# Blackstone's Employment Tribunals Handbook 2014–2015

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# 4 Advocacy: Presenting the Case

## Introduction

**4.01** This chapter deals with the practical points involved in preparing and presenting a case in the employment tribunal. Obviously there are matters relating to procedure, which are dealt with in Chapter 1, and Chapter 5 on Evidence is also of relevance.

**4.02** This chapter is directed primarily at those with limited experience of appearing in employment tribunals. It refers to 'representatives', although many of the points which are made are equally relevant to parties who represent themselves ('litigants in person').

## Case preparation

**4.03** The key to successful advocacy is preparation. If the case is thoroughly prepared, then the representative will gain in confidence, and will be able to present the case more effectively.

**4.04** To begin the process of preparation, the representative needs to consider what their case is. For example, is it that the claimant was unfairly dismissed? Or is it that the employer acted fairly, and is not liable? The next step is to determine what the issues are in the case. This chapter proceeds on the basis that the claim and the response forms have already been served, so that the nature of the case and the issues are likely to be relatively clear. The various chapters in this Handbook which deal with different aspects of the law will assist in ascertaining the issues. Some potential issues will not be in dispute, and there will be no need to prepare evidence or argument in respect of them.

**4.05** Take, for example, an unfair dismissal claim. The potential issues might be:

(1) Was the claim in time?
(2) Is the claimant entitled to bring a claim for unfair dismissal, eg does she have two years' continuous employment?
(3) Was the claimant dismissed?
(4) What was the reason for dismissal?
(5) Was it a potentially fair reason in accordance with the statute?
(6) Did the employer act reasonably or unreasonably in deciding to dismiss?

**4.06** Assume that the employer accepts that the claim was within the three-month period after the effective date of termination, that the claimant had four years' continuous employment, and that she was dismissed after a disciplinary hearing and appeal. Issues (1), (2), and (3) are therefore not in dispute and there is no need for either side to prepare evidence and argument in relation to them. However, each side will have to determine what its case is in relation to (4), (5), and (6).

## The evidence

**4.07** It is up to each party to decide what evidence it needs to bring in order to win the case, and how to present it. Such evidence might, for example, be produced by:

(a) witnesses who have personal knowledge about the relevant facts and events—the parties themselves may be witnesses, and it is usual for the claimant and any dismissing officer in particular to give evidence;
(b) documents such as correspondence between the parties, notes of a disciplinary hearing, copies of the employment contract, pay slips and sickness absence records (to name some random, but common, examples);
(c) a medical report or a report from an expert on health and safety, ie expert evidence.

**4.08** Care must be taken to ensure that the evidence which a party intends to produce is relevant to one or more of the issues which have been identified, in accordance with the preceding section. The aim of any such evidence is to convince the tribunal on that particular issue. (In addition the parties should bear in mind the importance of 'disclosing' any relevant evidence, whether or not it is helpful or unhelpful to their own case.)

**4.09** Once the evidence has been gathered, the representative should prepare by considering the statements of his or her own witnesses. In doing so, it is useful to draw up a chronology of the events which are relevant to the case. **Table 4.1** gives an example of part of a chronology—the completed article will contain more events, but the way in which they are recorded will follow the same pattern. It is important in the course of preparation to note down in the relevant column the references where evidence of the events in question can be found. Such references would usually be to paragraphs in a witness statement, or pages in the trial bundle. In **Table 4.1**, 'C' is the claimant, the trial bundle is 'R1'.

