

# How To Help Your Barrister Win ET Cases

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# A good first impression – the pleaded case: Less is more, isn't it?

*A claim form sets out a legal claim. It is not a witness statement (although in this case both the Claim Form and Response in this case bear many similarities to a witness statement). Ideally, in a Claim Form, the author should seek to set out a brief statement of relevant facts, and the cause of action relied upon by the Claimant. The purpose of doing so is to allow the other side to understand what it is that they have done or not done which is said to be unlawful. It should be clear from the document (Claim Form) itself, within the brief summary of the relevant factual events, which facts are relevant to which claim, if more than one is advanced. The Respondent can then properly respond to that claim or claims. The Respondent can admit, not admit, or deny the facts and claims asserted by the Claimant and, where appropriate, set out a brief summary of the relevant facts the Respondent asserts occurred. Lawyers will, or should, understand, that each of the phrases 'admit, not admit, or 'deny' have a particular meaning in this context. The task in hand, when setting out a Claim or Response (certainly for an instructed lawyer) is to distil the relevant factual matters to their essential or key component parts.*

**C v D**

**KEAT/0132/19**

**/RN**

**Paras 12-14**

# C v D continued

*Doing that effectively will often be more difficult, and take more time, than simply reciting lengthy facts and then listing a series of claims. It is often, however, time well spent. Different considerations obviously apply where parties represent themselves and the documents are prepared by people who are not lawyers.*

*However, the basic principle remains good: the UKEAT/0132/19/RN -6- A B C D E F G H Claim form should set out what the claim is and a brief summary of the facts relevant to each particular claim. 13. This case in my judgment, is a paradigm example of that which can occur when a claim is not set out with sufficient legal precision. Valuable time can be lost. Costs can increase. There may be a delay in the case being heard, because the parties are not clear precisely what issues are in dispute or consider that they have inadequate time to meet the case that is advanced against them, once they have understood it. 14. Regrettably, I consider that some criticism must be levelled in this case at the manner in which the Claim and Response were set out*

# A good first impression – the pleaded case: Some general points [2]

## ■ Take good instructions:

- Speak directly to the relevant parties
- See original documents
- Keep on the look out for clues for what you have not been shown
- Don't be afraid to challenge your client

## ■ Only include relevant narrative. Ask:

- What part does the fact play in proving the claim?

## ■ A good narrative – clear, coherent, ordered, pathway to victory

# A good first impression – the pleaded case:

## The Particulars of Claim [1]

- Think carefully about what species of claims to include:

*Analysis of the facts of this case in terms of indirect discrimination has an air of unreality. The temptation to place a single series of events simultaneously in various different legal categories is, for lawyers at least, ever present...Claims will not necessarily be improved by the number of different ways they are pleaded.*

**Gan  
Menachem  
Hendon  
Ltd v De  
Groen  
[2019] IRLR  
410, para  
66**

# A good first impression – the pleaded case: The Particulars of Claim [2]

## ■ Matters to consider:

- Does the type of claim comfortably fit the facts? Weak claims take up the most effort
- Weighing the advantages of different claims:
  - Avoiding statutory caps
  - Lowering the burden on your client
  - Easier limitation periods
- Pleading in the alternative

# A good first impression – the pleaded case: The Particulars of Claim [3]

- The case for including everything – the complete picture

There is an obvious temptation in directing the complainant to select her ten best points; ... In many discrimination cases, however, this will not be consistent with the just determination of the claims made: the ET will have to consider the complete picture if it is to fairly answer the question whether there has or has not been unlawful discrimination on the relevant protected grounds.



**Tarn v  
Hughes  
[2018]  
IRLR 1021**

# A good first impression – the pleaded case: Grounds of Resistance

- Reflect on all aspects of the legal tests.
- Don't deny every constituent part of the legal test for the sake of it.
- Think carefully about pleading to cases that might be there
- Your back-up case may be needed – think carefully how to frame it.
- Polkey, Chagger and contributory conduct are your friends rather than a one-sentence afterthought.



