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Sources of employment law advice and representation

- 1.1 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 individual claimants will prefer to have representation if they can find it, and in most cases representation will improve their chances of a successful outcome.¹
- 1.2 It is suggested that claimants who cannot afford to pay substantial sums of money for representation should consider the possibilities of free or affordable representation in this order:
- their trade union, if they belong to one;
 - their household, credit card, car (etc.) insurance;
 - a voluntary sector advice centre or one of the statutory Commissions;
 - high street solicitors;
 - employment consultants.

Trade unions

- 1.3 A claimant who is a member of a trade union should normally expect to be represented by the union in a dispute with his or her employer. Unions have different rules about which cases they will support, and some will withdraw support (sometimes shortly before the hearing) if the claimant refuses to accept what the union's lawyers advise is a good offer of settlement. Claimants considering relying on union assistance should make sure that they have been given clear information about the circumstances in which the union will withdraw its assistance.

Household insurance

- 1.4 Household (and other) insurance policies include legal expenses insurance surprisingly often. This tends to be a neglected source of assistance for claimants for the simple reason that many do not realise that they

1 The claimant is the individual complaining to an employment tribunal of a breach of his or her employment rights. Until October 2004 the correct term was 'applicant' and this term is likely still to be used occasionally. The other party – usually the employer – is called the respondent.

have the cover. 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 the claimant recovers a large award. It is important to investigate this at an early stage in the dispute, however, because a claimant who has already taken steps in employment tribunal proceedings without the advice of an insurer-approved lawyer may find that she has invalidated her insurance.²

Voluntary sector advice agencies

- 1.5 There are various kinds of voluntary sector advice agencies that may be able to offer free advice and/or representation. Almost all of them are badly over-stretched, and many claimants will spend fruitless hours telephoning advice agencies only to be told that no-one can help. However, some agencies will deliver an exceptional service that rivals the best that private practice solicitors can offer, so (within limits) it is worth persevering. The process may well be frustrating, but anyone seeking free representation should try not to let the frustration show. Mostly ‘we cannot help’ means just that – the organisation simply has no spare capacity, or does not do this sort of work. If there is any flexibility, human nature is as it is and charm almost always gets further than aggression.³
- 1.6 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:

Law Centres:	Law Centres Federation: www.lawcentres.org.uk
Citizens’ Advice Bureaux:	Citizens Advice: www.citizensadvice.org.uk
Other advice agencies:	AdviceUK (formerly the Federation of Independent Advice Agencies): www.adviceuk.org.uk

- 2 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.
- 3 There is a practical insight of wide application here. Even when – as sometimes – aggression may be effective, charm should always be tried first. The reason is that if charm does not work, aggression is still available as a last resort. Starting with aggression and then trying to backtrack to charm is futile.

Law Centres®

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

Citizens Advice Bureaux

- 1.8 Citizens Advice Bureaux (CABx) tend to offer a generalist service, and only some employ a specialist employment adviser. CABx do not generally have a catchment area policy and will advise anyone who approaches, subject to availability of advisers. CABx do not generally means-test their clients except for Legal Services Commission funded work. There are around 460 CABx in the UK providing advice from over 3,000 locations: any sizeable town centre is likely to have one. The umbrella group is called Citizens Advice (formerly more intelligibly known as the National Association of Citizens Advice Bureaux).⁴

Racial Equality Councils

- 1.9 Racial Equality Councils (RECs) are specialist advice agencies that serve their local area but will deal only with claims that involve an element of race discrimination.

The Free Representation Unit and the Bar Pro Bono Unit

- 1.10 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.⁵ Claimants in London who are receiving advice and assistance for case preparation, but whose adviser is not able to represent them at a hearing should make sure their cases are referred to FRU as soon as a hearing date is set to have the best chance of representation. Most FRU volunteers are student or trainee lawyers who work under the supervision of a specialist employment lawyer. They choose their own cases, rather than having cases assigned to them, so FRU can never guarantee representation in any given case until a particular volunteer has offered to take the case on.
- 1.11 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.

5 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

LawWorks

- 1.12 LawWorks is a solicitors' pro bono organisation.⁶ Like the Bar Pro Bono Unit and FRU, it accepts applications for assistance only through advice agencies. Like BPBU, it applies both means and merits tests before offering assistance. An application form can be downloaded from its website.

Specialist charities

- 1.13 Some of the larger disability charities, including RNIB (Royal National Institute for the Blind), RNID (Royal National Institute for the Deaf), 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 whistleblowing issues but does not undertake casework. The Terence Higgins Trust provides helpline advice on HIV-status employment issues, and may be able to refer on to other agencies for casework. The Andrea Adams Trust provides advice and information on bullying at work.⁷
- 1.14 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.

The Commission for Equality and Human Rights

- 1.15 From 1 October 2007 the three statutory commissions, the Equal Opportunities Commission (EOC), Commission for Racial Equality (CRE) and Disability Rights Commission (DRC) will be replaced by the Commission for Equality and Human Rights.⁸ The CEHR will be responsible for all aspects of equality law, including those like age and sexual orientation not covered by one of the original commissions.
- 1.16 The existing commissions have provided helpline advice and website guidance on tribunal claims. In rare cases they were able to provide representation for a case where the result would impact a large number

6 www.lawworks.org.uk

7 The websites of these organisations are at www.rnib.org.uk, www.rnid.org.uk, www.dls.org.uk, www.pcaaw.co.uk, www.tht.org.uk and www.andreadams.org

8 See www.eoc.org.uk, www.cre.gov.uk, www.drc.org.uk and www.cehr.org.uk

of other individuals. The CEHR is likely to take a similar approach. Early indications are that it is unlikely to provide representation in more than a dozen cases each year, and these will be test cases chosen for their strategic importance.

Private practice solicitors

1.17 Claimants who are eligible for Legal Services Commission funding (those who are dependent on means-tested benefits, or are on very low incomes) may be able to find a solicitor who can advise and assist with preparation of the case. There is no public funding (in any but the most exceptional cases) for representation at the tribunal hearing, 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. In London, some solicitors will be able to refer the case to the Free Representation Unit at this stage, so before choosing a solicitor it may be worth finding out whether they subscribe to FRU's service.

