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Shared Insights

Employment Tribunals in the Health and Care Sector

Speakers

Jacqui Atkinson, Partner and Head of Employment Healthcare, Browne Jacobson LLP
Helen Badger, Partner in Employment, Browne Jacobson LLP
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Rachel Tomkins, Divisional Director of Nursing at Walsall Healthcare NHS Trust

NHS
Walsall Healthcare
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Introduction

This session focused on preparing for employment tribunals in the Health and Care Sector. We heard perspectives from our employment lawyers who discussed the stages of the Tribunal process.

We also heard from guest speaker, Rachel Tomkins, Divisional Director of Nursing at Walsall Healthcare NHS Trust, about her recent experience of giving evidence in an Employment Tribunal hearing and her top tips for successfully navigating the process.

Jacqui Atkinson, Head of Employment Healthcare shared some headlines from recent NHS cases which had led to findings of discrimination or unfair dismissal and where the headlines were impactful on the reputation of the Trusts involved.

For NHS clients, with the settlement constraints in the NHS, litigation can be more common than in the private sector. It is important that in complex cases that the Trust supports its managers and key decision makers throughout what can feel like combative or challenging internal Employee Relations processes.

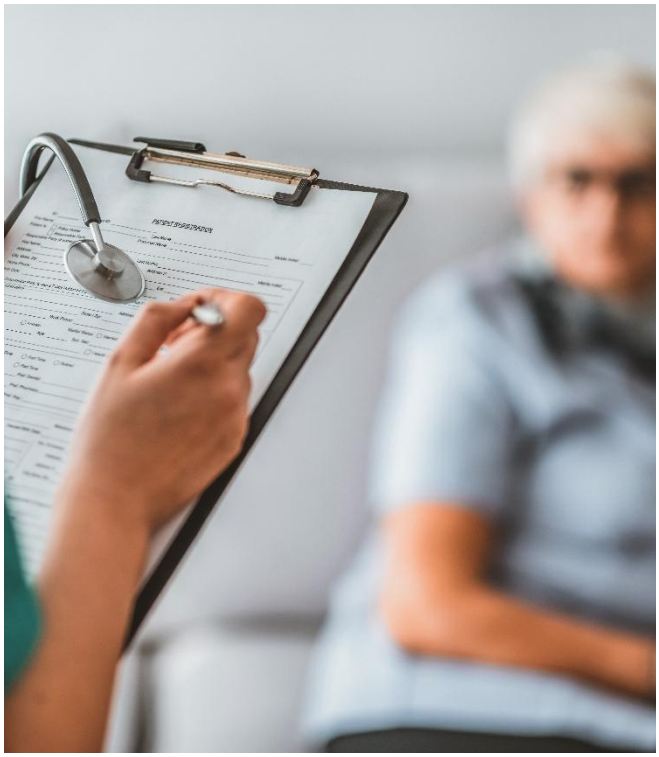
Contents

How we can help

We can offer training for managers dealing with the myriad of issues that might lead to Tribunal claims, including:

- Disciplinary hearings and appeals.
- Conducting workplace investigations.
- Managing absence and ill health.
- Responding to discrimination complaints.
- Mock Employment Tribunals.

We can also provide advice and guidance to panels in advance of them hearing complex cases.



The Employment Tribunal

Jacqui Atkinson, Helen Badger
– Browne Jacobson LLP

Understanding the process

What are Employment Tribunals and what do they do?

The Employment Tribunal is similar to a Court, and its function is to resolve disputes over employment matters such as whether a person has been unfairly dismissed or subjected to discrimination or victimisation.

Employment Tribunals are slightly less formal than Courts. Nobody wears gowns or wigs, and all parties remain seated throughout (save for when the Judge enters or leaves the room and when you, as a witness, are confirming you will be telling the truth). The rules of evidence and procedure are also more relaxed than say in the Crown Court or any criminal court.