## First draft of closing submissions

**4.10** If the representative has followed the steps set out previously, he or she will now have a list of the issues and a chronology. Many

Table 4.1 **Partial chronology of events**

| Date | Event | References |
|---|---|---|
| 1.10.09 | C starts employment with R | R1/15 |
| 31.1.11 | C promoted to assistant manager | R1/26, C's statement, para 8 |
| 20.4.12 | C given appraisal by Chris Jones | R1/32 |
| 23.8.12 | Conversation between Jones and Smith criticizing C | Jones' statement, para 11<br>Smith's statement, para 9 |
| 29.3.13 | C given warning by Smith | R1/49 |
| 3.2.14 | C sent notice of disciplinary hearing | R1/68 |
| 11.2.14 | Disciplinary hearing | R1/72 to 88, C's statement, para 19, Smith's statement, para 14 |

advocates then go on to prepare a first draft of the closing submissions which they intend to make at the close of the case. If this is done, it can be extremely useful. It will give the representative a clear idea of where they would like to be at the conclusion of evidence. It provides a road-map, assuming that the hearing goes along the lines which the representative realistically hopes that it will. Obviously what is prepared at this stage can only be a first draft, as it is impossible to predict with any certainty just what the evidence will be. Nevertheless it provides useful guidance for the situation in which the representative hopes to be. It will of course need revision (possibly drastic revision) in the course of the hearing. It does, however, fulfil the important additional role of providing a 'security blanket' so that the representative can feel that they already have the basis of a closing speech for the time when they are called on to deliver it.

## On the day

[*This section is particularly directed at those with little experience of appearing in the employment tribunal, including litigants in person.*]

**4.11** On the day of the hearing, the representative should ensure that they have with them all relevant documents. This will include a copy of the trial bundle, the witness statements, and any documents which are not included in the trial bundle but which may prove relevant in the hearing. Directions in relation to the trial bundle and the witness statements are dealt with in more detail in Chapter 1 on Tribunal Procedure, where it will be seen that copies have to be provided for the tribunal and the other side. The tribunal will not usually carry out photocopying, so it is important to ensure that sufficient copies are available.

**4.12** In addition, the representative should take stationery and/or a laptop with them in order to keep a note of what is said during

the hearing. Frequently, there arise points about what has been said in evidence, and notes will be invaluable in order to check that the tribunal and the other side have recorded any point which you regard as important.

**4.13** Most employment tribunals start at 10 am, but it is worth checking to ensure that this is in fact the correct time. Whatever the start time is, it is crucial to arrive early, and arriving one hour before proceedings start will give a proper opportunity to carry out the various tasks which are necessary.

**4.14** A litigant in person would be well advised to ask someone they know and trust to accompany them to the tribunal. Such a person will provide support and advice, even if they have little or no knowledge of the law. They can provide a second opinion for the litigant in person to consider, and assist in taking notes and keeping control of the papers. The tribunal will generally allow this friend or supporter to sit next to the litigant in person, but should be informed at the outset of their identity. It is also usually possible for the party to confer quietly with that friend during the course of the hearing, provided that no disturbance is caused. In any event, notes can be passed when necessary.

**4.15** On arrival at the tribunal, the standard procedure is that parties, representatives, and witnesses sign in at reception. They are then told which tribunal their case is to be heard in, and directed to one of the waiting rooms: one is for claimants and those with them, and the other for respondents and those with them.

**4.16** The usual procedure is that the clerk for the hearing will visit each waiting room in turn in order to take details of the people who will be attending the hearing. This provides an opportunity to seek information about the hearing, although this is really confined to the more basic points about when it is likely to start, whether the other parties have arrived, and whether there are other cases to be heard beforehand. If there is any information which a representative wishes to convey to the tribunal, this can also be done through the clerk. In addition, any documents which the tribunal ought to have can be handed to the clerk.

**4.17** The representative needs to ensure that any witnesses expected to give evidence on their behalf are present, and if they have not arrived will need to make enquiries as to where they are and when they will arrive. If they will be late, the clerk should be informed.

**4.18** In addition, it is necessary to speak to any other parties in the case who are expected to attend the tribunal. Usually this will be the representative of the other side, or the party himself or herself. They will be in the other waiting room, and the clerk will be able to give directions as to its whereabouts if necessary. Any documents which

the other side does not have should be handed over, and copies of any additional documents which they have brought should be received. (The exception is closing submissions, which the parties normally exchange after all the evidence has been heard.)