1.18 The decision to pay privately for employment law advice should be approached with caution. Lawyers' fees can mount up frighteningly fast, and the total value of an employment tribunal claim is often too small to justify them. Some solicitors offer 'no win no fee' agreements, but the drawback to these is that, because the solicitor is taking a risk of not being paid at all, the fee if the case is successful will normally be higher than it would otherwise have been. There can also be sums that the client has to pay anyway, such as fees for medical or other experts' reports or barristers' fees. Occasionally this will be the best, or the only practical, way of running an employment tribunal claim, but a claimant considering taking this course should make sure she or he has had a very clear explanation of the 'worst case' outcome before making a decision. It is also worth asking solicitors to advise, as a preliminary matter, on whether any insurance policy the claimant has is capable of covering legal expenses.

Employment consultants

1.19 There are no restrictions on who may appear as a representative in the employment tribunals, and a number of firms of employment consultants offer their services in this area. Some of these market

their services aggressively to claimants and respondents in employment tribunal cases. They vary in quality, and although some can provide a good and relatively cheap service, others are worse than useless. Unlike barristers and solicitors, they are not regulated by a professional body. It is suggested that claimants should do their research carefully before using the services of these organisations. One question to ask is how many costs orders have been made against clients of the organisation in the past year, compared to the total number of clients represented. Costs orders are still rare in the employment tribunal, and they tend – though not invariably – to suggest bad advice or poor conduct of the case by the representative. Costs orders running at 1% or more of cases handled by a particular consultancy would give cause for concern.⁹ It is also worth asking whether any wasted costs order have ever been made against the organisation: wasted costs orders are very rare indeed, and even one against a particular consultancy can be taken as a warning.

Whether to bring a claim

- 1.20 For a lawyer, the question whether a claim should be brought is normally approached by way of three questions: (i) what are the prospects of success? (ii) how much compensation will be awarded (or what other benefit will it bring) if it succeeds? and (iii) what will it cost to run?
- 1.21 For a claimant, the third question needs to be considered carefully from all angles. The question how much money will need to be spent on the claim is, of course, an important one. Even if you are acting for yourself or are lucky enough to have free representation, there will be some financial costs – telephone calls, postage, photocopying, fees for expert reports, etc. However, the non-financial costs of running a case against your former employer should be looked in the eye too.¹⁰

9 In 2005–06, 86,083 employment tribunal cases were settled, withdrawn or disposed of by the tribunal. Of those cases, around 20,000 of which would appear to have gone to a hearing, costs were awarded against the claimant in only 148 cases: Employment Tribunal Service Annual Report for 2005–06, available at www.ets.gsi.gov.uk

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

- 1.22 The first thing to notice here is just how important the employer/employee relationship can be for the employee. Obviously this varies: the 25-year-old graduate in her third job in the last four years will feel much less attachment to her employer than the fifty-something who has been with the same employer since leaving school at 16. But in many cases, losing your job doesn't just mean losing an income: it may also mean losing much of your reason for getting up in the morning, daily contact with people with whom you have a common experience and circle of acquaintance, your status, your self-esteem and in some cases of long-standing employment, much of your social life as well.
- 1.23 The second point to note is that the importance of the employment relationship is not symmetrical. Most employees have a considerable emotional investment in their jobs. Employers do not as a rule have any particular emotional attachment to their employees.¹¹ Although the bodies – the companies, public authorities, charitable trusts, unincorporated associations or partnerships – that employ staff act through human beings, and those individual human beings can be kind and well-meaning, the body itself does not, whatever its mission statement or staff handbook may say to the contrary, 'care'. It is incapable of caring; it simply lacks the equipment with which caring is done.
- 1.24 Both factors can make litigation tempting. Being an employee can have something in common with being the child of a psychopathic parent: you have a large emotional investment in a relationship with 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 all employment tribunal cases are motivated at least 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.¹²
- 1.25 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

11 The authors apologise for any shattered illusions.

12 This is a wholly unscientific observation, but the authors have between them seen a lot of employment tribunal claims and believe it to be broadly true.

be modest.¹³ Very rarely, the employer is ordered to reinstate or re-engage the employee; even more rarely such an order is obeyed.¹⁴

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

1.27 For these reasons, if the employment has ended in stress and depression for the employee, litigating about it will almost certainly exacerbate both effects. Claimants often say something to the effect 'If I had known what this was going to be like, I would never have begun.' 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 the losses you have sustained 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, and social lives and marriages can suffer or crumble under the strain.

1.28 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

13 The median award for unfair dismissal in 2005–06 was £4,228; the median awards for race, sex and disability discrimination were respectively £6,640, £5,546 and £9,021. Awards exceeding £50,000 were made in only 2.6% of unfair dismissal cases, and 6.8%, 2.4% and 11.8% of race, sex and disability discrimination cases: Employment Tribunal Service Annual Report for 2005–2006, available at www.ets.gsi.gov.uk

14 In 2005–06 the tribunals made eight orders for reinstatement or re-engagement, that is in only 0.23% of unfair dismissal cases that were upheld after a hearing.

do.¹⁵ It is sensible to litigate (a) if you have to; or (b) if there is a fairly clear probability that the costs – emotional as well as financial – will be justified by the benefits; or (c) 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.¹⁶ One point to keep clearly in mind when making this decision 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.

- 1.29 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.¹⁷ 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.

Outline of the employment tribunal process

- 1.30 Strictly speaking an employment tribunal case begins with a formal claim on form ET1 (see chapter 3 below), but since the introduction of the statutory dispute resolution procedures, an internal grievance procedure is now a necessary first step in many cases. Broadly, there is a distinction between complaints of dismissal (other than constructive dismissal) and other complaints (including constructive dismissal).¹⁸ An employee whose complaint is about dismissal (other than constructive dismissal) is not required to bring a statutory grievance, but may proceed direct to a complaint to the employment tribunal.

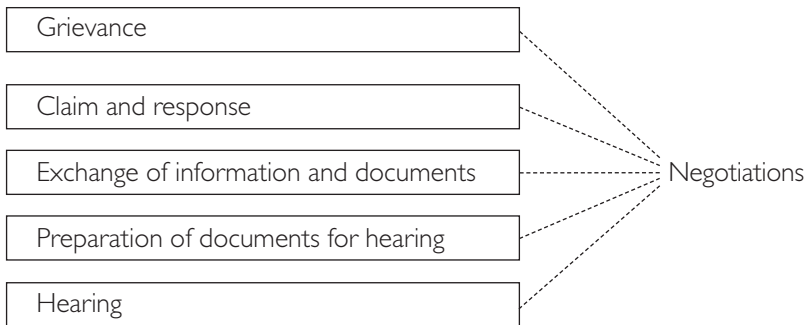
15 This is no criticism of lawyers. It is as reasonable to expect your lawyers to help you decide whether the emotional costs of litigation are worth incurring as to expect your priest or therapist to provide legal advice; their expertise is elsewhere.