Cases are heard by a legally qualified Employment Judge and, if the case involves issues such as discrimination and whistleblowing detriment, potentially two Panel Members. The Judge takes the lead throughout the hearing in asking questions and in giving directions as to how the proceedings should be conducted. The Employment Judge and two Panel Members (if sitting) sit in judgement together and will reach either a unanimous or majority decision. One Panel Member will have a background in Human Resources and so experience of being an 'employer' and the other will have a trade union background and so experience of being an 'employee' – neither is legally-qualified. Their role is to bring practical industry experience to the decision making of the Employment Tribunal.

Responding to a claim

The first stage in any claim is the pleadings. A claim is started by an employee or former employee (or in some cases, job applicant) ("the Claimant") completing a claim form called an ET1. This is served on the employer ("the Respondent") who then has 28 days from service of the ET1 to submit a defence. From the claim form, the Respondent should be able to determine who and what the claim is about, although this is not always clear.

Legal advisors, if instructed, will then work with the Respondent to respond to the allegations or claims made. That is likely to involve reviewing key documents (for example outcome letters from grievance or disciplinary processes) and speaking to the key individuals involved in the relevant issues. The main focus at this stage is to be confirming whether the specific legal claims are admitted or denied and providing a brief factual history. All of the relevant facts and matters are unlikely to be included in the response to the claim but will come through witness statements at a later stage in proceedings. The documents filed on behalf of the Respondent are likely to be the Form ET3 and Grounds of Resistance which set out the employer's main defence to the claim.

Case management after responding to an employment tribunal claim

It is very common in Employment Tribunals for Claimants not to have any legal representation. This means they have no experience of pleading a legal case and leads to many claims being quite poorly pleaded, sometimes with no descriptive narrative at all.

A Respondent is entitled to be informed what the claim is about, and it is not the Respondent's responsibility to have to guess or deduce this from a poorly pleaded claim. After the defence has been lodged, it is often necessary to seek further particulars from the Claimant – this will involve asking the Claimant to clarify what their claims are (e.g. are they claiming direct discrimination, harassment, victimisation etc). In a discrimination claim, for example, it may also be necessary to ask the Claimant to confirm who they allege did or said something, when it is alleged that happened and how they say that amounts to less favourable treatment on the grounds of a protected characteristic.

Where a Claimant does not have legal representation, it may not be until the first Preliminary Hearing that the further particulars can be obtained. The purpose of a Preliminary Hearing is to identify the issues and for the Tribunal to give directions for how and when the preparation for full hearing must be done. This hearing almost always takes place remotely via telephone or video rather than in-person. There is no need for witnesses or a member of staff from the Respondent to attend, and it is usually just attended by the Respondent's legal representative.

Following the Preliminary Hearing, the parties will need to disclose to each other, the documents that are relevant to the issues in the case. This is known as the disclosure process.

Both the Claimant and Respondent(s) have to disclose anything that supports their case or the other party's case. The sooner the Respondent starts the process of collating and reviewing the documents the better. Where legal advisors are instructed, early disclosure of relevant documents to the advisors will allow an early assessment of the strengths or weaknesses of the defence.

Following the disclosure, the parties are required to agree the contents of the bundle of documents that will be used at the hearing. This can be challenging, in particular with litigants in person who often wish to include documents which aren't relevant, but the Claimant feels support their case in some way. When we are advising on these situations, to avoid incurring unnecessary costs with lots of correspondence between the parties, we may prepare a core bundle containing the key and important documents, with a supplementary bundle containing the Claimant's disclosure that does not appear to be relevant, but the Claimant thinks is necessary. Bristol Employment Tribunal limits the number of pages that a bundle can contain and will only allow that limit to be exceeded if the parties can persuade it that there is a good reason to do so. We think it is likely that a similar approach may start to be adopted more widely.

Witness statements

After disclosure, the process moves on to preparing witness statements. This process will normally start with the legal advisors meeting the witness to go through the issues which hopefully have been clarified and agreed. This meeting is confidential and privileged. Witnesses should feel free to give their honest responses to questions without fear that this information will be disclosed to the Claimant without them knowing about it.

