

# **Preparing the case**

**The initial assessment**

**Witnesses**

**Developing the Chronology**

**Deciding strategy and tactics**

**chapter 5**

**5**

## Chapter 5:

# Preparing the case

### The initial assessment

Before going too far in preparing a case, it is essential to carry out an initial assessment and determine the first steps that should be taken to respond to the claim.

The first question to answer is:

#### 1. On what grounds is the applicant seeking relief?

What is it they are asking the Employment Tribunal to decide? One tip here is to look in the top right hand corner of the front page of the ET1. Here the COET will have recorded in abbreviated code, the heading under which they have recorded the claim in the central register. The most obvious of these is 'UD' - Unfair Dismissal. This, and similar, easy to follow codes will give a clue as to how the COET have viewed the claim.

The investigation into the facts of the case cannot properly commence until it is clear exactly what the applicant is claiming.

#### 2. What is it that they want the Employment Tribunal to rule on?

Where this is not clear, then the respondent must seek further and better particulars from the applicant on the precise nature of the claim.

Any exchange of correspondence seeking this information should be copied to the Regional Office of the Employment Tribunals. An extension in the 14 day time limit to return the ET3 may need to be sought if the nature of the claim is unclear at this stage.

The application should then be considered as a whole.

#### 3. Are there areas that would allow the applicant to change the nature of the claim as the case develops?

Statements such as '*I was dismissed because I am black*' may have been coded as an Unfair Dismissal claim. However it is quite likely that a claim of racial discrimination will be added later in the proceedings. It is open to the Employment Tribunal to allow the nature of the claim to change as late as the day of the hearing. Whilst in such circumstances the respondent who has not prepared a defence to an amended claim, can seek an adjournment to deal with the changed circumstances, it is by no means certain that this will be granted.

Similarly a statement such as '*I was made redundant at short notice and did not receive any redundancy pay*' can easily be extended from a claim for redundancy pay into a claim of Unfair Dismissal. An overview of the claim at this initial stage can help prevent the respondent being ambushed at a later stage in the proceedings.

The initial assessment should concentrate on:

- The precise nature of the claim.
- The facts of the case as understood at this early stage.
- The documents that exist which support/challenge the applicants version of events.
- The witnesses that are available and whether they are competent and reliable.
- The statutes that are involved in the claim.
- The judicial precedents that exist (case law).
- Whether the relevant procedures were followed.
- The nature of the applicant - are they a professional litigant?
- How important is it to win the case?
- The Public Relations and Employment Relations implications associated with the case.
- Whether the case can be settled quickly for nuisance value - and if so for how much?
- The likely cost of losing the case - and the award of compensation that could be made.
- The time and other resources available to prepare the defence.
- Who is to handle the case?

The cost and implications of losing the case needs to be worked out carefully. It is essential to have this figure to hand at an early stage. If the likely level of compensation is very low then this fact should be drawn to the attention of the other side early on in the proceedings, thus enhancing the prospects of settling the case at minimal cost. If on the other hand the figure is at the maximum level of compensation that the Employment Tribunal can award, or there are risks of a higher figure than the maximum arising because of the possibility of reinstatement or re-engagement being requested and denied, or because the claim includes an element of racial or sexual discrimination, these facts must also be take into account.

The implications of settling the case without a hearing also need to be considered. Will this create an unhealthy precedent for future similar situations? Is the issue a principled one on which it would be detrimental to management's authority to settle etc.

The tactics that will be appropriate in a claim that attracts the possibility of a maximum award of compensation arising, need to be thought through very carefully. Senior management need to be aware of the risks that this poses to the 'bottom line'. Consideration also needs to be given to the possibility of making a meaningful offer to settle where the respondents' case is weak. Once this initial assessment has been completed, work can commence on the case preparation.

### **Summary**

The initial assessment:

- On what grounds is relief being sought from the Employment Tribunal?
- What are the costs and other implications of losing at Employment Tribunal?
- What witnesses and evidence are available?
- Are these reliable?
- What documentary evidence is available?
- Does this support the respondents' case?
- Has procedure been followed in every respect?
- What are the public relations and employment relations implications of proceeding to a full hearing?
- Can the case be settled for 'nuisance' value?
- What is 'behind' the claim?
- What time and resources are available to fight the claim?
- What statutes are involved - do they involve sex, race or trade union activities?
- Who is to handle the case?