16 You have to litigate, in effect, if you face a threat that your children will be taken away from you or you will be sent to a country where you will be tortured and murdered. Necessity of this sort rarely if ever arises in the employment context.

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

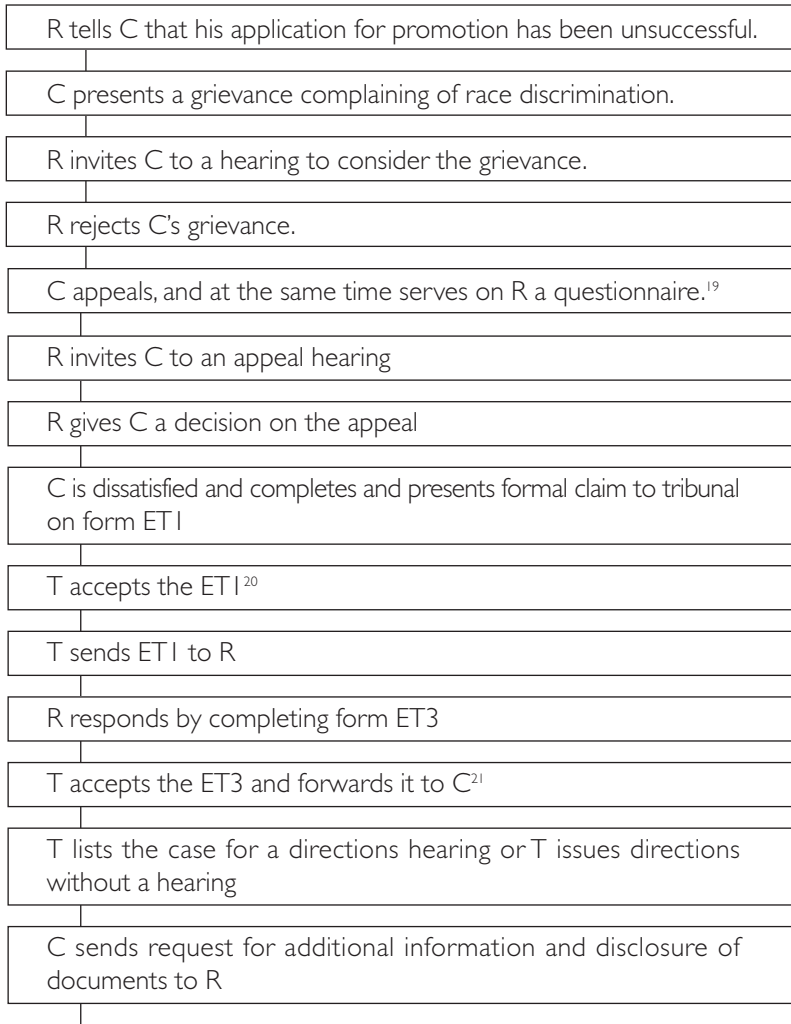
18 For an explanation of this term see glossary; for more detail, see ELAH 7 para 6.33.

- 1.31 In very broad outline, then, the process falls into four stages: (1) internal grievance process; (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. There may be negotiations at any of these stages. The parties are normally referred to as the claimant (the employee who brings the claim) and the respondent (the employer, who responds to it).



- 1.32 In the more detailed outline that follows, the players are referred to as C (for claimant) and R (for respondent), and T (the employment tribunal). A complaint of a discriminatory failure to promote is taken as an example, and it is assumed that the case goes all the way to a decision by the employment tribunal. There could be different outcomes at many points: this example should be seen as one of the possible paths through a fairly complicated flow-chart rather than a recipe for what must happen in every case.

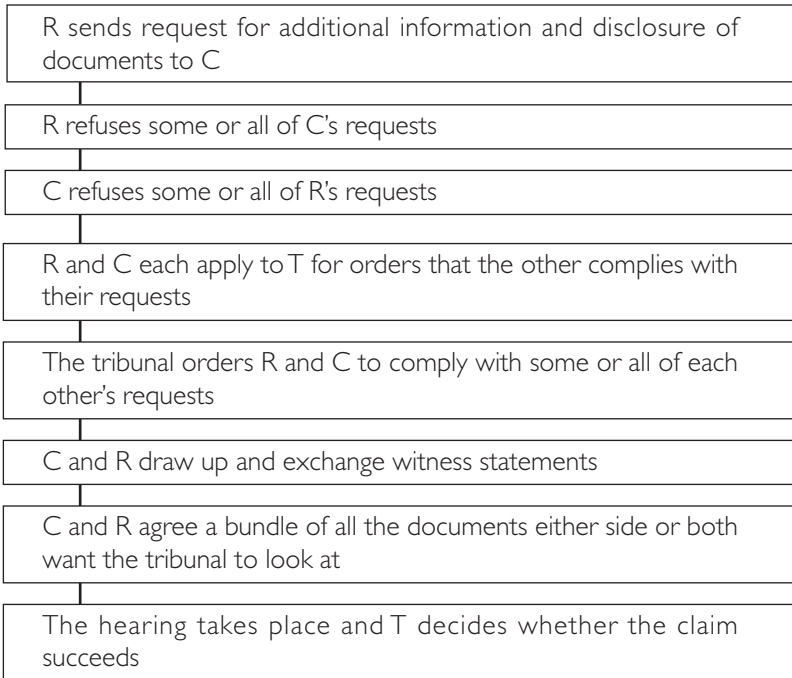
14 *Employment Tribunal Claims / chapter 1*



19 Note that the questionnaire can be served at any time from the notification of C that he has not been promoted until 21 days from the presentation of a claim to the tribunal.

20 If T considers that the claim does not include all the required information, the statutory grievance procedure has not been followed, or it does not have jurisdiction to consider the claim – or, from 6 April 2005 (but see paras 1.63–1.64 below), if it has not been presented on the required form – it will reject the claim. In that case it may be necessary either to redraft the claim and try again, or to appeal the decision to reject the claim or seek a review.

