

Introduction

This book grew out of a file of precedents created for volunteers at the Free Representation Unit (FRU) where we have both worked, training and supervising volunteer employment tribunal representatives.¹ We have also, at different times, been FRU volunteers ourselves. FRU volunteers are typically postgraduate law students, pupil barristers or trainee solicitors who come to the organisation with little or no prior knowledge of employment law and practice. They found a broad collection of precedents reassuring when taking their first steps in employment tribunal litigation, and that suggested that a similar collection might be of use to other non-specialist, unqualified or part-qualified advisers and to lay people representing themselves in the employment tribunals.

This book was conceived as little more than the original collection of sample documents, supported by footnotes and short sections of explanatory text. The explanatory text grew in the writing of the first edition, and has become the core of the book. Much of this, too, reflects experience drawn from FRU. Volunteers grappling with a difficult legal problem have a wealth of specialist law reports, text books and articles to rely on. Guidance on softer questions – questions about the ‘feel’ of the process, how a tribunal is likely to react to a particular application, how to go about structuring a cross-examination, where to pitch the next offer in a negotiation, etc – is much harder to find in written form. One of the main aims of this book is to fill that gap. We do not set out the substantive or procedural law except as necessary to place the precedents and tactical guidance in their context.²

1 Naomi Cunningham from August 2000 to April 2004; Michael Reed from January 2005 to date.

2 For an accessible guide to employment law, see Tamara Lewis, *Employment Law: an adviser's handbook* (ELAH) (10th edn, Legal Action Group, 2013); for a much more detailed and technical treatment, see *Harvey on Industrial Relations and Employment Law* (Butterworths, looseleaf). *Butterworths Employment Law Handbook* (21st edn, Butterworths, 2013) edited by Peter Wallington is a

Although the book is primarily written with claimants acting for themselves and unqualified or part-qualified advisers in mind, we hope that it will also prove useful to lawyers who only occasionally practise in employment law, and to specialist employment lawyers early in their careers. The focus of the book, true to its origins, is on the conduct of proceedings by or on behalf of employees, but most of the text is applicable to both sides and many of the precedents could be used with minor adaptations by employers and their advisers.

Aims of the book

Employment tribunals and the lawyers who appear in them have their own habits and expectations. Judges can behave as if these were self-explanatory when, to an outsider or a beginner, they are not. One particular source of difficulty for the non-lawyer operating in employment tribunals comes – ironically – from efforts to make the process informal and non-legalistic. The tribunal system is supposed to provide a quick, cheap and informal process; procedure rules are expressed in non-technical language, and everything is supposed to be plain and straightforward.

The problem with this is that the whole structure is still dominated by lawyers. Employment judges are trained lawyers, as are very many of those who represent claimants and respondents before them. The employment tribunal rules are in many ways a simplified version of the rules that apply in the ordinary courts, many of which have literally centuries of development and case law behind them. The result is that the employment tribunal procedure rules look very different from the perspective of a non-lawyer who simply reads the words and tries to work out what they mean, than from the perspective of a lawyer who instinctively compares them to the rules he or she is familiar with in other legal contexts. Tribunal judges may throw up their hands in horror at what they see as a basic failure of good practice or tribunal etiquette, and claimants acting in person or inexperienced advisers can sometimes be made to feel that the process – for all its supposed informality – is in fact a minefield of obscure unwritten rules and embarrassing unexpected howlers.³

comprehensive collection of employment legislation.

