination is unlawful and gives the employment tribunals jurisdiction to deal with the cases. What is unlawful and what the tribunal can do about it is set down in the Act.

1.84 At the heart of the employment relationship is the contract of employment. Contract law is what's called a common law subject: that is, its main principles are to be found in previously decided cases rather than in statutes.¹⁸

17 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. There is also www.statutelaw.gov.uk, an online database of legislation. This provides updated versions of almost all primary legislation – that is to say, Acts of Parliament, but secondary legislation is only published there in the form in which it was originally enacted. Unfortunately quite a lot of employment law is in the form of secondary legislation.

18 The standard practitioners' book is *Chitty on Contracts*, (31st edn, Sweet & Maxwell, 2013). Chitty is very comprehensive, but is likely to be forbiddingly technical for anyone without a legal training. It's also eye-wateringly expensive. The important point, for non-lawyers, is simply to be aware that there are two different kinds of law operating in this field.

1.85 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.

1.86 To complicate matters further, there's 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.

1.87 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 (previously the House of Lords).¹⁹

1.88 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 case. 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.²⁰

1.89 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.²¹

1.90 The standard method of referring to a case reported in one of these, or similar, series follows the pattern: *Party v Other Party* [2014] IRLR 382. This tells you that the report of the case will be found at page 382 of the 2014 volume of the *Industrial Relations Law Reports*.

19 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.

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

21 In London, the Westminster Reference Library still maintains a specialist law collection. Any university law school will have a law library and some will allow members of the public to use reference facilities in some circumstances: ask your nearest law school.

In addition, more recent decisions of the Employment Appeal Tribunal, the Court of Appeal and the Supreme Court are all available online.²²

Books

1.91 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 (10th edition, 2013). This is an excellent and accessible short guide to the substantive law. The same author has also written *The Claimant's Companion: a client's guide to employment tribunal cases*, which can be downloaded as a pdf from the www.londonlawcentre.org.uk.

1.92 Two series that you certainly won't want to buy – because they are extremely expensive – but you may want to consult in a library if a difficult question arises in your case to which you can't find the answer in one of the shorter books are *Harvey on Industrial Relations and Employment Law* (Butterworths) and the IDS Handbooks. 'Harvey' is a large loose-leaf publication in several volumes that explains the law in great detail and is updated regularly throughout the year.²³ The IDS Handbooks are a series of short or shortish guides on specific employment topics: unfair dismissal, equal pay, tribunal practice and procedure, continuity of employment, and so on.

1.93 Law books in general are difficult to read if you're not used to them, but don't let them faze you. If you don't understand something the first time you read it, take another run at it. If you still don't understand it, try looking up the same topic in a different book. Read the cases referred to, especially Court of Appeal cases: (some) judges are some of the best legal writers around, and sometimes they will explain things more clearly than the textbooks.

Key employment cases

1.94 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.

22 Key websites are BAILII (British and Irish Legal Information Institute) www.bailii.org, the EAT website at www.employmentappeals.gov.uk, HM Courts & Tribunals Service website at www.justice.gov.uk/about/hmcts and the Supreme Court at www.supremecourt.gov.uk.

23 It is also available as an online subscription service.

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

Incapacity dismissal

- *Lynock v Cereal Packaging Ltd* [1988] ICR 67

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] UKHL 35, [2004] ICR 1064

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] EWCA Civ 142, [2005] ICR 931

- *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337
- *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

Mitigation of loss

- *Wilding v British Telecommunications (BT) plc* [2002] EWCA Civ 349, [2002] IRLR 524

Appeals

- *Anya v University of Oxford* [2001] EWCA Civ 405, [2001] ICR 847
- *Meek v City of Birmingham District Council* [1987] IRLR 250, CA
- *Kumchyk v Derby City Council* [1978] ICR 1116, EAT
- *Yeboah v Crofton* [2002] EWCA Civ 794, [2002] IRLR 634
- *Barke v SEETEC Business Technology Centre Ltd* [2005] ICR 1373

The tribunal's powers

1.95 The tribunals operate under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013,²⁴ and in particular under Schedule 1 to the Regulations, the Employment Tribunal Rules of Procedure. These are referred to throughout this book simply as the 'procedure rules'.