21 Again, there are grounds on which the ET3 may be rejected.



Sources of employment law

- 1.33 Much of employment law is contained in legislation, but it must be remembered that at the heart of the employment relationship is the contract of employment. Non-lawyers should also remember that legislation is far from static. Most of the major employment statutes have been regularly updated since they came into force. This means that some care needs to be taken to ensure that you are referring to the current law.²²
- 1.34 Contract law is what is called a common law subject: that is, its main principles are to be found in previously decided cases rather

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

than in statutes.²³ Employment tribunals must apply common law principles where appropriate as well as the relevant statutory rules. To complicate matters further, there is a substantial body of European employment law; and the European Convention on Human Rights, applied in the UK by way of the Human Rights Act 1998, also has many applications in this area.

1.35 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 House of Lords.²⁴ Sometimes the argument between the parties will focus on whether or not the facts of the case are similar in the relevant way to the facts of a previously decided case, so that the result in the earlier case is binding on the tribunal that decides the later. The party seeking to apply the result in a previous case will say that the two cases are alike in all relevant respects; the other party will argue that there is a material difference between the cases that means that the earlier case need not be followed.²⁵

1.36 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.²⁶ The standard method of referring to a

23 The standard practitioners' textbook is *Chitty on Contracts*, 29th edn, Sweet & Maxwell, 2004. Chitty is very comprehensive, but is likely to be forbiddingly technical for anyone without a legal training. The important point, for non-lawyers, is simply to be aware that there are two different kinds of law operating in this field.

24 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.

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

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

case reported in one of these, or similar, series follows the pattern: *Party v Other Party* [2004] IRLR 382. This indicates that the report of the case will be found at page 382 of the 2004 volume of the Industrial Relations Law Reports. In addition, more recent decisions of the Employment Appeal Tribunal, the Court of Appeal and the House of Lords are all available online.²⁷ Two volumes, M Rubenstein, *Unfair dismissal: a guide to relevant case law* and M Rubenstein and Y Frost, *Discrimination: a guide to the relevant case law on sex, race and disability discrimination and equal pay* provide helpful quick reference to the case law in those two areas.²⁸

Books

- 1.37 A great many books are published on employment law, and the following represent a tiny sample of what is available. Lewis, *Employment Law: an adviser's handbook* (ELAH 7) is an excellent and accessible short guide to the substantive law, and McMullen et al *Employment Tribunal Procedure* (ETP 3) gives a detailed explanation of tribunal procedure (Legal Action Group, 7th edn, 2007 and Legal Action Group, 3rd edn, 2005). *Harvey on Industrial Relations and Employment Law*, published by Butterworths, is a large loose-leaf publication in several volumes that explains the law in great detail and is updated regularly throughout the year.²⁹ It is likely to be dauntingly technical for anyone without a legal training, but if a difficult question arises to which the answer cannot be found in one of the shorter books it will be worth consulting. Similar comments apply to *Employment Court Practice* (Sweet & Maxwell, 2007) which deals with procedure in employment tribunals and appeals to EAT and Court of Appeal.

Key employment cases

- 1.38 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.

27 Key websites are BAILII (British and Irish Legal Information Institute) at www.bailii.org, the EAT website at www.employmentappeals.gov.uk and the Court Service website at www.hmcourt-service.gov.uk

28 LexisNexis Butterworths, 25th edn, 2007 and LexisNexis Butterworths, 20th edn, 2007.

29 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

Iceland Frozen Foods v Jones [1983] ICR 17, EAT
Post Office v Foley [2000] ICR 1283, CA

Conduct dismissal

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

Procedural fairness

Polkey v AE Dayton Services [1987] IRLR 503, HL³⁰

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

30 The effect of this decision has been altered since 1 October 2004 by the Employment Rights Act 1996 s98A, but it has been such an important part of the landscape for employment lawyers for so long that it is still helpful to be familiar with it.

Trust and confidence term

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

Who is an employee

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

Discrimination

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

Transfer of Undertakings (Protection of Employees) Regulations

Litster v Forth Dry Dock & Engineering Co Ltd [1989] ICR 341, HL
Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice [1997] ICR 662, ECJ

Mitigation of loss

Wilding v British Telecom [2002] IRLR 524, CA

Appeals

Anya v University of Oxford [2001] ICR 847, CA
Meek v City of Birmingham District Council [1987] IRLR 250, CA
Kumchyk v Derby City Council [1978] ICR 1116, EAT
Yeboah v Crofton [2002] IRLR 634, CA

The tribunal's powers

- 1.39 The tribunals operate under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, and in particular under Schedule 1 to these Regulations, the Employment Tribunal Rules of Procedure.³¹ These are referred to throughout this book simply as the 'procedure rules'.
- 1.40 It is worthwhile for any claimant or adviser with limited experience in this area to read 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. Particular provisions to note are the interpretation provisions at regulation 2, the overriding objective at regulation 3 and the guidance on calculation of time limits at regulation 15. Rules 1 to 48 of the Procedure Rules are the main rules that govern most types of proceedings, and rules 10 (case management), 11 (applications), and 37 to 48 (costs and preparation time orders) are of particular practical significance.
- 1.41 The President of the employment tribunals has power to issue practice directions giving detailed guidance about how cases should be conducted.³² At the time of writing no employment tribunal practice direction has been issued under the new rules, and there is no proposal to issue any in the near future.
- 1.42 As stated above, the procedure rules will not be the only material informing the tribunal in its procedural decisions. Tribunals are very often guided – sometimes, but not always, consciously – by principles and procedures that operate in the ordinary courts, often drawn from the Civil Procedure Rules (CPR) which apply there. If the tribunal criticises a claimant for some failure to observe 'obvious common sense' or 'basic good practice' in some aspect of the conduct of proceedings on which neither the claimant's 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.
- 1.43 For this reason, some familiarity with the CPR is, although not essential, certainly helpful for employment advisers – partly so that they are not taken by surprise when the tribunal borrows from the

31 SI No 1861.

32 Compare the EAT Practice Direction of 2004.

CPR, and partly so that they are in a position either to warn the tribunal against automatic adherence to rules devised for a more formal (and unequivocally adversarial) setting, or sometimes to propose that the manner of dealing with particular practical problems set out in the CPR should be adapted for the employment tribunal.³³ The CPR can sometimes provide helpful insights into the thinking behind the tribunal procedure rules. In many instances, the latter are a simplified version of the former; sometimes, on the other hand, it is clear that a deliberate distinction has been made between the tribunal rules and the CPR.³⁴

- 1.44 The up-to-date CPR can be found on the Ministry of Justice website.³⁵ This should be regarded as a recommendation only for advisers who will run a substantial number of cases for clients, however: grappling with the fairly forbidding CPR will rarely, if ever, be the best use of time for a claimant representing him or herself in a single case.