# Getting the pleading upper hand: Request for further information [1]

*General principles affecting the ordering of further and better particulars include that the parties should not be taken by surprise at the last minute; that particulars should only be ordered when necessary in order to do justice in the case or to prevent adjournment; that the Order should not be oppressive; that particulars are for the purposes of identifying the issues, not for the production of the evidence; and that complicated pleadings battles should not be encouraged.*

**Byrne v The  
Financial  
Times Ltd  
[1991] IRLR  
417, para 18**

# Getting the pleading upper hand: Request for further information [2]

- Useful when pleading leaves gaps in understanding of other side's case.
- Can help to flush out weaknesses.
- Take care not to give other side opportunity to strengthen their own case.
- Sometimes it's better to use PH to deal with gaps rather than requests for further information – allows for three way process and careful management of the filling in exercise.

# Setting the path to trial: The List of Issues

*A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal.*

**Parekh v London Borough of Brent [2012]**  
**EWCA Civ 1630**

*That list of issues then constitutes the road map by which the judge is to navigate his or her way to a just determination of the case.*

**Scicluna v Zippy Stitch Ltd [2018]**  
**EWCA Civ 1320**

# Setting the path to trial: The List of Issues [2]

- A good list of issues provides a checklist of questions the ET must ask itself, covering:
  - Jurisdictional issues – eg time limits; employment status; continuous employment
  - Substantive legal issues dealing with the elements of the relevant legal tests;
  - Factual disputes relevant to determination of the claims of law.

# Setting the path to trial: The List of Issues [3] – some tips

- Ensure all extant bases of claim are listed as issues – forgetting can be costly
- Stick closely to the legal tests
- Note relevant paragraph numbers of the pleadings
- Opportunity for Respondents to force Claimants to nail colours to the mast e.g. comparators
- Whilst a neutral document, points of emphasis or understatement can play to your client's strengths and underplay their weaknesses

# Case management directions for trial:

## Some key ways to help your barrister

- Witness statements – exchange date well before trial
- List of witnesses – at PH stage count potential witnesses in rather than counting them out
- Listing for trial – err on the generous side to avoid trial going part heard or inadequate trial timetable

# The hearing bundle: Making the Judge and your barrister

- Start with a good, descriptive index **happy**
- Clear, visible, correct, continuous page numbers
- Ensure all pages are present & legible
- Agree typed versions of hard-to-read notes
- Keep out irrelevant documents & avoid repetition
- If possible, avoid starting trial by arguing over bundles or with each party providing their own bundle
- Provide a list of acronyms appearing in the document



# The hearing bundle: Making the Judge and your barrister happy [2]

## ■ Compile the bundle in a coherent order, ideally:

- ACAS certificates (if time is in issue)
- Pleadings
- Orders and directions
- Main body of documents (chronologically)
- Additional chronological sections for pay slips, medical records, comparator documents
- Relevant policy documents
- Inter partes correspondence (if relevant)
- Keep mitigation bundle separate



# Choose your witnesses wisely: The Claimant

- Often you will only call the Claimant
- The Claimant's partner/family can be useful witnesses
- Particularly:
  - On disability - substantial adverse impact on day to day activities;
  - Where they can give evidence of C's contemporaneous accounts to them of disputed facts
- Consider seeking witness orders. Dangerous at trial but can be useful for pushing settlement.

# Choose your witnesses wisely: The Respondent



- In cases about exercises of discretion, call the decision-maker – consider carefully whether there’s need for anyone else.
- In unfair dismissal cases, there’s usually no need for the investigating officer unless:
  - dismissing officer weak;
  - complex/technical investigation (perhaps);
  - weaknesses in dismissal and appeal decisions mean investigating officer is your best route to *Polkey*;
  - the wrongful dismissal claim benefits from calling them

# Choose your witnesses wisely: The Respondent [2]

- In discrimination cases, usually call everyone impugned, even bit-part players – never forget, the key is usually what motivated them
- Don't assume that lower grade staff will make poorer witnesses – the reverse can often be true
- There can be a benefit of calling a witness who can only speak to one or two issues. It can be difficult to undermine a witness who only deals with a discrete point.
- Not always the more the merrier: choose wisely