1.96 It's 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.²⁵

1.97 Particular provisions to note are the interpretation provisions at regulation 3 and Schedule 1 rule 1; the overriding objective at rule 3 and the guidance on calculation of time limits at rule 4. Rules 1–106 are the main rules that govern most types of proceedings, and rules 29–40 (case management), and 75–84 (costs and preparation time orders) are of particular practical significance.

24 SI No 1237. See: www.legislation.gov.uk.

25 Don't attempt to read them in detail: just take a quick skim through them so that you know roughly how they work, and what to find where.

1.98 In the 2013 rules, the case management powers have been ‘simplified’ in a particularly unhelpful way. The old (2004) rules gave a long list of examples of the kinds of orders that might be made. There’s a different and much shorter selection of specific powers in the 2013 rules; but the general words of rule 29 make it clear enough to anyone familiar with the old rules that the tribunal can and probably will continue to exercise all the powers specifically set out there.

1.99 That being the case, it’s worth knowing what the old rules covered. They specifically empowered the tribunal to make orders:

- about how the proceedings were to be conducted;
- about the time by which things were to be done;
- that a party provide additional information;
- requiring the attendance of witnesses;
- for the disclosure of documents or information;
- extending time limits;
- requiring the provision of written answers to questions;
- staying the whole or part of proceedings;
- that different claims be considered together;
- that part of the case be considered separately;
- that different claims be heard together;
- adding or removing respondents;
- postponing or adjourning any hearing;
- giving permission to amend a claim or response;
- about the use of witness statements;
- about the use of expert witnesses.

1.100 Employment judges being (like everyone else) creatures of habit, they will feel more comfortable making these familiar sorts of orders than making entirely novel orders dreamed up to deal with the circumstances of a particular case; and anyway, the orders listed are the kinds of orders that are most commonly needed in practice. That doesn’t mean you shouldn’t ever ask for an order not on this list; it just means that if you do, you’ll be asking for something a bit unfamiliar – so the tribunal may be harder to persuade.

1.101 The President of the employment tribunals has power to issue practice directions giving detailed guidance about how cases should be conducted. Under the old rules, practice directions were exclusively concerned with the practicalities of handling large-scale multiple claims: for example, mass equal pay litigation. At the time of writing, the only practice direction that has been issued under the 2013 rules

is on the presentation of claims. It can be downloaded as a pdf from the Ministry of Justice website.²⁶

1.102 The procedure rules will not be the only material informing the tribunal's 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.

1.103 For this reason, some familiarity with the CPR is useful if you're an employment adviser – partly so that you're not taken by surprise when the tribunal borrows from the CPR, and partly so that you're in a position either to warn the tribunal against automatic adherence to rules devised for a more formal setting, or sometimes to propose that the manner of dealing with particular practical problems set out in the CPR should be adopted. The CPR can also provide 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.²⁷

1.104 The up-to-date CPR can be found on the Ministry of Justice website.²⁸ 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 is unlikely to be the best use of your time if you're representing yourself.

General note on correspondence

1.105 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

26 See: www.justice.gov.uk/downloads/tribunals/employment/rules-legislation/et-practice-direction.pdf.

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

28 See: www.justice.gov.uk/courts/procedure-rules/civil/rules.

style. This rule won't necessarily be followed the respondent or its advisers, but try to resist the temptation to be abrasive or sarcastic even if sorely provoked. This can be particularly important if either side makes a costs application at the end of the case. If there is unavoidable delay, or 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.