General note on correspondence

- 1.45 Much of a party's correspondence with the tribunal or the other side will have a secondary tactical motive as well as the purpose it has on its face. It should be remembered that any correspondence may in some circumstances be read by the tribunal, so it is advisable always to maintain a calm and co-operative style. This will not invariably be reflected by the respondent or its advisers but it will almost always be in the client's interests to resist any temptation to be abrasive or sarcastic.³⁶ This can be particularly important if there is a costs application by either side. If there is unavoidable delay, or if there has been a

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

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

35 www.justice.gov.uk/civil/procrules_fin/index.htm

36 Correspondence from the other side may well reflect the adviser's wish to demonstrate to their own client that they are conducting the litigation vigorously.

misunderstanding, 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.

1.46 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 is co-operation between the parties.³⁷ Both sides are likely to encounter certain difficulties along the way, and will sometimes need the other side's indulgence when they are unable to meet deadlines, etc. If the tone of the proceedings has been quarrelsome from the start, each side may waste a great deal of time (and in some cases their client's money too) scoring every possible point off the other. It is far better to be pragmatic and flexible about things that do not matter, and to conserve energy for the few battles that will win or lose the case. For a claimant acting in person against a represented employer, it is worth making a real effort to remember that the lawyer on the other side is simply doing the job he or she is paid to do in representing the respondent's interests, and is not a personal enemy of the claimant's.³⁸

1.47 Letters should make their point in plain language and as few words as possible. Fancy type-faces should be avoided. Inexperienced advisers and lawyers sometimes feel that they ought to act the part and write legalese. This is never a good idea. Opening and closing gambits like 'I write further to our conversation [/my letter] of [date]' or 'I write in relation to the above-mentioned matter and refer to your letter of [date]' or 'I look forward to hearing from you at your earliest convenience and thank you for your attention' are redundant. The heading indicates the subject-matter of the letter, and 'thank you for your letter of [date]' is ample to provide the link to the letter being answered. If there is a particular need for an urgent answer, it is sensible to spell that out, but otherwise there is not normally any need to ask for a reply.

1.48 Many solicitors still routinely duplicate faxed or e-mailed correspondence by post. This is unnecessary and causes the tribunal and the other party additional work. If the other party finds it at all

37 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.

38 This is good advice for lawyers too.

difficult to deal with correspondence (by reason of a visual impairment, for example, or dyslexia) it is particularly unhelpful and time-wasting. The tribunals positively request that parties should not do it. If it is essential to ensure that a document arrives by a certain date, the sensible thing is to fax it and then follow the fax with a telephone call to confirm arrival. An attendance note of that conversation, identifying the person spoken to, should be ample proof of delivery if the point arises subsequently.

1.49 E-mail is a fast and efficient method of communicating with the other party or the tribunal, and is perfectly acceptable. If a plain text e-mail does not seem to give the right degree of formality, a letter can be attached as a separate document. The main danger of using e-mail for this purpose is that the speed of e-mail exchanges can escalate a difference of views into a quarrel very quickly, and e-mails leave a permanent record that may later be shown to the tribunal. E-mails need to be drafted with the same care as any other correspondence, and should always be calm and reasonable. It is sensible to get into the habit of removing information about previous drafts, etc from any e-mailed attachment. This can be most simply done by selecting and copying the text and pasting it into a new document before attaching to an e-mail. Sending a witness statement to the respondent with recoverable information about previous drafts could be very damaging.

1.50 All letters to the tribunal (apart from requests for witness orders: see para 5.40) should be copied to the respondent. Many advisers will routinely copy all correspondence with the other side, other than ‘without prejudice’ correspondence, to the tribunal, but this is unnecessary.³⁹ It is preferable to copy correspondence to the tribunal only if it is relevant to something that the tribunal is being asked to do. So, for example, it is not necessary to copy a request for additional information to the tribunal when it is first made; but if the respondent refuses to comply with the request, then it should be copied to the tribunal with the request for an order. If there has been an extended wrangle between the parties over some aspect of case preparation, the tribunal will only need to see the relevant correspondence if and when it is asked to arbitrate on the wrangle, or if one party seeks costs on grounds of the other party’s unreasonable conduct. At that point the whole correspondence can be copied to the tribunal, or collated into a bundle to support a costs application at the hearing.

39 See glossary for ‘without prejudice.’

- 1.51 Thought should be given at all stages to the convenience of both the other party and the tribunal. A history of conspicuously considerate letters will be one of the best defences against a costs order if there is an application for costs at any stage. So, for example, if the claimant is unable to meet a deadline that has been set by the tribunal or agreed between the parties, the tribunal and/or the other side should be informed of the difficulty as soon as the claimant is aware of it, and a realistic revised timetable should be proposed. If the claimant seeks to amend his or her claim, then it is likely that the respondent will need time to amend their response to deal with the new points: the letter requesting permission to amend should recognise this and propose suitable arrangements.
- 1.52 It is conventional to address letters sent to the tribunal to ‘the Regional Secretary’, with a request, where appropriate, to refer the letter or the application to a chairman for his or her attention. The regional secretaries are the administrative heads of the employment tribunals; the regional chairmen are the judicial heads. Similarly, correspondence with the Employment Appeal Tribunal is addressed to the Registrar, who is the administrative head of the EAT. At the time of writing the Registrar at the EAT and many, possibly the majority, of the regional secretaries are women. The examples in this book use the salutation ‘Dear Madam’ throughout.
- 1.53 Letters are drafted in the first person in this book because this gives the writer personal responsibility for the content. ‘We’ is too often an excuse for pomposity. The form of address ‘Dear Sirs’ is still in common use but can cause irritation, so letters are either addressed to the individual with conduct of the case (‘Dear Mr Bean’, ‘Dear Ms Marrow’, ‘Dear Madam’) or else solicitors’ firms and other organisations are addressed by name – as for example ‘Dear Carrot & Marrow’, ‘Dear NaffTat plc’, ‘Dear Camden Council’.
- 1.54 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.⁴⁰
- 1.55 These headings are not compulsory and are far from universal in employment tribunal litigation; it is largely a matter of personal taste whether or not to use them. They may, marginally, help to convey a sense of competence and professionalism to the tribunal and the other party.