**4.19** If the other party hands over a document which has not been seen before, and it is important to the issues in the hearing and/or lengthy, it may be necessary to request time to read it before the hearing begins. If so, a request for a short delay in the start of the hearing may be conveyed through the clerk, but this should only be done if really necessary.

**4.20** It is important to remember that discussions which take place between the parties about the management of the case are 'open discussions', which means that they can be referred to in the tribunal. The representative should therefore confine what they say to the task in hand, and not deal with the strengths and weaknesses of their case.

**4.21** On the other hand, quite frequently a settlement can be reached at the door of the tribunal. A representative wishing to try to settle their case can raise this with the other side. Any discussion about a settlement cannot be referred to in the tribunal unless it results in an agreement. This is termed a 'without prejudice' discussion (see Chapter 5 on Evidence). If the parties are engaged in negotiations about a settlement, it is important to tell the clerk. Even after doing so, the parties may be called into tribunal, but should explain (without going into any details at all) that discussions with a view to settlement are taking place, asking the tribunal for a limited amount of time (eg 15 minutes) to bring them to a conclusion.

## Useful documents

**4.22** Documents which contain additional evidence upon which a party intends to rely should be handed to the other side and to the tribunal before the hearing commences.

**4.23** In addition, the following documents may be of assistance in explaining the case to the tribunal, and it is worth considering whether any or all of them should be handed to the other side and the tribunal in advance:

(a) a chronology (see 'Case preparation' at 4.09 for detail);
(b) a list of the people who are relevant to the case, with their job title or function in the proceedings (a cast list);
(c) a diagram of the structure of the employer company or organization (an organogram);
(d) a glossary of any technical terms;
(e) a list of any important agreed facts;
(f) a list of any relevant disputed facts;

(g) a skeleton argument, setting out the main submissions which are being made, together with any legal authority and references to the factual evidence.

**4.24** As far as the skeleton argument referred to in (g) is concerned, this will be distinct from any skeleton argument for the closing submissions referred to later. As it is being submitted at the start of the hearing, it will not be able to refer to the evidence which is given. The closing submissions will be able to do so, and to adjust the arguments to take into account any unexpected evidence which has emerged, together with the arguments anticipated from the other side.

## Speaking at the hearing

[*Again, this section is particularly directed at those with little experience of appearing in the employment tribunal, including litigants in person.*]

**4.25** Those who are not familiar with the law should avoid the trap of speaking in 'legalese'. The tribunal will respond better to a party or lay representative who talks in plain English and is polite. (In fact, this is probably good advice for lawyers as well!)

**4.26** It is important to speak clearly and loudly. Members of the tribunal will find it frustrating if they cannot hear clearly what is being said. In particular, delivery should be considerably slower than normal speech. About half of normal speed is probably right. This makes sense once one takes into account the fact that the judge will be trying to take a detailed note of what is being said. If what is being said is important, it is also important that the judge should be given an opportunity to take it down accurately. The standard advice is to keep an eye on the judge's pen when speaking. At the end of the sentence, if the judge is still writing, wait. When the judge stops writing, start speaking again.

**4.27** It will be easier for the tribunal to understand what is being said if it is clearly structured. One way of doing this is to give clear headings or 'signposts'. An argument or submission which is structured in this way might begin: 'I wish to make four points. My first point is . . . My second point is . . .' The effect of this way of speaking is to make it easier to understand the argument which is being put forward, which becomes more persuasive as a result.

## Time management

**4.28** The tribunal will be concerned to ensure that time is not wasted during the course of the hearing. This is important, not just for the tribunal system, but also for the parties, because if time is wasted then the case may not be completed within the allotted time, with the result that the case goes 'part heard' and has to go over to another

day. If this happens, it means that the parties will have to bear the expense and inconvenience of the additional day's hearing. Further, all those concerned will then have to struggle to recall exactly what happened on the previous occasion. Because of the number of people involved in the hearing, the date on which the remainder of the case can be heard will often be some time in the future, which compounds the problem.