# Telling the Tale -The Witness Statement [1]

- Take a step back, why are you calling this witness and what do they need to cover? Checklists can help.
- Remember Tribunal's lack of pre-existing knowledge – avoid jargon
- Don't just repeat the contents of minutes of meetings (pull out key points you want to highlight)
- A clear narrative sets the unconscious bias in your favour
- Spacing and page references make a happy Judge
- Where possible use a witness's own words (from documents or instructions) and avoid using words a witness doesn't know

# Telling the Tale -The Witness Statement [2]



- Check, check and check again the accuracy of the statement
- No unnecessary inconsistencies between statement and documents
- No unnecessary inconsistencies between your witnesses
- Where there must be inconsistency, work out why and consider how to deal with it: explaining it away or hopeful silence
- Ensure witness internalises their statement and relevant documents
- Ask for comments on the other side's statements – it helps counsel's prep and helps the witness in thinking about the case

# Passing the Baton - The Brief [1]

- Repeating the ET3 is unnecessary
- Focus on the key issues or disputes
- Gossip can be helpful! Internal politics, personality clashes, suspected motivations etc can assist with the case directly or in managing the client relationship. Add detail by phone if sensitive.
- Who else is coming to the hearing and when/where have you asked them to meet the barrister?
- When and how are the bundles going to the Tribunal?



# Passing the Baton - The Brief [2]



## ■ Prospects

- What do you think of the case? If you have concerns or think there are weaknesses, please say so.
- Are any witnesses likely to be particularly good or poor?
- What information have you passed on to the client about your views on prospects?
- Are there reasons why any concerns the barrister has, should not be shared with all who attend the hearing?
- If you have a prospects and remedy document which has been sent to the client, send it to Counsel too.

# Passing the Baton - The Brief [3]



## ■ Settlement

- Have there been any offers (by either side) in this case so far?
- How will any settlement be funded?
- What are the client's motivations in bringing/defending this case?
- Does this employer have any broader policy, attitude, or history to settling ET claims i.e. maybe a union in the background?
- What is the client's view on settlement in this case and is it on the cards?
- What are the parameters and who are the key decision makers?



# The Conference [1]



## Pre-Pleading

- Appropriate in largest cases or where:
  - Assistance needed in selecting C's best points;
  - Complex area – TUPE, Equal pay etc
  - Narrow and early window of settlement
  - The wording of the pleadings is of particular significance:
    - i) Indirect discrimination;
    - ii) Arising from/reasonable adjustments;
    - iii) Justification defence.
- The more information (disclosure and instructions) available the better

# The Conference [2]

## Pre-Witness Statement Exchange

- Appropriate in most larger cases
- Particularly when issues arise as to the contents of statements or which witnesses to call
- Where possible have draft statements before the conference
- Consider whether to have further conference post exchange of statements

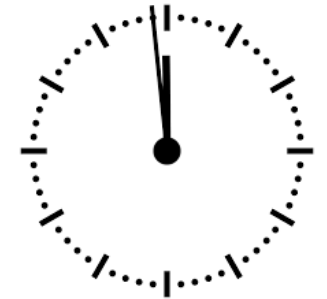
# The Conference [3]

## Post-Witness Statement Exchange

- Consult with Counsel about the potential length
- Aim for 1-2 weeks before the hearing
- Allows time to find and include documents, and/or to negotiate
- Aim to have the comments of witnesses on the other side's statements
- How long have the witnesses been told the conference will last?
- How much guidance is needed on Tribunal procedure?



# Last minute developments



- Don't worry – something crops up in almost every case
- Problems are often avoided by a prompt consideration of the other side's witness statements:
  - Ask for comments from your witnesses on any issues
  - Do the statements lead to further disclosure?
  - Supplemental statement from existing witness?
  - Statement from new witness?
- Tribunals are relatively relaxed but things are easier if raised earlier
- Consider how adding documents may affect the electronic bundle

# Team Work - Attendance at the Hearing



- Do come if you can
- Bring some Post-It notes. Don't be afraid to pass on messages
- Will a hearing note be useful or not? Usually will be – particularly during cross-examination - but check
- Try and keep tabs on what is covered in cross examination to help identify if any area is missed out

**Any Questions?**