

Disability Law Service

advice and legal representation for disabled people

A Claimant's Guide to Discrimination/DDA Claims:

Representing Yourself at the Tribunal

Introduction

The following factsheet has been written with the aim of providing assistance to those who are either contemplating or are in the early stages of bringing a claim and will be representing themselves in the employment tribunal.

This factsheet cannot cover every fine detail that a claimant will encounter during the course of their claim. However, this factsheet is intended to be used as a practical guide that outlines the general procedures and processes.

For many people, the thought of running and presenting their own case in an employment tribunal will be a daunting thought. A key aspect to running your case effectively amounts to gaining confidence and becoming familiar with the tribunal process so that you know what to do and when. Once you know what is expected of you, you can then begin work on your case.

The Tribunal Process

1. Filling out the ET1 claim form
2. 28 days for the respondent in the case to file a defence on an ET3 form
3. Pre-Hearing Review
4. Case Management Discussion
5. Compliance with Employment Tribunal Orders and Directions (Disclosure of evidence)
6. Preparing for the Hearing
7. The Hearing
8. Post -Hearing

Step 1 – ET1 (The Claim Form)

You should set out the basis of your claim on a form called an ET1 and submit it to the relevant regional Employment Tribunal office. ET1 forms can be downloaded directly from:

www.employmenttribunals.gov.uk/Documents/FormsGuidance/newforms/ET1

Alternatively, ET1 Forms are available from an employment tribunal office, Acas, Citizens Advice Bureaux and Job Centres. Details about where to send the ET1 can be found at:

www.employmenttribunals.gov.uk/FormsGuidance/whereToSendYourClaim

Claim forms must be completed and submitted within the relevant time limits (normally 3 months but this may vary). For advice about the time limit of your claim you can contact the employment tribunal helpline on: **08457 959 775**.

For late claims attach a separate application for extension of time (proposing grounds/reasons to extend time). Once you have sent an ET1 to the tribunal office the tribunal will:

- send you an acknowledgement with the details of the case;
- state whether or not the tribunal has accepted the claim; **and**
- send the respondent(s) (your employer) a copy of the ET1.

Step 2 – ET3 (The Defence)

The respondent (s) (the person/company whom the case is being brought against) must file a defence to the tribunal within 28 days from the date upon which the respondent was sent a copy of the claim. Respondents will normally submit their

defence upon a form called an ET3. If you do not receive a copy of the ET3 defence you should contact the employment tribunal office to determine whether they have received an ET3 from the respondent(s). If the tribunal office has not received an ET3 you can request default judgement of your claim.

Step 3 – Pre-Hearing Review

If there is any doubt as to whether you are eligible to bring a claim you may be required to attend a Pre-Hearing Review (PHR). A party can request a PHR or the tribunal may set PHR on its own initiative. A PHR will normally be heard by one employment judge. The purpose of a PHR is to:

- Decide whether a claim or defence should be struck out;
- Assess the likely success of a claim or defence;
- Decide whether a deposit should be paid before allowing a party to proceed.

In the event the tribunal considers a claim or defence to have no reasonable prospect of success it may order a party to pay a deposit of up to £500 as a condition of proceeding with the claim or defence. This is done in an attempt to prevent hopeless litigation.

Step 4 – Case Management Discussion

The purpose of a Case Management Discussion (CMD) is to direct how the case should proceed. You should normally receive a letter that will outline the matters to be addressed at the CMD but a CMD will normally decide the main issues to be decided in the case, the length and time of main hearing and what documentation and additional information should be sought and when exchange (disclosure) of this information should occur. A CMD can be heard in person or over the telephone.

Step 5 – Compliance with Employment Tribunal Orders and Directions

Disclosure (Obtaining Evidence)

Once you have the respondent's ET3 defence which sets out the basis for their case/defence, you can start to analyse the case as a whole. You need to consider what documentation and/or other items will help you to prove your case. Once you have decided on what information you require you can request additional information from the respondent. You can set out specific questions for which you require written answers as well as the disclosure of specific documentation. Equally, the respondents may request further information and documentation from you. Normally, exchange of information between the parties should occur on the same day (this will normally be decided during the CMD).

However, if the requested information is not forthcoming after the agreed date of disclosure you should write to the tribunal and request an order that the information is disclosed by the respondent. If this situation occurs, you should also send a copy of this letter to the respondent.

Step 6 – Preparing for the Hearing

The most important aspect to running your case effectively is thorough preparation. It is important that you undertake some legal research with regard to relevant legislation and case law and it is vital that you have a thorough understanding of the issues and facts of your case so that you can assist the tribunal in understanding your claim.