**4.29** As a result, it is common for the employment judge to set down a timetable at the beginning of the case, or even prior to the commencement of the case at a preliminary hearing. This timetable needs to have the input of the parties in order to be realistic and fair. That means that the representatives have to calculate how long they will take for each stage of the case. A representative consequently needs to estimate how long they will take, for example, in cross-examining a particular witness. In addition, some sort of estimate will be required as to how long the closing submissions will take. It is obviously difficult for someone without experience of advocacy to make such a calculation. However, at least he or she ought to be able to say which witnesses have to be cross-examined at some length, and which witnesses can be dealt with briefly. Such an indication will assist the judge in coming to a timetable which has the input of the parties.

**4.30** In accordance with the rules (see Chapter 1 on Tribunal Procedure at 1.05 and 1.145), the judge not only has power to construct a timetable, but can implement it by means of a guillotine if necessary. This means that any timetable laid down by the judge must be respected, and that an eye should be kept on the clock, eg during the course of cross-examination or the closing speech.

**4.31** Even if a representative is within the constraints of the timetable, it is important that the matters which they deal with are relevant to the issues in the case. The judge can be expected to intervene if a party strays from those issues, and the party should abide by any ruling that is given in that regard.

**4.32** Overall, cooperation and politeness will help to ensure a favourable impression on the part of the tribunal, and efficient disposal of the case. The aim is to be 'the tribunal's friend'.

**4.33** It can also help to raise any issues which may affect the hearing at this stage, before the tribunal begins hearing evidence. For example, a party may wish to challenge the admissibility of evidence, or bring to the tribunal's attention a problem affecting case management. However, in doing so, the party raising the issue should be as brief and helpful as possible, and it is very rare that the tribunal's suggested solution should be challenged. This is simply a matter of bringing the issue to the tribunal's attention so they can plan accordingly.

## Examination-in-chief

**4.34** The evidence which a witness gives on behalf of the party calling them is referred to as 'examination-in-chief'. All or most of this comes in the form of a witness statement, usually given to the other side in advance and in accordance with the directions of the tribunal. The position in the employment tribunal now is that statements are generally taken as read. In other words, the witness is not required or allowed to read the statement out to the tribunal, and the members of the tribunal will either have read it in advance, or will read it to themselves immediately after the witness comes to the witness table.

**4.35** As a result, shortly after being sworn or affirmed, the witness will be cross-examined by the other side. The witness should be made aware of this fact. It means that it is important to ensure that he or she reads over the statement and is happy with its contents shortly before the hearing. The representative should enquire of the witness whether the statement is accurate before going into the tribunal, and decide how to correct any errors. The witness should also be given an opportunity to become familiar with any relevant portion of the trial bundle. It is, however, inappropriate for a witness to be coached in preparation for the hearing, and any attempt to do so is likely to be exposed, with embarrassing consequences.

**4.36** Although coaching is not allowed, some general advice to witnesses may be useful. When being cross-examined, the answer given should be truthful and straightforward. It will often be 'yes' or 'no'. If either of these would be a misleading answer the witness should say so, and ask for the chance to give a more complete answer. But the witness should not make a speech, or avoid answering the question. Nor should he or she argue with the questioner. Simple, factual answers are what is required. If the witness does not remember something, they should say so. That is part of the requirement to tell the truth.

**4.37** Once in the tribunal, the witness will, after being sworn or affirmed, be asked to look at their statement and confirm that it is correct. If it is not, they should be given the opportunity to correct it before being asked any questions.

**4.38** Witnesses are not normally permitted to refer to notes when giving evidence. A clean copy of the witness statement will be available on the witness table, and the witness will not normally be allowed to use their own marked-up copy of that statement. There is an exception, however, for a party representing themselves in the employment tribunals. It was held in *Watson–Smith v Tagol Ltd (t/a Alangate Personnel)* (EAT/611/81) that where a party represents themselves in the employment tribunal they should be allowed to refer to notes in giving evidence. After all, a professional representative would

normally have a marked-up statement from a witness to assist in dealing with their evidence.