- 3 For example: in one hearing, the tribunal judge was heard to bark at an unrepresented employer, repeatedly and with rising irritation, 'Don't lead the witness!' The employer clearly had no idea what this meant, but was too rattled to ask – and so carried on asking leading questions until the claimant's representative intervened to suggest that it might be better if the judge

A key aim of this book is to alert users to the unwritten rules and guide them in the art of staying on the right side of the decision-making body. A subsidiary aim is to encourage inexperienced advisers not to let the occasional ‘telling off’ in the course of the hearing alarm them unduly: although you can probably conclude that you are doing something wrong if you are in constant hot water with the tribunal, it is in the nature of the job – certainly if you are an adviser – that properly looking after your clients’ interests does sometimes mean opposing what the tribunal wants to do, and standing your ground under fire. Beginners in the field should also take courage from the thought that all practitioners learn by their mistakes. Where we warn against any specific error, there is a decent chance that one of us has bravely road-tested it for you.⁴

Structure of the book

The book is divided into chapters that broadly follow the sequence of employment tribunal proceedings. Each chapter aims to give practical guidance on the stage of proceedings discussed, to alert users to unwritten rules, conventional practice and pit-falls, and to give them insights into the likely thought processes of the tribunal and the other parties. Sample pleadings, letters and other documents appear throughout each chapter to illustrate the points made. These are given numbers that correspond to the preceding paragraph number: so, for example, a precedent following paragraph 3.7 will be P3.7; if two precedents follow one after the other at that point, they will be numbered P3.7.1 and P3.7.2. Occasionally where it seems useful to show the structure of the document before giving a sample, there will be what we have called a ‘document outline’. These are numbered similarly. As for the perennial problem of a neutral pronoun, we have chosen to use ‘she’ and ‘he’ in alternate chapters. Both should be taken to mean ‘he or she.’

The precedents

The collection of precedents deliberately makes no attempt at comprehensiveness. Its aim is to demonstrate techniques and tactics through examples rather than to provide a precedent for every occasion. For this reason it is both broader and shallower than its

explained what he meant by ‘leading’ and why it was unhelpful.

4 Long ago, of course.

closest comparators. It is shallower in that it offers a relatively small range of examples of formal employment tribunal pleadings and makes no attempt to illustrate all the kinds of complaint that can be brought to an employment tribunal.⁵ It is broader in that it does offer a greater range of kinds of documents than is usual – correspondence with the respondent and the tribunal, written submissions, cross-examination notes, chronologies, draft directions, etc, as well as formal employment tribunal pleadings. The intention is not to persuade users that they should depend on a precedent for everything. On the contrary, the intention is to provide enough examples to give users the confidence to draft their own documents flexibly and responsively. Precedents, like water-wings, have only finished their job when their users discard them.

We illustrate our points wherever possible by reference to two main cases – those of Saifur Rahman and Pauline Phelps – which we follow from the claim, through interlocutory applications, the hearing, and appeals. The aim is to allow the reader to understand the points we make without having to come to grips with a new set of facts for each precedent.

There remain some individual precedents and examples that cannot without artificiality be incorporated into either Miss Phelps' or Mr Rahman's stories, so as well as the two main characters, there are several 'walk on' parts. These are particularly prevalent in the chapter on negotiation and settlement: we want Mr Rahman and Miss Phelps to illustrate various points about hearings and appeals, so it would not do at all to settle their cases at chapter 6.

All names are fictional. Where documents are adapted from real cases, other details have also been changed to preserve anonymity. Letters are written in the names of Natalie Cummings and Malcolm Rhodes, alter-egos of the authors, who practise employment law from the imaginary North London Law Centre. Curiously, all the respondents with whom Ms Cummings and Mr Rhodes deal are represented by the same George Bean of Carrot & Marrow Solicitors in Islington. Even more curiously, a series of computer glitches in the tribunal service have assigned all their cases the same number, 123456/09.

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5 For more examples, see *Harvey on Industrial Relations and Employment Law* (Butterworths) division U or appendix A of ELAH.

The book is supported by a blog at etclaims.co.uk. We regularly post material that updates or supplements what we have written here, as well as new insights that have arisen from our own practices. If you sign up on the site, you can get updates by email.⁶ Comments on the blog are welcomed. You can also email us with feedback on the book at book@etclaims.co.uk.⁷

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Any remaining errors are our own.

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6 Or RSS.

7 But we will not be able to provide legal advice in response to either.