

Employment law - practice and procedure

(6) The Hearing: preparing, presenting and the aftermath

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Agenda

- Witness statements
- Dealing with your own witnesses
- Cross-examination, Tribunal questions, Re-examination
- Submissions
- Judgment
- Reconsideration
- Appeals

Trial bundle

- Its contents flow from the disclosure process
- It will consist of the documents which are referred to in the witness statements or which will be the subject of cross-examination (XX)
- The parties should agree its contents; any documents not agreed could be in a separate folder for the ET to decide whether to add
- Who prepares the bundle? R usually is given the task but are you content with that?
- Documents are in chronological order, with ET1 and ET3 at the front, and an index
- 3 or 5 copies needed additional to those for parties
- Do not send in advance unless so ordered

Witness statements (1)

- The preferred practice is that each witness has a statement which will be read by ET, but not read out by the witness
- They are kept separate from the trial bundle
- A representative should usually draft the statement, but ensure that the witness is totally in agreement with its contents, and accepts ownership
- It should consist of short numbered paragraphs with wide margins
- Where it refers to a document in the trial bundle, its page number should appear in brackets at the relevant point in the witness statement
- It should give any necessary background briefly, then deal with events chronologically

Witness statements (2)

- In drafting the statement, accuracy and consistency with the pleadings are important
- Ensure each paragraph is relevant to the issues
- Deal with any problem areas for your case, rather than waiting for them to be exposed in XX by the other side
- Focus on key issues and keep the length within limits
- Ensure C agrees with the statement after suggesting any amendments which you incorporate
- Assure C that it is OK for their representative to have drafted a statement, so long as they agree with the finished product

Witness statements (3)

- The witness should sign the statement - a statement of truth is usual but not required
- Statements should be exchanged with the other side eg by messenger or email (if by email make sure changes are not tracked!)
- Exchange takes place on the date ordered - if none then asap and should be 2 weeks before the Hearing
- On receiving the other side's statement you may find that you have omitted something important
- If so, you may issue a supplementary statement, but don't think you have to respond to everything in their statements

The Hearing

- At the outset EJ will set out the issues and ask for agreement
- Who presents their case first? Onus of proof
- Unfair dismissal, usually R first except constructive dismissal
- Discrimination, usually C first
- ET will either have read the statements, or will do so as each witness is called
- Then the witness may be asked supplementary questions (unpopular)
- Cross-examination (XX), Tribunal questions (TX), Re-examination (RX)

Dealing with your own witnesses

- Make sure you meet before the Hearing
- And that they read through the statement and accept it as theirs
- Take on board any errors in the statement and deal with them
- You may familiarise the witness with the process, but no coaching
- Explain that they will not read the statement out loud but that the ET will read it
- Point out that short answers are best eg Yes, No, I can't remember
- And to answer the question and not argue with the questioner

Cross-examination (1)

- In preparing work through the bundle marking any pages you will refer to
- Work out the questions you want to ask (headings rather than verbatim)
- In doing so, look for inconsistencies in the other side's evidence, and for any aspects which lack credibility
- Make sure you are able to refer to the relevant page of the bundle when asking a question

Cross-examination (2)

Delivery

- In delivery, ask short precise questions
- You should lead, and put your case
- Make sure the witness understands, taking them to any relevant page number
- Repeat once if they are evasive
- Note the answers
- Don't argue with the witness - your chance comes later
- Keep to time (may mean asking the crucial questions early on)

Tribunal questions and re-examination

- Members of the ET may ask questions (TX)
- Pay careful attention to why they may be asking a particular question
- After TX you have the chance to re-examine
- In doing so, you may not lead (suggest the answer in the question)
- And any RX must be based on a matter raised in XX or TX
- Only RX if you need to eg your witness clearly wanted to explain something and was cut short

Submissions

- Prepare your submissions at an early stage
- It is useful to have written submissions which you speak to
- Use the issues set out at the start (as updated) for your structure
- Make it short - what are the pivotal points?
- Deal with the credibility of witnesses
- Don't gloss over any weak points
- Make any necessary concessions: saves time and inspires trust (but remember you cannot appeal on a point conceded)

Judgment

- After submissions, ET will usually retire
- If case is simple they will come back after a short period and deliver oral judgment
- After that evidence and submissions on remedy if C is successful
- In more complex cases, judgment will be reserved and sent to the parties at a later date
- A provisional date for a remedies hearing will usually be set if judgment is reserved
- Full reasons must be requested within 14 days (Rule 62)
- They are necessary for an appeal

Reconsideration

- You can ask the ET to reconsider the decision within 14 days of the date when it was communicated (or 14 days of the reasons being sent if later): Rule 72
- It goes to the EJ who made the original decision (or chaired the original tribunal)
- They decide if there is no reasonable prospect that the original decision will be revoked or varied
- If so, the application is rejected
- If not, there will be reconsideration either on the papers with representations from both sides, or at a hearing with the parties present
- The decision on reconsideration may be that the original decision stands, or that it should be revoked or varied

Appeal

- Appeal is to the Employment Appeal Tribunal Must be lodged within 42 days from the date the written judgment (or written reasons if later) were sent out (the same day 6 weeks later, up to 4 pm)
- Very unusual for any late appeal to be accepted
- Be aware of all the documents which need to be sent
- See the website for detailed instructions
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/103990/8/T440_web_1221.pdf
- The hearing in the EAT will consist of legal argument based on the ET1, ET3 and the ET's decision on the facts
- To succeed, the appellant must show an error of law
- That can include showing that the ET's decision was legally perverse : “such as to provoke astonished gasps from amazed onlookers”

Questions

- Any on today's topics?
- Any thoughts on a future series
- Suggestions so far include:
 - running a discrimination case (including working out PCPs, drafting lists of issues, disability claims under ss 15 and 20 Equality Act, remedies)
 - calculating compensation (including how to draft schedules of loss and the process of negotiation)