**4.39** It sometimes happens that a statement is incomplete, and the party calling the witness wishes to supplement their evidence. With the permission of the tribunal, it may be possible to ask a few supplementary questions. The tribunal will need to know the reason why the matters in question were not included in the written statement, and will need to be assured that the questions are limited in number. In addition, any such questions should not be 'leading', ie suggesting the answer which the witness ought to give. The easiest way to avoid leading questions is to begin the question neutrally with an interrogative—who, what, why, when, where, how? etc. Alternatively, the witness can be asked to describe, explain, or give an account of an event.

## Cross-examination

**4.40** The process of questioning witnesses for the other side, or cross-examination, has the following aims:

(a) *To elicit any favourable evidence from the witness*. Often this will not be possible, as the witness will not have anything favourable to say about your case. After all, they have been called by the other side! Nevertheless, a fair-minded witness will often be prepared to give favourable evidence on some points.

(b) *To undermine any unfavourable evidence*. In cross-examining a witness, it is usual to identify and bring their attention to significant inconsistencies, inaccuracies, and points which are inherently unlikely.

(c) *Giving the witness a chance to respond to the case being put by the question*. It is important that the witness should be given an opportunity to disagree with the other side's version of events, so that they have the chance to respond. This is usually termed 'putting your case'. In an unfair dismissal case, for example, the claimant might say 'when you held the disciplinary hearing you didn't listen to what I had to say, did you?' He would then give the manager the chance to agree or disagree with that statement.

**4.41** The purpose of cross-examination is to ask questions. It is not an opportunity to argue with the witness. Nor should the tribunal be told, during the course of cross-examination, what conclusion should be drawn from what the witness has just said. The questioner should just write down anything helpful which has been said, and raise it in their closing submissions. Similarly, the cross-examiner should not comment on what the witness has said. Although it is tempting to say 'no one will believe that', such a comment is improper and will annoy the tribunal. The proper place for comments, once again, is in closing submissions.

**4.42** When cross-examining, leading questions are not just permitted but are actually the best way to proceed, contrary to the position when one is dealing with one's own witness. So the respondent in an unfair dismissal claim, when cross-examining the claimant, should not say:

> 'Did you get the chance to appeal?'

but rather should ask:

> 'You had the chance to appeal didn't you?'

**4.43** When cross-examining, multiple questions should be avoided. For example, the respondent should not ask:

> 'You had a fair investigation, a fair disciplinary hearing, and the chance to appeal, didn't you?'

but should ask separate questions:

> 'The investigation was fair, wasn't it?'
> 'And the disciplinary hearing was also fair, wasn't it?'
> 'In any event, you had the chance to appeal didn't you?'

**4.44** Those without much experience in advocacy will find it helpful to prepare a number of questions, but should ensure that their approach is flexible, and takes into account whatever answers are given to the earlier questions. Those with more experience will find it better to work in terms of a list of topics, to avoid the temptation to work through all the questions which have been prepared, regardless of whether they are relevant in view of previous answers.

**4.45** An important part of cross-examination is dealing with any inconsistencies on the part of the witness. For example, there may be evidence in a document which contradicts the witness's statement. In preparing cross-examination, it is important to check documents for such inconsistencies, and to raise them with the witness. In the course of preparation, it is vital to keep a note of the page and paragraph numbers of any such important inconsistencies. The witness can then be asked which statement is true. Assume that the claimant in an unfair dismissal case is cross-examining the manager who heard the disciplinary hearing:

> 'Please look at page 33 of the trial bundle, the notes of the disciplinary hearing. You stated that I had been given an oral warning 18 months ago, didn't you?' '*Yes.*'
>
> 'Now look at paragraph 11 of your witness statement. You say there that I had been given an oral warning 8 months ago, don't you?' '*Yes.*'
>
> 'Which one of those was true?' '*I'm not sure.*'

**4.46** During the course of cross-examination, it is important to ensure that a note is taken, as this will be invaluable when it comes to closing submissions.

