Employment Tribunal process: everything you need to know

The Employment Tribunal process made simple

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LEGAL EXCELLENCE

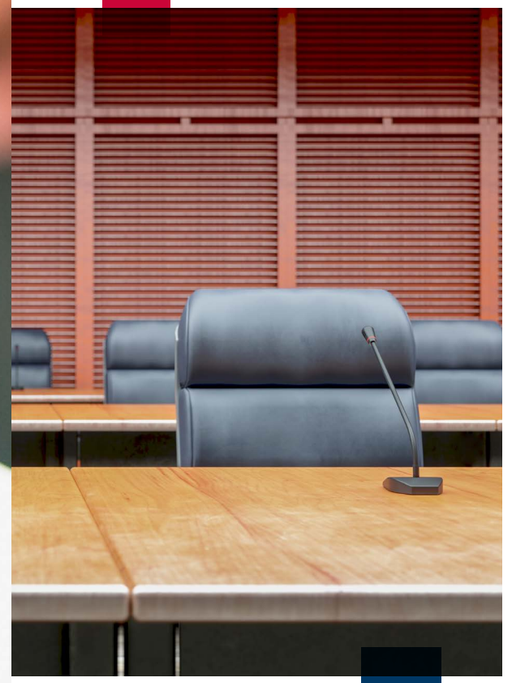
Employment Tribunal process

Introduction

Bringing or responding to an Employment Tribunal claim is a lengthy process and Tribunals are overwhelmed due to COVID-19 and other changes.

Our guide to the Employment Tribunal covers everything you need to know including the Employment Tribunal process, opportunities for settlement, Tribunal costs and what is required from you at each stage.

Our Employment team are experienced in representing clients against claims such as unfair dismissal, discrimination, whistleblowing, breach of contract and TUPE.



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CHAPTER 1

MAKING AN EMPLOYMENT TRIBUNAL CLAIM

Making an Employment Tribunal claim

The majority of claims will involve issues that have been considered via one of the employer's formal internal procedures, whether that is a disciplinary or capability process that has been started by the employer, or a formal grievance that has been raised by the employee. Investing time in managing these issues well internally can significantly reduce the risk of a claim occurring.

For disciplinary or capability processes, this includes ensuring that the employer carried out a full investigation, allows the employee a full opportunity to respond to the allegations raised against them and that decisions are taken by someone who is seen as sufficiently senior and impartial to make a fair and informed decision. For a grievance process, it is important that the employer considers ways to resolve the situation, even if the grievance is not upheld, for example offering mediation or appropriate support to the employee.

If an employee appeals the outcome of an internal process, this can be a good early indicator that they may be considering bringing an employment tribunal claim. The internal appeal process is equally a good opportunity for employers to identify and address any weaknesses in their process up to that stage, and to demonstrate that they have considered and addressed the employee's concerns. Seeking legal advice at the appeal stage can help employers to manage the appeal process to both minimise the risk of a claim being submitted and put themselves in the best possible position to defend a claim if it is made.

Before an employee can bring a claim the first step they need to take is to contact the ACAS Early Conciliation Service. They must do this within 3 months less one day of their dismissal or the act that they are complaining of. Early conciliation is designed to give both employees and employers an opportunity to try and resolve a dispute before the employee's claim has been formalised.

The process is started by a simple form that the employee completes online. It is then assigned to an ACAS officer who will contact the employee to discuss the matter further.

If the employee wishes to attempt to conciliate, the ACAS officer will then contact the employer to discuss the potential for settlement. This conciliation period can last up to 6 weeks. The advantage of early conciliation is that the ACAS officer can act as an impartial go-between. This can be particularly useful when an employee has not had the benefit of legal advice, and may have unrealistic expectations as to the value of their claim, or what the Employment Tribunal could ultimately award.

If either party doesn't want to conciliate or the conciliation fails, the employee is then sent a certificate with a reference number that they can use to bring a claim. Usually the employee has one month after the conciliation ends to submit their claim.

The Tribunal process is started by the employee submitting what's called an ET1 form. This needs to be completed electronically and submitted via the Tribunal's website.

The claim form requires the following details:

- Employee details
- Employer details
- ACAS early conciliation number
- Details about the employee's employment such as salary and start date

Details of the claim

Although the claim form appears very simple, the employee needs to ensure that the legal basis of their claim and the facts and events that they are relying on are clear. This is far more than just a tick box exercise.

Once the claim has been submitted the next steps are:

1. The Tribunal carries out a preliminary review to ensure that the claim can be accepted
2. The Tribunal will check it has been submitted within the required time limits
3. The early conciliation reference is checked to make sure the details provided are correct
4. It will then be sent to the employer by the Tribunal

CHAPTER 2

SUBMITTING A RESPONSE AND NEXT STEPS AS AN EMPLOYER

Submitting a response

Once a claim has been accepted the Tribunal will send an acknowledgement of claim and a copy of the claim form to the named employer. This will be sent by post to the address given by the employee. The Tribunal will also include a copy of the ET3 response form that needs to be completed.

The employer needs to provide its defence within 28 days of the claim being sent to them, otherwise they may lose the right to defend the claim. The response can be submitted online or by email to the relevant Tribunal.

The Tribunal's response form itself appears relatively simple. However, in addition to completing the form employers will also need to attach a much more detailed document setting out their full grounds of response.