## Witnesses

The next step is to identify and interview potential witnesses. Lord Justice Phillips in a significant case, laid down the basic rules to be followed when choosing witnesses when he said:

‘It is for the representatives to decide how they shall call their evidence. Representatives are entitled to conduct proceedings as they see fit within the rules, and in particular, to call witnesses in the order that they wish.’

Witnesses should be chosen for their ability to give relevant first hand evidence that will enable the Employment Tribunal to understand the facts of the case and reach their decision accordingly. Investigators should be seeking witnesses who can testify as to:

- What was said
- What was heard
- What was seen
- What was done.

It can be very helpful to first get all those who might be witnesses to write down, in their own words, their recollections of the events surrounding the incident or issues concerned. These written recollections can at a later stage, if necessary, be converted into formal witness statements. At the initial stage however the written recollections of potential witnesses can be an invaluable aid in deciding who to interview first, and what questions to put to them.

Investigators should wherever possible avoid putting leading questions to potential witnesses even during the initial investigation. Statements such as ‘*You saw... didn’t you?*’ are valueless, as questions such as this cannot be put at the Employment Tribunal hearing. Rather the investigator should ask questions designed to test the real knowledge of the potential witness. In addition answers should be sought to the following:

- How sure is the witness of the facts without being unduly prompted?
- How well will they stand up to cross-examination?
- Is their knowledge first, or second hand?
- How will they come across at the Employment Tribunal as a witness?
- Is their evidence ‘key’ to the issues that are to be tested at ET?

What the investigator is seeking is as clear a picture as possible of the events leading up to, and surrounding the incident, or issue in question. It may be that supporting witnesses will be required to explain to the Employment Tribunal the details of systems, practices, processes or procedures, even though these supporting witnesses may not have been directly

involved in the events in question. These supporting witnesses may be necessary to ‘flesh out’ the picture and ensure that the Employment Tribunal has the necessary knowledge to place the events or incident in question in their correct setting.

Issues of right or wrong, fairness or unfairness, are not of primary concern at this stage. The process of investigation should start by assembling the facts, rather than attempting to reach conclusions from them. This will come at a later stage in the proceedings.

Clearly it is essential to call the managers or directors who made the decision to discipline or dismiss, or made the salient decisions in the matter under question. It will be hard to convince the Employment Tribunal of the correctness of any decision without these personnel testifying in person. In addition it is essential to call any person who:

- Saw or witnessed the events in question
- Was involved in any relevant meeting/s
- Heard, or attended any appeal hearing
- Was part of any investigation that preceded disciplinary proceedings.

When carrying out the investigation the investigator should:

- Be objective - even sceptical until convinced otherwise.
- Critically examine documents that might be relevant.
- Test what potential witnesses are saying, against what other witnesses say.
- Concentrate on facts, not opinions.
- Collect evidence - avoid passing judgement at this early stage.
- Probe the memories of witnesses to determine the extent of their knowledge.
- Tactfully cross-examine witnesses to test the extent of their ability to stand up to rigorous questioning.
- Make notes and agree these with each witness at the end of each interview. \*

\*Note: These notes can be particularly useful when there is a long period of time between the interview and the hearing dates; as they will be virtually contemporaneous (i.e. written close to the time that the event/s occurred) they can act as memory joggers immediately prior to the hearing itself.

**Summary**

Witnesses should be chosen on their ability to give relevant first hand evidence to the Employment Tribunal on:

- what was said
- what was heard
- what was seen
- what was done.

It is vital that witnesses are credible and truthful. They must be sure of their facts without being prompted. Other considerations are:

- is their knowledge first or second hand?
- how will they come across as witnesses?
- is the evidence they will give 'key' to the case being heard?
- how well will they stand up to cross-examination?

Representatives should:

- be objective, even sceptical until convinced otherwise
- critically examine documents to ensure they match the testimony of each witness
- test witness statements against each other
- collect evidence - rather than pass judgement
- make notes as they proceed and agree these with witnesses
- test all evidence given.