Items that you will need to complete during the course of preparation for your case will include:

- Schedule of loss;
- Witness statements;

- Agreed bundle of documents;
- Maybe helpful to produce a list of the legal issues and a chronology of events (these are not essential but will help assist you to fully understand your case and may assist the tribunal); **and**
- Websites where you can obtain statutes (see useful contacts/websites).

Assessing the Merits of your Case

Objectivity

It is important to remember to assess your claim at the outset and thereafter as an employment tribunal will. This means maintaining an objective stance when assessing the legal and factual issues of the case. It may be difficult to remain objective as you are obviously very personally involved in the case. However, you should try to remember that the tribunal is **only** interested in establishing the facts of a case so that they can determine and apply the law. It is therefore essential that you are realistic about the strength of your claim.

For example:

Identify the facts of the case + identify the relevant evidence (to prove the facts) + application of the 'relevant law' = to determine the likely outcome

It may be helpful to keep the following points in mind when assessing your claim.

- Assessment of merits **must** always be realistic, accepting the state of the law as it is and accepting the evidence as it is. The prospects of obtaining additional evidence **must** also be realistic.
- In addition to assessing merits of the case the credibility and competence of witnesses must also be assessed. Credible and competent witnesses will add

strength to evidence they give making your case more credible and persuasive.

Checklist (Facts)

When compiling all the relevant facts of your case it may be helpful to:

- Identify evidence of disability (for DDA cases)
- Identify less favourable treatment/detriment/failure to make reasonable adjustments (i.e. discriminating acts) and connection to disability/race/gender etc
- Identify timing of discriminating acts
- Identify grievance(s), if any, lodged against discriminating acts or any other notice to employer
- Identify evidence of (or witnesses to) discriminating acts, evidence of employer's reaction to grievance(s) and/or notice of discriminating acts and evidence of any 'acceptance' by employee of discriminating acts.

Checklist (Law)

It is essential that you are familiar with and understand the law as it relates to your case. You should undertake some research to find the appropriate statute(s) and provision(s) as well as any relevant case law.

There are a number of websites from which you can access legislation (See useful contacts and websites at the end of this document). It may also be helpful to obtain an employment law textbook, so that you can become more familiar with the statutes and cases that are pertinent to this area of law.

While carrying out preparation for your case it is essential that you:

- Identify and understand precise statutory and/or case law relevant to discrimination being alleged.
- Identify strategy to be used to apply statutory and/or case law to relevant facts.
- Identify at least one alternative strategy to be used to apply statutory and/or case law to relevant facts.

Pleadings/Submissions of Claim

Checklist (ET1 Claim form)

A claim in the employment tribunal is initiated when the Claimant (the person bringing the claim) fills out and submits an ET1 form to the relevant regional employment tribunal office. There are strict time limits set as to when you can bring a claim. In most cases, the time limit for bringing a claim is three months from the cause of action. The time limit for bringing a claim for unfair dismissal or for discrimination is three months from the effective date of termination (the day you were dismissed) or three months from the last act of discrimination.

It is important to be as accurate as possible and to supply all the relevant information to help the tribunal and respondent understand your claim.

When completing the ET1 you should keep the following in mind:

- Ensure ET1 Claim form is submitted within the relevant time limits (normally three months). For late claims attach a separate application for extension of time (proposing the grounds/reasons to extend time).

- Ensure questionnaire is submitted within either three months of discrimination or 21 days of ET1 submission.
- It is very important that you ensure that all relevant sections of ET1 form are completed accurately.
- Ensure that all of the required fields of information have been completed. You must provide information in sections marked with the symbol * and, if it is relevant, you must provide information in sections marked with the symbol •.
- Attach a statement of claim/pleadings, within a separate document, to ET1 form.

Late Claims (Discrimination Cases)

In some circumstances you will still be able to submit your claim outside of the normal prescribed time limits. You should check the relevant provisions below to determine whether an extension of time is possible in your case.

- Permitted under section 68 Race Relations Act 1976; section 76 Sex Discrimination Act 1975; Schedule 3 Disability Discrimination Act 1995; regulation 34 Sexual Orientation Regulations 2003; regulation 34 Religious Beliefs Regulations 2003 and regulation 42 Age Discrimination Regulations 2006
- Permitted only where ET finds it is just and equitable to extend time. ET will consider length and reason for delay; any prejudice caused by delay; employee's action in obtaining timely legal advice; quality of advice
- **Chohan v Derby Law Centre [2004] IRLR 685** – Where a claim is late due to poor legal advice a claimant should not be punished via refusal of claim

Statement of Claim Layout

Statements of case refer to the claim and defence (these are sometimes also called pleadings). As we are only dealing with the claimant's side of matters we will only address the statement of claim.