## Tribunal questions

**4.47** Once cross-examination is over, the tribunal may ask questions of the witness. It is important for the representative to note the questions which are asked by the tribunal, and any answer which is given. The question may well give a clue to the matters which the tribunal thinks are particularly important, and this will provide some guidance for what should be included in closing submissions.

## Re-examination

**4.48** The party who called the witness is entitled to ask any final questions before their evidence is complete. This is the process of re-examination. Any such questions must arise from the questions which have been asked by the other side, or by the tribunal. In addition, as re-examination is conducted by the party who called the witness, it is not permissible to 'lead' the witness during the process of re-examination (see section 4.39). In other words, the question must not suggest the answer to the witness.

**4.49** A party should avoid re-examining for the sake of it. Often it is best to let the evidence of the witness stand. Occasionally, some clarification may be needed, eg by referring the witness to a document and asking whether that aids their recollection, in a case where their answer in cross-examination has been incomplete or ambiguous.

## Closing submissions

**4.50** After all the evidence has finished, each party is given the opportunity to make its closing submissions. This is a chance to focus upon the matters which will persuade the tribunal to come to a favourable decision, at the point immediately before they begin to decide.

**4.51** The party bearing the burden of proof (see Chapter 1 on Tribunal Procedure at 1.147 and 1.148) will deliver its closing submissions last, although it may well be that if only one side is professionally represented, that side will be asked to go first.

**4.52** The tribunal will often find it helpful to have a written outline of submissions in front of it during the course of a closing speech. Such a written outline is sometimes referred to as a skeleton argument, although the skeleton argument may be put before the tribunal

at an earlier stage as well. In any event, the skeleton argument should identify:

(a) the issues and the main relevant background facts;
(b) any law referred to, with references to the relevant authorities;
(c) the submissions of fact to be made with reference to the evidence, ie why do they support the case of the party presenting the argument?

**4.53** The closing submissions presented orally to the tribunal can then be based upon the written outline, commenting and expanding upon it rather than reading it out. The tribunal can in any event be relied upon to read the written submissions which have been handed to it.

**4.54** The submissions (whether oral or written) should have a clear structure. This could well be based upon the issues outlined by the tribunal at the outset of the hearing. In making the closing submissions, it is important to deal with evidence both positive and negative. If any evidence damages the case being put forward in argument, it is better to provide an explanation and a perspective on it. Where matters of fact are in dispute, the tribunal will welcome arguments as to why the evidence of a particular witness (supporting the case of the party presenting the submissions) should be preferred to that of an opposing witness.

**4.55** Any legal authorities upon which a party wishes to rely should be copied, one copy being given to the other side and sufficient copies being supplied for the members of the tribunal.

**4.56** It sometimes happens that there is not sufficient time for the parties to present oral submissions at the end of the evidence. In such a case, the tribunal will usually order the parties to provide written submissions according to a timetable which it lays down. This is usually regarded as preferable to asking the parties to return to the tribunal to make oral submissions. The procedure which the EAT has laid down for such cases is:

(a) written submissions should only be directed with the consent of all parties;
(b) the judge has a responsibility to ensure that the procedure adopted complies with natural justice;
(c) the tribunal and each party should be served with the written submissions of the other parties by a fixed deadline;
(d) each party should be informed that any comments upon the submissions of the other party should be sent to the tribunal within a further fixed period.

(*London Borough of Barking and Dagenham v Oguoku* [2000] IRLR 179 (EAT)).

## The decision

**4.57** After receiving closing submissions, the tribunal will consider its judgment. It may either do this on the same day, delivering its judgment orally, or it may reserve judgment and send it to the parties in written form (for further details see 1.174).