Top Tips for Employment Law Litigation

Iscoed Chambers Employment Seminars

George Pollitt, Catherine Collins and Helen Randall

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Aims of the Training

To discuss 3 important but often overlooked areas of employment law litigation whilst drawing our experiences of these claims.

Chatham House Rule applies

3 topics:

1. Mitigation
2. Disclosure and Legal Privilege
3. Maximising Compensation

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Topic 1: Think Mitigation First Not Last

Question:

Imagine you are an employer (or you are advising one). You have dismissed an employee and you suspect they will take the case to an Employment Tribunal. You have completed and sent the dismissal letter and made the employee aware of the appeal process.

What is the next thing you should do?

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Think Mitigation First Not Last

Answer:
Complete a job search for roles suitable for the dismissed employee.

You may have the employee's old CV and have their training records. Use them.

Repeat this process after the appeal and again when the schedule of loss is served if required.

Why?
To argue that the employee/claimant is not doing all they can to mitigate their losses and provide evidence of that.

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Think Mitigation First Not Last

Remember-

The duty to mitigate always applies (s123 ERA 1996).

S123(4) states:

In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland

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Think Mitigation First Not Last

However-
it is only a duty to make reasonable efforts to mitigate;

Fyfe –v- Scientific Furnishings [1989] ICR 648, EAT
"the plaintiff must take all reasonable steps to mitigate the loss…and cannot recover damages or any… loss which he could have … avoided but has failed through unreasonable action or inaction to avoid. It is important to emphasise that the duty is only to act reasonably and the standard reasonableness is not high in view of the fact that the defendant was the wrong-doer"

Banco de Portugal –v- Waterlows [1932] AC 452
"the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty"

AND the burden is on the employer to prove that a claimant's approach is unreasonable **Wilding v British Telecom [2002] IRLR 524.**

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Think Mitigation First Not Last

Question: Does this work?

Answer: Absolutely.

•You can use it to counter any over inflated schedule of loss during ACAS EC or at the start of a claim (or at the conclusion of a claim).

•Make a low commercial offer which is more likely to be accepted.

•If the Claimant is on a DBA with their representative it will cause them to reconsider.

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Think Mitigation First Not Last

Counter arguments:

•It may not be reasonable to expect a claimant to look for other jobs until the appeal process is completed (again why I argue that the process should be repeated after the appeal is completed and periodically throughout the litigation process).

•The jobs must be reasonable in the usual sense: the right type of work, correct level of pay, within a reasonable distance etc.

•The Respondent may be prejudging any appeal by preparing for a defence to litigation. However, it could be argued that it is not unreasonable for a company to do this, especially if the search is undertaken by someone who does not hear the appeal (so there is no argument of lack of objectivity of the appeal chair). It may also be privileged as completed by a lawyer or in contemplation of litigation (see below).

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Topic 2: Disclosure: Legal Advice Privilege Only Applies to Lawyers

There are a number of companies out there such as Peninsula, Citation and others that provide employment law and HR advice on a consultancy basis.

This will often be detailed advice about dismissal procedures and the decision to dismiss.

Some people who work at these consultancies are LPC or BVC graduates or ex lawyers. However, importantly, the companies are not law firms and the employees are mostly not practising as lawyers.

Question: Is the advice given legally privileged advice?

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Answer: Probably not- but it may depend when the advice is given. See:

R (on the application of Prudential Plc and another) v Special Commissioner of Income Tax and another [2013] UKSC 1 confirms (by a majority of the Supreme Court) that legal advice privilege does not extend to protect legal advice given by professionals who are not lawyers (in that case accountants giving advice about tax).

They went further to say that it is for Parliament, not the courts, to decide whether and how the privilege should be extended.

To date no changes have been made.

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Why is this important?

Consider cases such as **Ramphal v Department for Transport [2015] UKEAT**

His Honour Judge Serota QC stated (paragraph 55):

"In my opinion, an Investigating Officer is entitled to call for advice from Human Resources; but Human Resources must be very careful to limit advice essentially to questions of law and procedure and process and to avoid straying into areas of culpability, let alone advising on what was the appropriate sanction as to appropriate findings of fact in relation to culpability insofar as the advice went beyond addressing issues of consistency. It was not for Human Resources to advise whether the finding should be one of simple misconduct or gross misconduct."

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What does this mean for Employment Litigation?

This means that the role that HR professionals play in influencing decision makers' minds can legitimately come under scrutiny and are potentially relevant to the proceedings.

Therefore it is open for Claimant representatives to ask for specific disclosure of the advice given to decision makers which could include emails which the author thought would be kept private.

Equally the same can be said for advice given by a trade union representative to an employee.

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Counter Arguments:

•Rely on Litigation Privilege instead of Legal Advice Privilege

What is Litigation Privilege?