There is no one right way to complete a statement of claim but as a general guide the following should be included:

- General history – brief but informative details on history of disability (for DDA claims), history of employment, history of claimant's work, introduction to other key individuals.
- Facts of the case – details of facts relevant to allegations of discrimination/ unfair discrimination etc.
- Resolution efforts – details of the effort(s) made by claimant to resolve disputes and/or discriminating acts
- Claims – confirm the specific claims of discrimination being alleged

Case Management

Pre-Hearing Review (PHR)

As set out above, an employment tribunal may set a PHR where it has preliminary considerations over the claim and believes either it may have no jurisdiction to hear the claim and/or it believes the claim has no reasonable prospect of success. A PHR can result from either the employment tribunal's considerations or from an application made by the respondent.

Things to remember about PHRs:

- It is an extremely important hearing, as failure means termination of claim (or part of claim). Examples of jurisdiction issues: late or no grievance; wrong respondent; late claim; wrong litigation venue.
- PHRs equate to a preliminary assessment of merits by the employment tribunal. This can result in suspicion that the claim has no reasonable prospect of success – hence the importance to properly assess merits at the outset. Respond with references to prospective merit and evidence. If a claim is judged to have no reasonable prospect of success the tribunal can order that a deposit of up to £500 is paid into court if the claimant wishes to proceed with the claim.

Case Management Discussion (CMD)

A CMD is essentially a housekeeping hearing designed to ensure effective management of the claim up to full merits hearing.

- An employment tribunal may consider matters such as claim issues, claim value, disclosure of documents/evidence, instruction of medical expert (DDA cases) witnesses and witness statements, length and date(s) of hearing.
- A CMD could be conducted over telephone (if issues are drafted and agreed beforehand) or in person (if issues remain disputed or without agreement).

Preparation for Case Management Discussion (CMD)

As mentioned above the purpose of a CMD is to direct the parties as to how to proceed with the case.

The following should be undertaken in preparation of a CMD:

- A draft Schedule of Issues identifying – specific detriment(s) alleged; specific references to contravention of anti-discrimination statute; specific references to comparators; resolution/grievance efforts.
- Draft Schedule of Loss identifying – injury to feelings (**Vento v Chief Constable of West Yorkshire 2002 EWCA Civ 1871**); injury to health (**Sheriff v Klyne Tugs 1999 IRLR 481**); economic losses.
- Prepare knowledge of number of witnesses, potential length of hearing and future dates to avoid. Also prepare any applications for disclosure and/or witness orders.

Evidence

In order to prove the facts of your case you will need evidence. It is important that you gather as much evidence as possible to prove your case.

When collating evidence the following should be considered:

- Either documents or audio/video recordings.
- The evidence must address issues in dispute and compliment agreed issues.
- Assess your own evidence (within agreed strategy) and pursue prospective evidence at outset of case.
- Disclosure Orders apply to existing evidence only. Ensure, at the very least, evidence of disability (if disputed in DDA cases) and evidence of the detriment(s) alleged exist.
- When all documents are exchanged critically assess all the evidence 'as a whole' to avoid surprises.

Witnesses

- Critically assess claimant's and witnesses' characters as witnesses
- Ensure the claimant and the witness(es) agree 100% with the contents of their witness statements. Ensure that the claimant's witness statement addresses mitigation.
- **Do not coach witnesses** witnesses but do prepare them for psychology relevant to cross-examination.
- Safest and most productive principle for witnesses: be truthful and answer questions and no more.

The Hearing

The Hearing Sequence

- Introductions by the tribunal and representatives, confirmation of claim(s) to be heard and resolution of any outstanding case management issues.
- In discrimination cases the claimant has the immediate burden of proof before it may pass to the respondent (**Igen v Wong [2005] EWCA 142**). So generally the claimant and his or her witnesses will give evidence first.
- Sequence of evidence: evidence in chief (i.e. reading out the witness statement); examination-in-chief; cross-examination; re-examination and the tribunal's questions.
- Fundamental Rule: **Ensure you listen to everything that is said and remain adaptable throughout the hearing.**

Hearing Tactics during Case Presentation

- 'Homework' prior to hearing – read every page of the hearing bundle and all witness statements; prepare cross-examination questions accordingly; general advice – anticipate cross-examination questions and anticipate attention on your displays of disability (DDA cases) and character.
- Object to attempts to badger you and your witnesses – a witness is required only to answer a question, **not** to give the answer desired by the cross-examiner.
- Ensure you re-use re-examination to help you and your witnesses recover confidence and to repair any damage done during cross-examination.