40 See for example P3.11.1 on page 65 below.

Telephone calls

- 1.56 The choice between writing a letter and making a telephone call to the tribunal or the respondent will often be obvious. Self-evidently 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, then equally clearly the only sensible thing is to pick up the telephone to them straight away and ask them to re-send it.
- 1.57 Between these extremes there will be many communications for which either a letter or a telephone call will do. To a large extent the choice will be a matter of personal preference, although those who are not used to conducting litigation probably tend to make their task harder than necessary by dealing with almost everything by letter. For this reason it is worth suggesting that as a rule claimants should keep letters to a reasonable minimum and use the telephone instead where possible.⁴¹ This will save time and energy, and will also tend to encourage practical co-operation between the parties.
- 1.58 It is also worth remembering that both tribunal staff and lawyers acting for the respondent can be a valuable source of background information about how things are usually done or what the tribunal's expectations will be, and this kind of information is much easier to tap into in a fairly informal telephone conversation than in an exchange of letters.⁴²

File and diary management

- 1.59 Running an employment tribunal case requires habits that are second nature to solicitors, and to many others whose normal work requires them to handle correspondence files over months or years. For others they will be unfamiliar and will need to be learned.

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

42 Note too that the forces that encourage professional representatives to write quarrelsome letters – see note 37 above – do not operate in the same way when they speak on the telephone. This explains the solicitor who writes consistently abrasive letters but is charming and co-operative on the telephone: it is not a fiendish plot to disorientate the claimant, just a consequence of the fact that he sends his client copies of his letters but not tapes of his telephone calls.

- 1.60 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. Probably a wallet file is the most convenient. Copies of all documents sent out should be filed, and all documents received should be filed. Handwritten originals should be retained on the file even if subsequently typed up. A brief attendance note should be made promptly of any telephone conversation or meeting. The question ‘was that phone call worth recording?’ does not arise. If the conversation was short and seemingly trivial, the time taken to decide whether or not there could be any circumstances in the future in which it might be important to have a record of it will be greater than the time taken to record it. If it was of any length, it is bound to need a record. In case of a subsequent application for a costs or preparation time order, it is also sensible to record the time spent.⁴³

PI.60 Attendance note

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

Client: Davis

Date: 28 September 2007

T/C⁴⁴ to client to discuss schedule of loss. The figure of £500 p/w is gross, but without overtime pay. She will look out payslips for last 6 months of employment and send them. Will also send all payslips for temp work since dismissal.

Explained need for evidence of mitigation.⁴⁵ Client will collect all rejection letters and copy applications that she has retained so far into a file, and will start to keep notes of any inquiries and copies of all applications.

10 minutes

- 1.61 Papers should be subdivided into logical categories. The following categories are suggested: (i) correspondence and attendance notes, held together with a treasury tag, 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;

43 See ETP 3 Chapter 3.

44 Telephone call.

45 See glossary and para 10.29.

and (iv) statements. These sub-files can be enclosed in a folded sheet of paper to keep them separate from each other, or separated in a ring binder or lever arch file with tabbed divider cards. A running list of the telephone and fax numbers of all the people who may need to be contacted in connection with the case on the outside cover of the file is a useful time-saving device. It is also a good idea to keep a prominent note of key dates somewhere on the file cover.

Time recording

1.62 Because (since October 2004) the tribunals have power in certain circumstances to make ‘preparation time orders’ to compensate parties for the time they have spent preparing the case, it is prudent for claimants and their advisers.⁴⁶ to get into the habit of keeping a running record of the time they spend on the case. Preparation time can mount up to a surprising extent: it is much easier to demonstrate this convincingly by showing the Tribunal a record of this kind than by looking back at the work done weeks or months after the event and trying to estimate long after the event how long it would have taken. Claimants who are representing themselves should remember to record time that a lawyer might not have to spend – such as time travelling to a library or to a local print shop to fax a document. A note of any expenses, and itemised telephone bills, should also be kept.

1.63 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.

46 Including advisers acting for free: there is a standard hourly rate of £27 at the time of writing (see note 10 on page 322) that does not depend on showing that any charge has been made.

PI.63 Time sheet

Date	Activity	Time spent	expenses
4/10/07	t/c to EOC helpline	20 mins	
4/10/07	Trip to library for research (incl travel)	4 hours	£1.40 fare £5.20 copying
5/10/07	t/c to EOC helpline	5 mins	
5/10/07	Drafting grievance letter	1 hour	
24/10/07	Considering E's response	20 mins	
8/11/07	Trip to library for research	3½ hours	£1.40 fare £2.00 copying
9/11/07	Drafting ET1	3 hours	
9/11/07	t/c to EOC helpline	20 mins	
9/11/07	Redrafting ET1 in light of advice	1½ hours	
9/11/07	Trip to print shop to fax ET1	40 mins	£2 fare £1.20 fax
13/11/07	Drafting questionnaire	2 hours	
13/11/07	T/c to ACAS	5 mins	
13/11/07	Reading letter from E's solicitor	20 mins	
13/11/07	t/c to CAB	5 mins	
14/11/07	Drafting letter to E's solicitor	30 mins	

Key dates and time limits

- 1.64 It is particularly important to establish a rigid habit of noting key dates in such a way that it is impossible to forget them. There are many ways of setting up automatic reminders, though an old-fashioned diary will still be the most effective for many people. Whatever method is chosen, there is a pit-fall to be avoided at each end of the process. The

first is to forget to make the initial entry. An adviser who is busy when first consulted by a new client may be tempted to postpone the task of calculating and noting key dates until a calmer moment. This is always a mistake: a calm moment may not present itself for some time, and by the time it does the task may have been forgotten. An adviser who does not have time to calculate and record key dates at once does not have time to take on a new case.

1.65 The second pit-fall is to set up the reminder, but then to fail to register it when it falls due. There is no point noting key dates in a diary that is rarely opened, or setting up a reminder on an e-mail account that is not accessed every day. It is far better to link reminders to existing habits than to try to establish completely new habits: someone who already checks an e-mail account daily will do better to set up an automatic reminder on their e-mail package than to resolve to buy a desk diary and look in it every day. Someone who already has and constantly uses a desk diary will be better served by an entry in that.