- 1.106 There are good reasons in any event to keep relations with the respondent as calm as possible. Many aspects of the preparation of the case will go more smoothly if there's co-operation between the parties. 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. 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 often money too) scoring every possible point off the other. It's far better to be flexible about things that don't matter, and save your energy for the few battles that will win or lose the case. If you're acting in person against a represented employer, it's worth making a real effort to remember that the lawyer on the other side is simply doing the job she's paid to do in representing the respondent's interests, and is not a personal enemy.
- 1.107 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: you want them to tell you something, or send you a document, or order the other side to do something, or 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.
- 1.108 If you get a long quarrelsome letter from the other side, try not to get drawn in. Pick up a highlighter and highlight the bits of the letter that ask you to do something. Decide whether or not you're prepared to do it. Even if the letter is quarrelsome, approach that question with the attitude 'Is there any reason why not?' rather than

‘Why should I?’ Write a short letter back telling them what you have decided – or doing what you’re asked. If you’re refusing to do what they ask of you, explain briefly why. Ignore the rest of their letter.

1.109 Avoid fancy type-faces. Use headings and numbers to add clarity, but don’t use underlining, bold, capitals or italics for emphasis. If you really must emphasise something, use italics; capitals are the written equivalent of shouting, and writing a letter or e-mail in capitals is likely to be experienced by the reader as deliberate rudeness. Type your letters if you possibly can.

1.110 Inexperienced advisers sometimes feel that they ought to act the part and write legalese. 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 for your letter of [date]’ is ample to provide the link to the letter being answered. If there’s a particular need for an urgent answer, it makes sense to spell that out, but otherwise there’s rarely a need to add a specific request for a reply.

1.111 Letters can be sent in the conventional manner, either first or second class. There’s no requirement for recorded or special delivery. 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 isn’t at home or doesn’t hear the doorbell, the letter is taken back to the sorting office for collection later – or possibly never. E-mail correspondence is common and perfectly acceptable; fax machines are getting rarer, but if both sides have them that’s fine too.

1.112 Some solicitors still routinely duplicate faxed or e-mailed correspondence by post. Don’t do this – it’s unnecessary, and can cause the tribunal and the other side extra 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’s particularly unhelpful. The tribunals positively ask parties not to do it. If it’s essential to ensure that a document arrives by a certain date, the sensible thing is to fax or e-mail 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 you need it.

1.113 If an e-mail doesn’t 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. So draft e-mails with the same care as any other correspondence, and keep them calm and reasonable.

1.114 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.

1.115 All letters to the tribunal should be copied to the respondent. Many advisers routinely copy all correspondence with the other side, other than ‘without prejudice’ correspondence, to the tribunal, but this is unnecessary.²⁹ It’s better to copy correspondence to the tribunal only if it is relevant to something you’re asking the tribunal to do. So, for example, don’t copy a request for additional information to the tribunal when you first make it; but if the respondent refuses to comply, send it to the tribunal with your application for an order. If there’s 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 adjudicate on it, or if one party seeks costs on grounds of the other party’s unreasonable conduct. At that point you can copy the whole correspondence to the tribunal, or collate it into a bundle to support the point you want to make at a hearing.

1.116 Always think about the convenience of both the other party and the tribunal. A history of conspicuously considerate letters will be one of your best defences if the other side applies for their costs at any stage. So, for example, if you’re unable to meet a deadline, let the respondent know about the difficulty as soon as you become aware of it, and propose a realistic revised timetable. Or if you want to amend your claim, the respondent will probably need to amend their response to deal with the new points. The letter requesting permission to amend should recognise this and propose suitable arrangements.

1.117 These are just examples. The point is to make co-operativeness your default position; only get into a tussle with the other side if it’s genuinely worthwhile in terms of the likelihood of winning your case.

1.118 It’s 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

29. See glossary for ‘without prejudice’.

regional secretaries are the administrative heads of the employment tribunals; the regional chairmen are the judicial heads. Similarly, correspondence with the EAT 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.

1.119 Letters are drafted in the first person in this book: even if you're an adviser employed by an organisation, you're still an individual, and the decisions you make about the case are your decisions. It's probably better to take individual responsibility for them; if that makes you feel uncomfortable, it may be a clue that you're not making the right decisions.

1.120 The opening 'Dear Sirs' is still in common use, but if you think about it, as a form of address for an organisation in which women work, it's pretty discourteous. The examples in this book are addressed either to the individual with conduct of the case ('Dear Mr Bean', 'Dear Sir', 'Dear Ms Marrow', 'Dear Madam') or else to the organisation by name ('Dear Carrot & Marrow', 'Dear NaffTat plc', 'Dear Camden Council').