We recommend the witness is as transparent as possible with the Respondent's legal representative, leaving it to the legal advisor to determine whether the information is relevant and needs to be included in the statement. It is uncomfortable for a witness to give evidence about a matter during a Tribunal hearing which was not included in their witness statement as they may find themselves the subject of criticism from the judge or other side as to why that evidence was not in their statement. The key to preparing the best witness statement is for the witness to be well prepared before meeting with the legal advisor to give their statement. We strongly recommend to witnesses that they take time to refresh their memories of events, look at the issues in the claim and review relevant documents before we meet with them. For example, an investigating officer giving evidence should familiarise themselves with their investigation report and the dismissing officer should review their reasons for their decision recorded in their dismissal letter or other documents.

When the statement is prepared and sent to the witness for approval, we always explain that they must be comfortable that it is their evidence and therefore recommend they amend/re-word sections or phrases if they are not articulated in a way that the witness feels comfortable with.

Preparing for the Tribunal hearing

The key to giving effective evidence in Tribunal is adequate preparation. Before a witness gives evidence, they should read and re-read their statement several times. They should read and be familiar with all the documents referenced in their witness statement. For example, if the witness was an investigating officer, it would be important to have re-read the investigation report and any related correspondence prior to the Tribunal hearing. While familiarity with key documents is important, it is not the witness's job to know and have read every document in the bundle. That is the role for your legal team.

To prepare for being a witness, we strongly recommend a witness observes at least part of a hearing before they give evidence.

When giving evidence, a witness is not expected to read out their witness statement. The Tribunal will have read the statement, and it will be taken as "read". The main part of a witness giving evidence is the Claimant or their representative asking questions and challenging the evidence of the witness. This process is called cross-examination. It can be a challenging process when Claimants represent themselves because they may ask irrelevant and inappropriate questions. The Respondent's legal team will provide witnesses with guidance and support on how to give evidence and strategies to manage irrelevant and inappropriate questions when giving evidence.

Witnesses are required to either give a non-religious affirmation or swear on a holy book that their evidence will be truthful. It is absolutely essential that a witness gives honest evidence.

Once a witness's evidence has concluded, they will be released by the Tribunal and are then free to leave or to remain in the hearing to observe the rest of the process.

Judgments

Employment Tribunal judgments are posted online.

Ideally, during the allotted time for the hearing, the judge and lay members will have chance to deliberate and deliver an oral judgment. If the judgment is given orally, the written reasons will be available only if the parties request it.

This is especially important should either party wish to appeal the decision as they will require the judgment to appeal to the Employment Appeal Tribunal (EAT) and to assess the viability of the appeal.

If an oral judgment cannot be given, judgment will be reserved and delivered sometime later in writing. The judgment will be sent to the parties at the same time and will be published online shortly after.

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A witness perspective

Rachel Tomkins – Divisional Director of Nursing Walsall Healthcare NHS Trust

We welcomed Rachel Tomkins, Divisional Director of Nursing from Walsall Healthcare NHS Trust who was recently called as a witness in a discrimination and an unfair dismissal claim against an NHS Trust.

Rachel offered a number of top tips for being an effective witness based on her recent experience:

1. Rachel highlighted the importance of doing everything possible to track down a document that you have been asked by the legal team to provide. She highlighted an example of a witness during their evidence referring to documents that had not been given to the legal team and were not therefore in the bundle. Rachel explained how the judge became frustrated with this and how it could have been interpreted that the witness was not being honest and open.
3. Know your witness statement inside and out, particularly where it references policies and letters. Rachel also explained the value of being familiar with the evidence of witnesses who come directly before or after you in the chronology of events. Rachel explained that knowing what evidence the investigating officer and the dismissing officer were going to give helped her to understand how her evidence fitted into the history of the case.
4. Rachel explained that as a nurse, she relies heavily on the NMC code of conduct and judges the rights or wrongs of a nurses' actions according to that Code. However, the Tribunal process made her realise that it is important not to rely on that too heavily and to make sure you understand why, from an employment perspective, action is being taken. In a Coroner's Court the questions are a lot more around clinical judgment as opposed to whether her actions were reasonable and justifiable in an employment context.