1.66 It is beyond the scope of this book to discuss time limits in detail, but two calculations need to be second nature to employment advisers.⁴⁷ 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).⁴⁸ Discrimination complaints can present difficulties as there will often be allegations of a number of discriminatory acts on different dates. Sometimes it will be possible to argue that these all form part of the same continuing act, but this argument can be complicated. The safest course is to treat the normal time limit as expiring 3 months after the earliest of the acts complained of. Often this will be impossible because the client will have put up with mistreatment for weeks, months or sometimes even years before seeking advice; in that case the claim should be presented as soon as it can be drafted, subject to compliance with the dispute resolution procedures.⁴⁹

1.67 The second crucial calculation is the last day for presentation of an appeal to the Employment Appeal Tribunal, which is 42 days from the date when the employment tribunal's judgment or order is sent to

47 For a detailed discussion of time limits, see ELAH 7, paras 20.27–20.35, 22.47, 21.13–21.35.

48 For details, see ETP 3, Chapter 3.

49 See chapter 2 below.

the parties. This means that if the judgment is sent to the parties on Thursday 12 April 2007, then the notice of appeal together with forms ET1 and ET3 and a copy of the judgment appealed must be received by the Employment Appeal Tribunal before 4pm on Thursday 24 May 2007.

- 1.68 In either case, it is essential – especially if the deadline is close – to make sure that the document has arrived, and was complete on arrival. This last cannot be over-emphasised: there is no method of delivery that is 100% fool-proof, and a missed deadline for presenting a claim or an appeal is the kind of error most likely to get an adviser sued for negligence.⁵⁰ If a claim or appeal in the last few days is unavoidable, the best course is to fax the document, print and retain a transmission confirmation on the file, telephone the tribunal to check that each page has arrived and is complete, and to make and retain on the file a note of this conversation and the name of the individual spoken to. This is in fact good practice even where the expiry of a time limit is not imminent: if a new claim is posted four weeks before the deadline but lost in the post, the deadline may have passed by the time the claimant or adviser wonders why no acknowledgement has yet been received from the tribunal. A document lost in the post will not usually provide a sufficient excuse for a late claim or appeal, so advisers should either make a diary note to chase if no acknowledgement is received within a reasonable time (but still within the limitation period); or else – which is probably easier – simply fax the document and double-check safe arrival at once.

Adjustment of time limits for the purposes of the dispute resolution procedures

- 1.69 With effect from 1 October 2004, the whole subject of time limits in the employment tribunals became immensely more complicated. Detailed consideration of the relevant provisions is beyond the scope of this book, but a practical guide to tribunal litigation would fail its users if it did not lay down a clear warning that the rules about presentation of claims are now extremely treacherous for claimants and their advisers.

50 Not even hand-delivery: for a cautionary tale see *Gdynia American Shipping Lines v Chelminski* [2004] IRLR 725, CA. See also *J R Beasley v National Grid* UKEAT/0626/06 in which a claim delivered 88 seconds late was held to be out of time.

Note first, however, that the dispute resolution procedures were almost universally condemned by employment lawyers, including employment tribunals and the Employment Appeal Tribunal, and are at the time of writing the subject of proposals for very substantial amendment.⁵¹

Outline of the effect on time limits

1.70 For a fuller account of the regime implemented by the Employment Act (EA) 2002 and the Employment Act 2002 (Dispute Resolution) Regulations (EA(DR)R) 2004 see ETP 3 paras 3.3–3.15. In very broad outline, this legislation does three things:

- It requires employers to go through a statutory procedure (a dismissal and disciplinary procedure (DDP)) before dismissing or disciplining any employee, and provides that a dismissal in the absence of those procedures is unfair.
- It requires employees to raise an internal grievance through a statutory grievance procedure (GP) and then wait 28 days before making a complaint to the tribunal about anything⁵² other than a dismissal.
- It provides for adjustments up or down of awards to claimants in cases where DDP or GP (as the case may be) has not been completed: the award will be adjusted upwards if it is the employer's fault that the procedure was not completed, down if it was the employee's fault.

1.71 These provisions have the effect that employees cannot always present their claims immediately when they arise, and for that reason the time limits for presentation of claims is sometimes but not always extended by three months.

1.72 The rules governing these extensions of time are at EA(DR)R 2004 reg 15. Again a broad outline of the effect of them is necessary here. For complaints about grievances, the extension of time is gained by doing one of two things:

- raising a grievance; or
- presenting a claim to the tribunal that is premature either because no grievance has been raised, or because 28 days have not yet passed since the grievance was raised.

51 See the review, 'Better Dispute Resolution' by Michael Gibbons, published DTI March 2007, available on the DTI website: www.dti.gov.uk. For further developments, see the blog that supports and updates this book, www.etclaims.co.uk

52 Almost anything: see ELAH 7, para 22.55.

- 1.73 For complaints about dismissal, the additional three months is available in one situation only:
- if at the time the normal time limit for the complaint expired the claimant had reasonable grounds for believing that there was an ongoing disciplinary or dismissal procedure.
- 1.74 Note that it is not the case that a claimant must always wait for the outcome of an internal appeal against dismissal or against the outcome of his or her grievance before presenting a claim to the tribunal. Note too that time will not always be extended to six months.

Multiple claims

- 1.75 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.
- 1.76 The dispute resolution regime means that careful thought has to be given to what the relevant limitation period is for each claim separately. Sometimes the periods will coincide or overlap, but that is not to be assumed. Note in particular the danger of missing the deadline for a complaint against an individual respondent in respect of acts for which the employer is also liable.

Example

Tanya Waters is employed as a semi-skilled machinist in a factory. All the other machinists in her department are men. Her male colleagues are often offered overtime work at busy times. She is only rarely offered overtime. On 5 October 2007 the factory receives a large order with a tight deadline and several of her colleagues are given two hours overtime a night that day and for the whole of the following week, ending 12 October. On 12 October, Tanya complains to her department supervisor about this and says that she thinks she is being left out because she is a woman. The supervisor, Mo, tells her she is a nuisance and always moaning about something, and tells her to get a life.

On 25 October Tanya is handed a letter inviting her to a disciplinary meeting on 27 October to discuss her persistent lateness. She went through a bad patch for time-keeping a few months earlier because of child-care difficulties and was given a written warning, but her time-keeping had been mostly good for the last couple of months: she has only been late on two or three occasions since the beginning of August, and nothing was said at the time. At the end of the meeting on 27 October she is dismissed with immediate effect, but with pay in lieu of notice. She appeals the dismissal on Monday 30 October. The appeal is heard on 5 November and dismissed.