Litigation privilege applies to confidential communications (written or oral) between a client and his lawyer (or either a client or his lawyer and a third party) created for the dominant purpose of adversarial proceedings that are either pending, reasonably contemplated or existing at the time of the communication. Litigation privilege is therefore wider in scope than legal advice privilege as it can also include communications with non-lawyer third parties

(Extract from PLC online Practice Note**: Legal professional privilege in internal investigations**)

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Counter Arguments:

Litigation Privilege

See **New Victoria Hospital v Ryan [1993] ICR 201:**

- HR consultant brought in to carry out disciplinary process
- Employee subsequently dismissed and asked for disclosure of documents in his unfair dismissal claim- the ET allowed application
- Employer appealed to the EAT and argued that there was the equivalent of Legal Advice Privilege and/or Litigation Privilege
- They lost on both counts and did not take it to the Court of Appeal
- However, it was worth noting that the Judge made a finding of fact that Litigation Privilege had not been engaged on that occasion- he did not rule out the idea in principle.
- Timing and purpose of engagement is key

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Counter Arguments Continued:

•Requests for disclosure of advice given by external HR consultants could be open to challenge if the consultant is in fact a solicitor or barrister and has a valid practising certificate.

•Challenge the reasonableness of the request as to whether the documents are relevant. Is there any evidence of undue influence of the decision maker or is this a fishing expedition?

•This applies equally to advice given from union representatives to employees.

•Top tip: Be careful what you put in writing!

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Be Wary of Waiving Privilege:

In ***Kasongo v Humanscale UK Ltd***, the EAT has held that a note and email summarising a solicitor's advice, followed by a solicitor's comments on a draft dismissal letter prepared six days later, were all part of the same transaction for the purpose of legal advice privilege. The employer could not, therefore, waive privilege in respect of the note and email but seek to maintain it in respect of the letter – this would amount to impermissible 'cherry-picking'.

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Topic 3: Don't Forget Additional Claims and Uplifts

During the rush of litigation it is often all too easy forget some useful claims that can bulk up a schedule of loss;

Uplift (or reduction) in compensation for an unreasonable failure to follow a relevant ACAS code under S207A TULRCA 1992.

S10 of the Employment Relations Act 1999 (failure to allow a trade union representative to a disciplinary or grievance meeting). 2 weeks gross pay (s11 Employment Relations Act 1999).

Failure to provide written statement of the terms of employment (s1 ERA 1996). 0-4 Weeks compensation but only if you win another claim (s38 Employment Act 2002).

Failure to provide wage slips s12(4) ERA- 1996- repay deductions

Written reasons for dismissal- s92 ERA 1996- 2 weeks pay

Aggravated Damages (Discrimination only)

Interest (if applicable)

Issue and Hearing Fee (if applicable)

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Don't Forget Additional Claims and Uplifts

What is an ACAS uplift?

S207A of TULRCA 1992 allows for an employment Tribunal to uplift or reduce compensation by up to 25% where an employer or employee has unreasonably refused to follow a relevant ACAS code.

The claim must be one set out in Schedule 2 of the TULRCA 1992 (which includes a number of common claims such as breach of contract, unlawful deduction of wages and unfair dismissal).

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Don't Forget Additional Claims and Uplifts

Question: Must an uplift or reduction be pleaded to be considered?

Answer: No (but it helps).

A Tribunal does not have to consider making an adjustment unless one or the other party has specifically asked for this (**Pipecoil Technologies Ltd v Heathcote UKEAT/0432/11**).

However…

The Tribunal can consider making an uplift or reduction of its own motion but must invite submissions from the parties before doing so (**Tandem Bars Ltd v Pilloni UKEAT/0050/12**)

I would suggest this is different to s10 ERA 1999 or a s1 ERA 1996 claim as these are different causes of action as opposed to an uplift in compensation for a claim already pleaded.

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Question: Does the ACAS code apply to ex employees?

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Answer: Maybe….

For a S207A uplift, a relevant code must apply and it must not have been followed in some way. This will usually be the code for Discipline and Grievances.

The ACAS Code for Grievances refers to 'employees' who raise grievances but does not define this further

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The Practical Law Company (PLC) article 'Grievances under the ACAS Code: a quick guide' suggests that a 'senior ACAS figure' has previously stated that the that ACAS Code for grievances was never intended to apply to ex employees. However, ACAS confirmed that ultimately this was a matter for parliament or the courts.

Remember that it is not for ACAS to dictate the law (**Toal and Another v GB Oils Ltd UKEAT 0569/12?**)

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Don't Forget Additional Claims and Uplifts

The TULRCA 1992 defines employee as both current and ex employees

s295 Meaning of employee and related expressions.

(1)In this Act—

contract of employment means a contract of service or of apprenticeship,

*employee means an individual who has entered into or works under (**or, where the employment has ceased, worked under**) a contract of employment, and*

I think this must be right or how can breach of contract claims, listed under Schedule 2 TULCRA 1992, apply to s207A uplifts?

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Don't Forget Additional Claims and Uplifts

Interest

Remember the position is different for different claims:

In unfair dismissal cases there is no legal power to award interest on past losses (unless there is an unpaid tribunal award). However, see the Court of Appeal decision of **Melia v Magna Kansei [2005] EWCA 1547**. This was a whistle blowing detriment/constructive UD claim.

In discrimination and equal pay cases, the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 (SI 1996/2803) apply. The tribunal is required to consider the question of interest.

In unlawful deduction of wages claims, section 24(2) of ERA 1996, states that a tribunal may award a sum that it "considers appropriate" to compensate the worker for "any financial loss sustained by him which is attributable to the matter complained of". This can include interest and even bank charges.

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Conclusions

Successful Employment Law litigation is about 3 things:

1. For the Respondent, limiting risk, costs and reputational damage.

2. For the Claimant, maximising the potential value of the claim.

3. For either side, gathering all the relevant evidence to assist in these aims and of course the chance of winning/defending the claim.

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