Hearing Tactics during Cross-examination

- Always begin cross-examination with questions from the bundle and **not** from witness statements.
- Be adaptable with questioning as cross examination progresses and take notes of answers given (for references purposes).
- Stress every point conceded during cross examination and challenge every point disputed.
- Cross reference questions with other witnesses' statements (especially from other respondent witnesses).
- Draw attention to any helpful displays of witnesses' character and take time to exhaust all lines of questioning before concluding.

Closing submissions

- Pre-draft closing submissions in skeleton form, leaving gaps/room for adaptations.
- Adapt closing submissions during breaks and whenever else possible in order to update contents with points/issues/concessions/statements made during the course of the hearing.
- Be bold and affirmative in closing submissions as you are permitted to, however also be realistic as to what has or has not been proven during the hearing, as Judges often question representatives over aspects of their closing submissions.

Delivery of Judgement

- Judgement either delivered at the end of the hearing or 'Reserved' to be delivered in writing (along with 'Reasons') at a later date.
- If delivered at the end of the hearing, write down judgement and reasons as Judge reads them out – very good for records.
- If the case is lost, make a verbal application for 'Written Reasons' as they are not given unless requested and they are required for an Employment Appeal Tribunal.

Costs

- Not an automatic consideration for Employment Tribunals as it is for Courts; only in exceptional cases – **Lodwick v London Borough of Southwark [2004] IRLR 554**.
- Only applicable in certain circumstances – i.e. unreasonable conduct within proceedings by a party or their representatives; unreasonable postponement of a hearing; misconceived, vexatious and/or malicious claim or defence.
- Party pursuing costs should provide a schedule of costs which, in itself, can be challenged and scrutinised during the hearing.
- Beware of early and unfounded threats of costs used by the respondents as a form of intimidation and consider complaining to the tribunal if this occurs.

Reviews

Within 14 days of the Judgement Date (i.e. – the date stamped or written on the last page of the written Judgement/Reasons) the losing party has the right to submit an application to the same tribunal Judge for review of the judgement. Other than where new evidence exists or development of law has occurred Reviews have been notoriously unsuccessful.

- Grounds for requesting reviews are as follows: wrong decision due to administrative error; decision in justifiable absence of a party; availability of 'new' evidence; absence of notice of hearing; in the interests of justice (e.g. a development of law since the judgement was handed down).

Appeals

Appeals must be brought within 42 days of Judgement Date (i.e. date stamped or written on the last page of written Judgement/Reasons). The losing party has the right to submit an appeal application to the Employment Appeal Tribunal (either London or Edinburgh).

- Grounds for appeal – ‘bias’; ‘error of law’; ‘perversity’.
- When drafting the notice of appeal you **must** aim primarily to attack the Employment Tribunal’s ‘Reasons’ and little else – for appeals referring to ‘bias’ also attack the Tribunal’s conduct of proceedings .

Jargon Buster

ACAS – stands for the Advisory Conciliation and Arbitration Service. This statutory body provides advice to both employees and employers on employment matters. It produces Codes of Guidance and is responsible for preventing, resolving and negotiating settlements in employment cases.

Authorities – decided cases that a party uses to support its own arguments.

Bundle – A file of all the papers relating to the case. In most cases you and respondent will have an agreed bundle meaning you agree to include the same documents in the same order. In addition to your and respondent’s own copy the employment tribunal will need to have at least four corresponding copies of the bundle: one for each member of the tribunal (three people), and one for the witnesses. Bundles should be paginated and contain an index.

Burden of Proof – The party which has the responsibility of proving the facts in issue.

Case Management Discussion – A ‘housekeeping’ hearing designed to ensure effective management of the claim. Parties are directed as to how the case should proceed and by when.

Cause of action – the facts that entitle a person to bring a claim.

Claim – the assertion that the claimant is owed a remedy by the respondent

Claimant – the person bringing a claim (you).

Constructive Dismissal – where an employee resigns following a fundamental breach of the employment contract.

Continuous employment – the period of time an employee works for an employer without interruption. Continuous service is an important concept in employment law as in order to qualify for certain employment law rights an employee must usually have a period of one year’s continuous service (there are exceptions to this). Continuous service is also used as a basis for calculating awards made to successful claimants.

Cross-examination – the questioning of a witness not conducted by the party that called him or her, i.e. questioning your opponent’s witness in order to undermine their case. All questions should be leading and open questions should not be asked.

DDA – The Disability Discrimination Act 1995.