Towards the end of November Tanya gets an appointment with her local CAB. She is advised that she has potential claims of sex discrimination in the allocation of overtime, and also of unfair dismissal and sex discrimination by way of victimisation in relation to the dismissal. She is told that she can bring complaints against her employer, and against Mo. She is advised to raise a grievance about the overtime complaint, but because of money worries arising from the loss of her job she does not get around to it until 4 January 2008.

Tanya was dismissed on 27 October 2007, so the normal period for presentation of her unfair dismissal complaint and her complaint that her dismissal was discriminatory ends on 26 January 2008. The last unfair allocation of overtime ended on 12 October 2007, so the normal period for presenting that complaint ends on 11 January 2008. Because she raised a grievance about the overtime allocation on 4 January 2008 – inside the normal period for presentation of the claim – she has the benefit of a three month extension, so her sex discrimination claim in relation to that must now be presented to the tribunal by 11 April 2008.⁵³ That claim cannot be presented until 1 February 2008, because she must wait 28 days after raising her grievance. For her unfair dismissal claim and her complaint that the dismissal was an act of victimisation, on the other hand, she does

53 Or, according to the EAT in *Bisset v (1) Martino and (2) Castlehill Housing Association* UKEAT/0023/06, 12 April 2008. The authors respectfully doubt that *Bisset* was correctly decided, it remains safer to assume that the last date for presenting a claim subject to a three month normal limitation period and three month extension is six months less one day from the act complained of.

not get a three month extension on the normal time limit. This is because her appeal was concluded back in November: she does not have reasonable grounds to believe that there is an ongoing DDP. For her complaint about overtime against Mo, no grievance is required, and so there is no opportunity to earn a three month extension. This complaint must therefore be brought within three months of 12 October 2007, that is on or before 11 January 2008.

This means that Tanya has separate, non-overlapping windows of opportunity in which to present her claims. She must present her discrimination claim against Mo on or before 11 January 2008. She must present her unfair dismissal and victimisation claims on or before 26 January 2008. She must present her sex discrimination claim against the employer on or before 11 April 2008, but she may not present it until 1 February.

The tribunal's duty to reject incomplete claims

1.77 The 2004 procedure rules insist that certain 'required information' must be included on all claims, and that claims must be presented on the prescribed form. Because the tribunals have a duty to reject claims that do not comply with these requirements, this is a further source of potential difficulty in presenting a valid claim within the relevant time limit. There is no automatic extension of time in a case where a claim is presented within the applicable time limit but rejected, although in some cases tribunals may be amenable to the argument either that it was not reasonably practicable to present the claim in time or that an extension should be granted on just and equitable grounds.⁵⁴

1.78 The Employment Tribunal Service has adopted an extremely strict policy in relation to the prescribed form, rejecting claims unless they are made on the online or pdf forms (both available from the employment tribunal service website); or on the official paper form, available from Job Centres, CABx or on request to the employment tribunals' public inquiry line, 08457 959775. Claims presented on a re-typed or scanned version of the form, or on a copy taken from a reprint of the official form in a textbook, have been rejected. A number of cases

54 Depending which test applies: see ETP 3 paras 3.28–3.29.

illustrate both the strictness of the rules and the willingness of the EAT to mitigate their effects. In *Builins Skyline Ltd v Beynon*,⁵⁵ the EAT overturned the rejection of a claim where the faxing process had reduced the form in size, usefully confirming at the same time that a rejection is subject to both review and appeal; see also *Grant v In 2 Focus*.⁵⁶ In *Cummings v Scholarest* UKEAT/0625/06, rejection of a claim for failing to identify the claimant where her name had been misspelled on the form was overturned by the EAT.

- 1.79 If an employee presents a complaint near the end of the limitation period, and the tribunal rejects it as incomplete, or because it is not presented on the prescribed form, the employee may by the time she knows her claim has been rejected either be too late to correct her claim and resubmit it, or have a very limited time indeed in which to do so. For this reason it is important to present the claim as soon as possible in order to have time to correct and present again in the event of rejection.

Whether to present the claim or wait for the outcome of the statutory procedure

- 1.80 Complaints about grievances may not be presented until 28 days have elapsed since the grievance was raised, but it is important to be aware that aside from that there is no requirement for employees to wait a reasonable period, or any period, for their employers to complete statutory procedures before presenting a tribunal claim. The Employment Act (EA) 2002 s31 provides for the reduction of awards where non-completion of the statutory procedure is attributable to a failure by the employee either to comply with a requirement of the procedure, or to exercise a right of appeal, but those are the only two circumstances in which the employee will be blamed for non-completion of the process. It follows that there should be no penalty for presenting an appeal (against dismissal, or against an unsatisfactory outcome to a grievance) and immediately presenting a claim.
- 1.81 The risk of having the claim rejected as incomplete on the first attempt means that the safest course is:

55 [2007] ICR 121.

56 [2007] UKEAT 0310/06.

- to present a complaint about dismissal as soon as possible after the effective date of termination;⁵⁷
- to present a complaint about a grievance as soon as possible once 28 days have elapsed after the presentation of the initial grievance.

1.82 Employees who are very confident that they know when the relevant limitation period expires and can present a valid claim on the first attempt might sometimes get a tactical advantage by waiting for a period after presenting an internal appeal before presenting the claim. The reason for this is that giving the employer the opportunity to deal with the appeal before presenting the claim also gives the employer the opportunity to fail to deal with the appeal within a reasonable time, and that can give rise to an enhanced award of compensation.

1.83 If the employee presents a claim a day or two after appealing, the employee will not suffer a reduction of his award by reason of the non-completion of the procedure because EA 2002 s31(2)(c) gives only two situations in which non-completion of the procedure will be treated as the employee's fault and this is not one of them.⁵⁸ However, if non-completion of the statutory procedure is attributable to the employer's failure to deal with an appeal within a reasonable time, then any award made to the employee should be adjusted upwards.

1.84 It follows that in some cases a tactical pause (probably for 28 days or so, time limits permitting) after appealing the employer's internal decision and before presenting a claim to the tribunal may result in an enhanced award for the claimant. However, this tactic should be used, if at all, with great caution: the most important thing is to ensure the claim is presented in time.

57 See glossary.

58 The two situations are where the employee has failed to comply with a requirement of the procedure, or where he or she has failed to exercise a right of appeal.