Rachel explained understanding and articulating the reason why decisions were taken helped her to explain why a decision was reasonable, justified and supported her credibility professionally. It supports that clarity in articulation.

How has your experience as a witness changed the way you would manage HR issues day to day?

Rachel explained the whole process was very emotional and tiring. She highlighted the concentration and the listening required throughout each day and referenced the anxiety it provokes.

Rachel described having reflected and debriefed with colleagues and how the experience had brought home the responsibility and accountability she has as a senior nurse and manager. The whole experience really brought to the forefront how her decisions can really make a difference whether rightly or wrongly. Consequently, she carries the experience with her and makes sure that, when colleagues bring things to her attention that she gives herself time to read everything, write down any questions or queries she has so that she can get answers before making decisions. She now won't be rushed into making a decision. Rachel described how she now ensures she refers back to policies before making decisions and how she has now got a clear understanding that she can never assume anything.

What became very clear through the process was how assumptions had been made about the employee's level of understanding, for example their belief about what a dismissal and its consequences were. She now pays more attention to ensuring the employee understands everything and following this up with clear correspondence which refers to the relevant policy or process.

Key takeaways and top tips

Jacqui Atkinson, Helen Badger, Alex Berkshire – Browne Jacobson LLP

Personal wellbeing is very important throughout the Tribunal process. It is exhausting and stressful and witnesses will need the support of their employer, before during and after an ET hearing.

It is helpful for us all to understand the scrutiny a Tribunal will apply to what might seem to be insignificant pieces of correspondence. All words should be chosen carefully as you will want to come across as a professional and compassionate manager even though processes can be quite difficult and combative.

Witnesses attending for the first time are often struck by the extremely close attention to detail and often recognise that there may be a need to reflect on the timing of the sending of correspondence as well as the tone and content.

One area worth considering is the extent to which your panel members for grievance or disciplinary hearings are trained. This can be in group training settings or bespoke case training. Quite frequently panel members are asked about this and in our experience having had the training before being involved in complex case management or panel hearings can be invaluable.

We are seeing a number of cases where Tribunal proceedings can feel quite challenging, involve several Executive Directors and may have Fit and Proper Persons implications if claims are successful and we explained that it is important to ensure that the corporate support from HR and legal are provided to those who are commissioning or case managing complex Tribunal cases.

Witnesses often feel disconcerted by the fact that they will be warned by a Tribunal Judge that they are unable to talk to their colleagues if their evidence is complete over the lunch adjournment, overnight or even for longer periods such as weekends and other adjournments so as to ensure that they are not discussing their evidence or the case. Witnesses should come prepared for that to happen and not take it as a personal slight.

Questions and Discussion

Any thoughts on the implications for a member of staff asked to be a witness by the claimant, in the context that they want to continue working for their employer? Potential conflict of interest between being honest in the hearing vs uncomfortableness of criticising an employer?

Employees are able to give evidence in support of another staff member and our advice to employers is that they should not try to prevent an employee from doing that. There is legal protection against detriment for employees who give evidence in discrimination claims. Even for other cases where they do not have legal protection, it does not portray a picture of a compassionate employer if it tries to prevent its employees from giving evidence to an impartial Tribunal. After the process, you may have divisions in teams, and it will be important for your HR team to think about the measures that can be taken to rebuild relationships.

Is it possible to reach a settlement before the hearing?

For NHS employers, there are stringent requirements that must be met before a case can be settled. An NHS body needs to apply to NHSE if it wishes to settle a case with a former employee, explaining why it is appropriate to settle that claim. In whistleblowing cases, the default NHS position is that the matters need to be litigated in public and heard properly and the application will therefore need to explain why that should not be the case in particular circumstances. We have had some cases where we are able to persuade that there were good reasons to settle a whistleblowing claim but it is not easy.

For our non-NHS clients, settlement is much easier to achieve, and it is something that we would recommend is considered all the way along the process. A claimant may have completely unreasonable expectations at the early stages, but those expectations will change significantly over the course of the process, particularly when faced with the prospect of a lengthy Tribunal hearing.

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