1.121 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.³⁰ 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.

Telephone calls

1.122 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.

1.123 Between these extremes there will be many communications for which either will do fine. To a large extent the choice will be a matter of preference, though if you're not used to conducting litigation you may make your task harder than necessary by dealing with almost

30 See, eg, Precedent 2.86.1.

everything by letter. So keep letters to a reasonable minimum and use the telephone instead where possible. This will save time and energy, and will also tend to encourage the other side to co-operate with you.

- 1.124 It's 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. It's much easier to tap into that kind of information in a fairly informal telephone conversation than in an exchange of letters.³¹

File and diary management

- 1.125 Running an employment tribunal case requires habits that are second nature to solicitors, and to anyone else whose normal work requires them to handle correspondence files over months or years. But if you don't do that kind of work, you'll need to learn those habits especially for your case.
- 1.126 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 you use will probably depend on the volume of papers. File a copy of anything you send out or receive. If you make handwritten notes – for example, of a phone call while you're on the phone – you should file them too, even if you also make a typed copy.
- 1.127 Make a brief note of any telephone conversation or meeting, and file it. This is what lawyers call an 'attendance note'.
- 1.128 It can be tempting to think 'Oh, that was such a short and trivial conversation I don't need to make a note', but try to resist the temptation. If the conversation was short and seemingly trivial, it won't take long to note it anyway – it'll take you longer to decide whether there could conceivably be any circumstances in the future in which it might be important to have a record of it. If it was of any length, it's bound to need a record. It's also a good idea to record the time spent, in case you might want to make an application for costs or a preparation time order.

31 Note too that the forces that encourage professional representatives to write quarrelsome letters don't operate in the same way when they speak on the telephone. I remember being baffled by a solicitor who wrote me consistently abrasive letters but was charming and co-operative on the telephone – until I realised that he was sending his client copies of his letters but not tapes of his phone calls.

Precedent 1.128: Attendance note

Attendance notes don't need to follow any particular format, and a handwritten note (provided it is legible) is perfectly adequate.

Client: Phelps

Date: 14 August 2013

T.C. to Carrot & Marrow to chase response to our draft list of issues. Mr Bean just back from holiday – agreed extension to close of business on Friday.

5 minutes

- 1.129 Divide your papers into logical categories. The following categories will often be the only ones you need: (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. You can keep these sub-files separate from each other by giving each one its own treasury tag, or enclosing it in a folded sheet of paper with the name of the category on the outside, or if your papers are in a ring binder or lever arch file you can use tabbed divider cards. It'll save you time if you keep a list of the phone numbers of all the people you may need to contact about the case on the inside flap of the file, or somewhere else you can always find it easily. It's also a good idea to keep a note of key dates – especially dates by which you need to do things – somewhere prominent on the file, though that's no substitute for diaries and automatic reminders.

Time recording

- 1.130 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's sensible 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 how long each task 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. Keep a note of any expenses and itemised telephone bills.

- 1.131 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. Or you could use a time-recording app on your phone or computer: the information you record still comes from you, obviously, but some tribunals may find a print-out more convincing than a handwritten list.

Precedent 1.131: Time sheet

Date	Activity	Time spent
4/10/13	t/c to PCAW helpline	20 mins
4/10/13	Trip to library for research (incl travel)	4 hours £1.40 fare £5.20 copying
7/10/13	t/c to PCAW helpline	5 mins
7/10/13	Drafting grievance letter	1 hour
24/10/13	Considering Employer's response	20 mins
8/11/13	Trip to library for research	3 hours £1.40 fare £2.00 copying
11/11/13	Drafting ET1	3 hours
11/11/13	t/c to EOC helpline	20 mins
11/11/13	Redrafting ET1 in light of advice	1 hour
11/11/13	Trip to print shop to fax ET1	40 mins £2 fare £1.20 fax
13/11/13	Drafting questionnaire	2 hours
13/11/13	t/c to ACAS	5 mins
13/11/13	Reading letter from Employer's solicitor	20 mins
13/11/13	t/c to CAB	5 mins
14/11/13	Drafting letter to Employer's solicitor	30 mins

Key dates and time limits

- 1.132 It's particularly important to establish a reliable habit of noting key dates in such a way that it is impossible to forget them. There are all kinds of ways of setting up automatic reminders, though an old-fashioned diary will still be the most effective for many people.

