

# **Handling a discrimination case**

**Session 3: gathering and finalising evidence**

**presented by John Sprack for LawWorks October 2023**

# Gathering evidence: overview

- The initial onus in a discrimination claim is upon the claimant (C)
- That emphasises the importance of gathering evidence
- There are some features of the process which are the same as for unfair dismissal, others which are unique to discrimination
- Seeking written reasons for dismissal is even more important in discrimination cases than usual: it pins the employer down and there is compensation if they give an inaccurate reason
- Medical evidence is advisable, not only for disability cases, but where personal injury is claimed as a result of the discrimination
- The use of the non-statutory questionnaire procedure is another feature of discrimination claims

# Non-statutory questionnaires (1)

- The history: statutory questionnaire until abolished in 2014 - adverse inference could be drawn if no reply within eight weeks
- Does the fact that there is no longer a statutory procedure make any difference?
- See Acas guidance <https://www.acas.org.uk/asking-and-answering-questions-about-discrimination>
- ET may well regard an employer's failure to respond, or its inaccurate or evasive responses, as the basis for an inference to help prove discrimination
- The response may yield information which is not in documents and cannot be obtained on disclosure
- The scope can be wider than would be accepted by the ET in requests for additional information
- It can be deployed before a claim is presented to help evaluate its merits

# Non-statutory questionnaires (2)

## When and where to send it

- Unlike the former statutory procedure, you can send more than one
- But it is not generally advisable - ET may be less inclined to draw inferences
- If possible send it before the case starts
- There is an incentive for the employer to answer to put the matter to rest
- And it will give you an early chance to evaluate the case and decide on strategy
- Send to whoever is named in the appropriate policy, or to managing director or head of HR, for example
- Set a deadline eg 21 days (but beware of time limits)

# Non-statutory questionnaires (3)

## Possible contents

1. Name and address of questioner and responder
2. A succinct account of what C is complaining about
3. A request that the responder indicate whether they dispute the factual accuracy of that account
4. An indication of the protected characteristic(s) involved
5. Why C thinks this was unlawful
6. Any other appropriate questions relevant to the complaint eg
  - A. who made any relevant decision
  - B. any relevant policy/procedure
  - C. statistics (don't be too ambitious)
  - D. how have other workers in similar circumstances been treated?

# Drafting the ET1

- C should describe the events which they believe constitute discrimination
- Set out in full, but without elaborating or specifying the evidence which will be used to prove the case
- Make clear which of the events are part of the claim, and which are supporting evidence
- Avoid dealing with every minor incident in detail, and focus on the real basis of the claim
- Specify which form of discrimination is alleged eg direct, indirect, harassment, victimisation
- Where the claim includes a dismissal, specify if that is discriminatory eg victimisation
- If it is claimed as a standard unfair dismissal, make it clear that it is distinct from discrimination
- If victimisation is claimed, specify the protected act
- Make sure that any offensive remarks related to protected characteristics are set out

# After receiving the ET3

## What do you do next?

- Compare it to ET1
- Where do you disagree?
- Is there agreement on any of the legal or factual issues?
- Have they raised any defences eg justification, all reasonable steps?
- Do they request any additional information? Is the request legitimate?
- Do you need any additional information about what their defence is, whether they concede any points etc?
- Are they asking for a preliminary hearing (PH) eg on time limits, whether C is disabled?
- What are the strengths and weaknesses of your case?
- What additional evidence do you need, bearing in mind the comparison between ET3 and ET1?

# Additional information

- Relevant once the ET3 has been received
- Not of course unique to discrimination, but particularly important
- Questions need to be more focused than for the questionnaire
- It is essentially further information about the employer's case
- Request from the employer first; if no sensible response then apply to ET
- The ET can order the employer to provide written answers
- Employer may ask for more information to clarify C's case
- Is it not clear enough already? If so
- Evidence will be dealt with when witness statements are exchanged



# Disclosure

- This would of course be after the claim is presented, as for non-discrimination cases
- In addition to the general duty of disclosure revealed by the standard procedure, you can request specific disclosure for anything important and relevant
- Request from employer, giving deadline
- On expiry of deadline, seek order from ET (quoting overriding objective) and if refused ask for decision to be varied
- The test is whether the information is necessary for the fair disposal of the case: ET Rules r 31; Civil Procedure Rules r31.5(7)
- ETs should be encouraged to be generous in orders for employers to disclose in discrimination cases
- If confidentiality is being used as a bar: *Nasse v Science Research Council* [1979]IRLR 465 HL
- If specific disclosure is refused, where the material is clearly crucial, appeal is possible
- If not successful, request again during the final hearing when relevance is obvious

# Privacy (1)

## Restricted reporting order

- Could be sought by C, or sought by R and opposed by C
- You would need to calculate the balance of advantage for C
- Two routes for ET to take
- Restricted reporting order: Employment Tribunals Act ss 11 and 12
- It relates to allegations of sexual misconduct eg sexual harassment
- EJ can order that certain parties cannot be identified
- It lasts until judgment is promulgated
- It is a criminal offence to breach it

# Privacy (2)

## Rule 50 application

- The other route is r 50 of ET Rules
- The hearing could be conducted in private
- Identities could be kept anonymous if public
- But case cannot be kept off the public register
- “Open justice” is the default position
- The questions: is it strictly necessary for the proper administration of justice? will publicity hinder a fair trial? is it needed to protect ECHR rights?
- In any event, no information may be published which may lead to identification of a victim of a specified sexual offence (s 2 Sexual Offences (Amendment) Act 1992)

# Witness statements (1)

- See Presidential Guidance on Case Management - guidance note 3
- <https://www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf>
- C will almost certainly be the first witness
- So background should be given at the start of the statement - nature of C's job, who's who etc
- Chronological order is usually best; occasionally useful to group by themes

# Witness statements (2)

- Highlight some of the discriminatory features early on if possible
- Statement should not be too long or difficult to understand
- In a disability case, deal early on with each element required to show C is disabled
- Deal with remedy as well as liability, including injury to feelings/physical injury
- Use language which C understands and ensure they check the contents and accept ownership of the statement

# Preliminary hearing (PH)(1)

## Case management

- It may be set down for determining an issue eg was C disabled? time limit?
- But the focus here is on the case management role which PH plays
- There is a standard agenda for case management at PH
- <https://www.judiciary.uk/wp-content/uploads/2013/08/empl-trib-agenda-for-case-management-at-prelim-hearing-20170810.pdf>
- Aim to complete as much of it as you can; see if other side agrees if possible
- I addressed the various questions posed in my series on Practice and Procedure , but worth highlighting some points for discrimination

# Preliminary hearing (PH)(2)

## The issues

- Identifying the issues: need to identify each discriminatory act: give details
- State what type of discrimination it was
- Then break it down into the legal and factual issues
- eg victimisation: did C make the specified complaint on 29 June 2023? was it a protected act? was it in bad faith? was he dismissed because of the complaint?
- The list of issues which results forms the agenda for the final hearing unless amended (not always easy to get an amendment)

# Preliminary hearing (PH) 3

## Points to bear in mind

- Beware of employer (or the EJ) asking at the PH for further details of the allegations
- Ask for time to supply any additional information
- Make any necessary applications eg amendment of claim, request for specific disclosure
- Once issues are clarified, ET will determine length of hearing, fix dates for hearing and for disclosure, exchange of witness statements etc
- Keep a note as deadlines may be met before you get the record of the PH!



**Any  
Questions?**