Default Judgement – Judgement obtained by one party when the other party fails to carry out a required act, i.e. submit a defence.

Disclosure – the exchange of information between the parties.

Employment Tribunal – A special court of law which only hears and rules on employment disputes between employees, employers and trade unions.

Employment tribunals are less formal than other civil courts and strict rules of

evidence do not apply. Parties are able to represent their own case or chose any person they wish to present their case. Tribunal cases are heard by three people; the Chairman (who will be legally qualified) and two lay members (whom will not have a legal background). Each of the lay members will have an employment background, one employee based while the other employer based.

Employment Appeals Tribunal – The court that hears appeals from decisions made in the employment tribunal.

Effective Date of Termination – the date upon which termination of employment takes place. It is important to establish the effective date of termination as the prescribed time limit to bring a claim often runs from this date.

ET1 – the form on which a claimant set out and initiates a claim his or her claim.

ET3 – the form on which a respondent submits his or her defence.

Evidence-in-Chief – the questioning of a witness by the party that called him or her. As a rule leading questions should not be asked.

Grievance Procedure – refers to any issues raised by an employee with his or her employer. Many employers will have a formal grievance procedure which an employee can comply with in order to resolve work problems.

Issues – the matters in dispute between the parties on which the employment tribunal will decide.

Judgement – the decision given by the employment tribunal on the case or issues within the case.

Leading Question – a question that prompts a particular answer, usually yes or no. Leading questions should only be used during cross-examination. Leading

questions are generally not allowed in examination-in-chief unless relating to undisputed issues.

Legislation – Acts of Parliament and laws made under Acts of Parliament.

Limitation Period – the time in which a claimant can initiate a claim.

Listing – the date on which the hearing date is fixed.

Mitigation – action taken by a claimant to reduce the amount of their losses, i.e. by finding new employment.

Open Questions – questions asked to elicit longer, more detailed answers than closed questions. Open questions should be used during examination-in-chief to allow the party's witness to give their account of events.

Order – a direction given by an employment tribunal that requires compliance by either/or both parties.

Pleadings – statement of each party's case i.e. the claim or defence.

Pre-Hearing Review – a hearing used to determine the prospect of success of a claim or defence or to decide any other preliminary matter the tribunal wishes to consider.

Re-engagement – an order made by an employment tribunal in unfair dismissal cases. Essentially it is a remedy in which the claimant is offered comparable alternative employment by the respondent.

Reinstatement – an order made by an employment tribunal in unfair dismissal cases. Essentially it is a remedy in which the claimant is reinstated in his position of employment prior to the unfair dismissal.

Remedies – what the claim seeks to achieve. A remedy will normally take the form of monetary compensation but in employment cases other possible remedies also include re-engagement or reinstatement. A claimant is not limited to seeking one type of remedy.

Respondent – the person against whom a claim is made.

Review – within 14 days of the judgement date a dissatisfied party may make an application that the tribunal review its decision. After review the tribunal may revoke or vary the decision or leave it to stand. Grounds for requesting a review are as follows: wrong decision due to administrative error; decision in justifiable absence of a party; availability of ‘new’ evidence; absence of notice of hearing; in the interests of justice.

Schedule of Loss – a document drafted by the claimant that sets out amount of loss suffered by the claimant and the overall value of the claim.

Skeleton Argument – an outline of the arguments a party will assert during the course of the hearing.

Statement of Truth – a statement of truth is required at the end of a witness statement. It is a statement that asserts the contents of a document are truthful by the person making it.

Statute – see legislation.

Submissions – the arguments made by a party in support of their case.

Witness Order – where a witness is uncooperative and unwilling to attend a hearing the employment tribunal can make a witness order that makes their attendance at the hearing mandatory.

Witness Statement – a written statement given by a witness that sets out their evidence. Witness statements should include a statement of truth as its concluding paragraph and should be signed by the witness to whom it relates. Witness statements should be exchanged with the opposing party in accordance with case management directions.

Legal Disclaimer

Although great care has been taken in the compilation and preparation of this work to ensure accuracy, DLS cannot accept responsibility for any errors or omissions. All information provided is for education / informative purposes and is not a substitute for professional advice. Any organisations, telephone numbers and links to external web-sites have been carefully selected but are provided without any endorsement of the content of those sites.

For further advice on these matters please contact:

Disability Law Service

Telephone: **020 7791 9800**

Minicom: **020 7791 9801**

Fax: **020 7791 9802**

Email: advice@dls.org.uk

Website: www.dls.org.uk

Or write to us at: 39 – 45 Cavell Street, London E1 2BP

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