

STRATEGIC HR FORUM DISCUSSION TOPICS

A) Employment Tribunals

Background

The Employment Tribunals are an independent judicial body established to resolve disputes between employers and employees over employment rights. The tribunal hears claims about employment matters such as unfair dismissal, discrimination, wages and redundancy payments. An Employment Tribunal is like a court but it is not as formal, however, like a court it must act independently and cannot give legal advice. Almost all hearings are open to the public.

When a person makes an Employment Tribunal claim normally the process involves a hearing and legal arguments are made with a decision (judicial determination) then being made. The process is a formal one involving evidence being given by witnesses which is very similar to what happens in a court. In the past Employment Tribunals always consisted of three members, a judge and two lay members; one from an employer background and one from an employee background. Since 2012 however many cases have been heard by an employment judge sitting alone.

The Employment Tribunal process

Concerns regarding the number of cases submitted to employment tribunals, costs and the length of time it was taking to reach a conclusion have led to recent changes to increase the efficiency and speed of the service. These mean that a fee has to be paid by the claimant when a claim is submitted and a further fee has to be paid before a hearing takes place. A sliding scale of fees applies depending on the type of claim; with submission fees ranging between £160 and £230 per individual claim and hearing fees from £230 - £950. Exceptions exist for those who are unable to afford these fees and remission is available to people who have less than £3,000 of disposable capital. Statistics for claims from October to December 2013 indicate the introduction of fees has resulted in a dramatic drop in the number of claims being made. 9,801 claims were received in that quarter, 79% fewer than in the same period of 2012, and 75% fewer than in the previous quarter.

Prior to a Hearing

Before an application to a tribunal can be made, an early conciliation process must take place under the auspices of ACAS (Advisory, Conciliation and Arbitration Service). If this does not result in a resolution, the applications from both claimant and respondent are considered by an employment judge to determine whether an arguable case/defence has been made. If they believe it has not, the judge writes to the parties explaining their view, and will dismiss the case if no response is forthcoming before a set date.

For cases that pass the sifting stage, a claim may be listed either for a preliminary hearing to consider the matter further or it may go straight to a full hearing.

The Hearing

At the hearing it will be usual for the Employment Judge to start by setting out the key issues. The previously submitted witness statements will then be 'taken as read' which means that they are the witnesses' chief evidence unless the tribunal directs otherwise. In some cases the judge may insist on hearing the witness read their statement out in full or perhaps the witness will be asked to clarify some crucial passages. Each witness will have to take an oath or swear on a holy book, before reading their statement or being asked questions about it. The main questioning will occur as cross-examination. The tribunal may then ask questions. Finally the representative for the witness's side can ask any further questions. If there is no legal representative, the employer or employee will be able to ask further questions of their own witnesses.

Once all witnesses for one party have given evidence, the process starts again for the other side's witnesses. At the end, the representatives of both sides will be able to 'sum up' their case, and then the tribunal may adjourn.

The Decision

On reaching a judgment, the tribunal can award:

- reinstatement (the employee gets the job back)
- re-engagement (the employee returns to the organisation in a new role)
- compensation
- payment of wages or monies due to the employee.

Reinstatement and re-engagement are very rare. The amount of compensation given depends on the type of case and the claimant's age, length of service and salary. The maximum award of compensation for a successful claim of unfair dismissal is £90,494 (April 2014) and in cases of discrimination, there is no limit. To encourage employers to pay rapidly after losing a case, interest, from the day of the award, accrues if the sums are not paid in full within 14 days.

In addition, tribunals have the right to levy fines of up to £5,000 on employers who have been found to have acted unreasonably in defending a claim. Losing respondents can also be required to reimburse victorious claimants in addition to paying any other compensation required by the tribunal, although this will be a matter for the tribunal to decide. It will not happen automatically.

In research carried out before the most recent changes to the tribunal system came into effect it was shown that the majority of successful claims were brought against small employers (under 50 staff) in the private sector. Unpaid wages and breach of contract claims were the most common jurisdictions. The average (median) award value was £2,600. In the year April 2011/March 2012 only 8% of unfair dismissal claims were successful at employment tribunal.

NHDC Experience

Robust management of employee relations cases means that the Council attends employment tribunals very rarely. The most recent occasion was in April 2012 when NHDC successfully defended a case of unfair dismissal following the termination of an employee's contract of employment on the grounds of misconduct. Prior to this, the last case was in 2004, which again the Council won. As attendances at tribunal hearings are so few, HR and managers have participated in "mock tribunal" sessions in recent years to maintain the skills required to manage such cases if and when they do occur.

The emphasis must always be on the correct use of the Council's policies and procedures to ensure the fair and equitable treatment of employees to avoid the need to resort to the employment tribunal procedure, but if there is a sound case, the Council should be prepared to follow the process to its conclusion. In doing this it is necessary to be mindful that whether the case is won or lost, there are significant costs to the organisation in factors such as legal expenses and time for both HR and management. In the most recent case, there was considerable input in both preparation and time spent attending the tribunal for three members of the HR Department, two Heads of service and a Strategic Director.