Whatever method you choose, there's a pitfall to be avoided at each end of the process. The first is to forget to make the initial entry. If you're busy when you're 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 a mistake: a calm moment may not come along for some time, and by the time it does, you may have 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.

1.133 The second pitfall is to set up the reminder, but then to fail to register it when it falls due. There's no point noting key dates in a diary that you rarely open, or setting up a reminder on an e-mail account that you don't access every day. It's 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'll do better to set up an automatic reminder on your e-mail 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'll be better served by an entry in that.

1.134 It's beyond the scope of this book to discuss time limits in detail, but two calculations need to be second nature to employment advisers.³²

1.135 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 the date of dismissal (in complaints about dismissal) or from the act complained of (in the case of most other complaints). So, for example, if you were dismissed on 5 August 2013, a claim about your dismissal must be received on or before 4 November 2013; 'before' is much better than 'on'.

1.136 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 that argument can be complicated. So if you can, get your claim in less than 3 months after the earliest of the acts that you want to complain about.

1.137 If that's impossible because you put up with mistreatment for months or years before deciding you had to bring a claim, just present it as soon as you can.³³

1.138 The second crucial calculation is the last day for presentation of an appeal to the EAT, which is 42 days from the date when the

32 For a detailed discussion of time limits, see ELAH, paras 20.34 and 21.14.

33 For advice on claiming in a hurry, see paras 2.88–2.90.

employment tribunal's judgment or order is sent to the parties. This means that if the judgment is sent out on Tuesday 13 August 2013, then the notice of appeal together with forms ET1 and ET3 and a copy of the judgment appealed must be received by the EAT before 4 pm on Tuesday 24 September 2013.

1.139 In either case, it's essential to make sure that the document arrives in time and complete. This cannot be over-emphasised: there's 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 wreck your claim without a hearing (and if you're an adviser, get you sued for negligence).³⁴

1.140 If a claim in the last few days is unavoidable, the best thing is to submit it online: you should get an acknowledgement that attaches a pdf of your form, so you can check that the tribunal has received it. Unfortunately, at the time of writing, the pdf won't include any rtf document you have uploaded with your form, so be particularly careful to make sure that you keep a copy of that.

1.141 If the time limit isn't imminent, make sure you check the safe arrival of your document before it does expire. 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 won't usually provide a sufficient excuse for a late claim or appeal, so make a diary note to find out what's happened if you haven't received an acknowledgement within a reasonable time.

Interim relief

What it is

1.142 Interim relief is an order that preserves your employment (at least so far as pay is concerned) until after the tribunal has decided your claim for unfair dismissal. That's very valuable: even if you ultimately lose your claim, you will have been paid meanwhile; and you won't have to pay the money back.

34 Even hand-delivery isn't completely safe: for a cautionary tale see *Gdynia American Shipping Lines v Chelminski* [2004] IRLR 725, CA. See also *JR Beasley v National Grid* [2008] EWCA Civ 742 in which a claim delivered 88 seconds late was held to be out of time.

When you can get it

- 1.143 Interim relief is only available if you are complaining of dismissal for one of a limited number of specific kinds of reason. These are:
- protected disclosure (otherwise known as ‘whistle-blowing’): when you say that the reason you have been dismissed is that you have raised certain kinds of concerns, normally but not exclusively about unlawful conduct;
 - certain kinds of trade union-related activities;
 - a reason relating to a prohibited list (that is to say, a ‘blacklist’ of trade union members or activists);
 - your performance of your duties as a workers’ representative in relation to health and safety, an occupational pension scheme or the Working Time Regulations;
 - for exercising or seeking to exercise the right to be accompanied to a meeting to discuss a request not to retire, or for accompanying or seeking to accompany a colleague at such a meeting.
- 1.144 If you think you have been dismissed because of trade union activities or blacklisting, you need to get in touch urgently with the union to get their advice and help with an interim relief claim if appropriate. There are certain additional formalities in trade union cases that we don’t deal with here.
- 1.145 Whistle-blowing dismissal is the most likely source of a right to claim interim relief. If you think you have good evidence that this is the reason you were dismissed, you should consider an application for interim relief before you do anything else.

Deciding whether to try for interim relief

- 1.146 Because of the very short deadline for claiming interim relief, applying for it means working fast. The usual warnings about the cost of instructing lawyers are relevant, only more so: urgent work tends to be more expensive than non-urgent work; and your choice of lawyer is likely to be more restricted than if you had a couple of months to play with.
- 1.147 Time for making a considered decision about whether or not to go ahead with the application at all will be squeezed, too: you and your adviser will be making decisions under considerable pressure of time with less information and less thought than you’d like. The result could be that you spend a lot of money making an urgent application that you’d actually have been better advised not to pursue if

there had been more time to consider its strength. Getting free representation in time for an application for interim relief will be even more difficult. Lawyers in Citizens Advice Bureaux and Law Centres are almost always rushed off their feet: even if you're lucky enough to get help, it can easily take several weeks just to get an appointment.

- 1.148 All of this means that if you want to try for interim relief, you may not have much realistic option other than to make the application yourself.

How likely are you to get it?

- 1.149 Not very. You have to persuade the tribunal – normally on the basis of your claim form and documentary evidence alone – that you are 'likely' to win the underlying claim; for example, that you are likely to persuade the tribunal that conducts the final hearing that you were dismissed because of a protected disclosure. 'Likely' has been held to mean something more than 'having a reasonable prospect of success.'

- 1.150 In practice, the documentary evidence of the right kind of prohibited reason will normally need to be pretty strong for it to be worthwhile trying for interim relief. In particular, 'I know that's why they dismissed me, and I'm sure I can prove it if I cross-examine the managers' will not be enough: you probably won't get the chance to cross-examine anyone at the interim relief hearing.

What you have to do

- 1.151 What you have to do to claim interim relief is basically the same as what you have to do to complain of unfair dismissal, only faster.

- 1.152 Specifically:

- complete and present an ET1: see paras 2.35–2.70;
- pay the fee or send in an application for remission.

- 1.153 You have to mention that you want interim relief. There's no special part of the form to fill in to do this, so at section 8.1, tick the box for 'I am making another type of claim which the Employment Tribunal can deal with,' and write in 'interim relief: I am claiming unfair dismissal by reason of [*insert your reason*].'

- 1.154 Once the tribunal has your claim, it is likely to list it for hearing very quickly; so don't wait for the notice of hearing – get on with preparation for it as fast as you can. Preparation for the hearing is the same as preparation for a final hearing; only you won't have much

time to do it, and it will necessarily be less elaborate. But you'll want a paginated bundle of relevant documents (see paras 7.5–7.14), and probably a witness statement (see paras 5.12–5.53). If colleagues are willing to give evidence in support of your claim, you'll want witness statements from them too: see paras 5.3–5.9 on the subject of deciding who you should call. A list of issues is always helpful: see para 7.28. If there's time, try to agree the bundle with the other side; but because of the time pressure, you may well end up with a claimant's bundle and a respondent's bundle. The tribunal will be more understanding about that than it would be in most hearings.

1.157

If you think there are key documents in your employer's possession that will prove your case, you may want to ask them for them. The tribunal almost certainly won't be willing to order disclosure of documents before an interim relief hearing; but the employer may comply voluntarily – and if they don't, you may be able to persuade the tribunal that their failure to do so is suspicious in itself. If you want to do this, ask for the documents as early as you possibly can, so as to deprive your employer of the opportunity to say that they were perfectly willing to provide them but couldn't retrieve them in the limited time available.