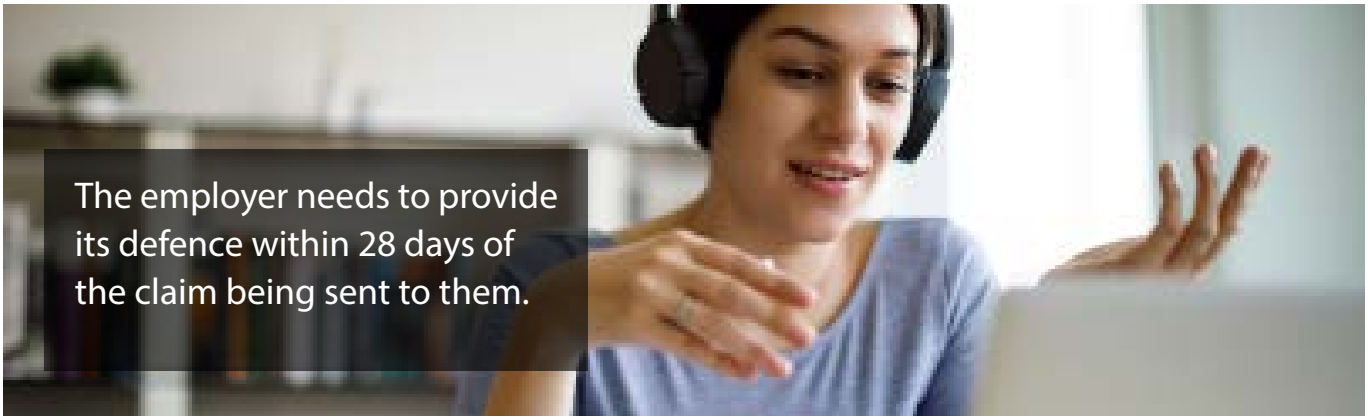
The ET3 should set out the employer's version of events and provide an explanation for any facts or circumstances that the employee has relied on in in the ET1. There will usually also be various legal points to raise. Most employers appoint a legal representative to respond on their behalf for this reason.

Once the Tribunal has accepted the employer's ET3, it will send a copy to the employee, who is known as the claimant. The Tribunal will also send an acknowledge of response to the employer, who is then known as the respondent.

An employment judge will review both the ET1 and the ET3.

They will then either send both parties a written "case management order", setting out a timetable of things to be done to prepare the case for final hearing, or set a date for a "preliminary hearing" to take place, either by telephone or at the Tribunal itself, to decide the appropriate timetable after hearing from the parties' representatives. Preliminary hearings are usually dealt with via telephone. Preliminary hearings can also be arranged to consider specific points of law ahead of the main hearing, for example whether the legal definition of disability has been met.

In most cases, the order for directions will set a timetable for the parties to exchange documents and witness statements and agree a bundle of documents to be used at the final hearing. It will also confirm how many days the Tribunal will set aside for the final hearing and when this will take place.



CHAPTER 3

DEFENDING A CLAIM AND PROVIDING EVIDENCE

Defending a claim

Both parties will need to give witness evidence to support their case. For the employer this is usually the individuals that made key decisions, for example the employee's manager or the individual that chaired the disciplinary hearing. It is common for the claimant's only witness to be themselves.

Both parties also need to go through a process called disclosure. This is where parties prepare lists of all documents that are potentially relevant to the case and provide these to the other party.

Once lists are compared, copies of documents must be swapped so that both parties have everything relevant.

Both parties have a duty to disclose all relevant documents, even those that are not helpful to their case or response.

All the relevant documents will then be included in the documents bundle used at the full Tribunal hearing, which the parties will be required to agree.

The employee will be required to produce a schedule of loss, setting out in detail the compensation that they are claiming, with supporting documents. In most cases, the employer will then provide a counter schedule of loss, setting out where they disagree with the employee's calculations and on what grounds.

CHAPTER 4

EMPLOYMENT TRIBUNAL SETTLEMENT OPTIONS

Settlement options

In addition to the cost of bringing or defending an employment case, there are a variety of additional factors, such as the time it can take up, the stress it can cause, the risks and uncertainty of litigation and the impact of publicity, that may make settlement an attractive option for either party.

The vast majority of employment cases do in fact settle before final hearing. Settlement is usually achieved via the ACAS service, which continues to be available to the parties during the life of the case.

Settlement usually involves the payment of an agreed sum of compensation to the employee and, in return, the withdrawal of the claim from the Tribunal and an agreement that both parties will keep the terms of the settlement confidential. In some cases, settlement can include non-financial aspects, such as agreeing the wording of a reference letter.

CHAPTER 5

PRELIMINARY HEARINGS

Preliminary hearings are commonly now listed as a matter of course, particularly for more complex claims that are brought in the Employment Tribunal, for example claims including a whistleblowing or discrimination element.

Many employers are unfamiliar with the purpose of preliminary hearings or what to expect. We've set out below a guide to the preliminary hearing process to answer some of employer's frequently asked questions on this topic.

What are preliminary hearings?

Preliminary hearings now bring the two previous categories of initial hearings – case management discussions and pre-hearing reviews into one.

Preliminary hearings are most commonly used to allow the Employment Tribunal to identify the issues in the case, and set case management directions to enable the parties to get the case ready for the final hearing.

For example, in a case where the employee's claims are unclear from the ET1, a preliminary hearing will often be used to clarify the basis of the employee's claim, so the Employment Tribunal and the employer understand the claims faced.

Preliminary hearings can also be arranged for the Employment Tribunal to consider and make a decision on initial issues in the case, for example to determine whether the employee is disabled or whether elements of the employee's claim are out of time.

Does someone from the company need to attend?

In most cases Preliminary Hearings take place via telephone. The Employment Judge will not expect anyone from the company to attend the telephone hearing and this would be unusual. The matters will be discussed by the parties' representatives where they are represented. Often the employee will represent themselves.

Where a preliminary hearing is listed to decide a specific issue, for example whether the employee is disabled, the hearing will be conducted at the Employment Tribunal in person or via a remote video hearing. Again there is usually no obligation for someone for the company to attend, unless witness evidence on any points will be required, which you would be informed of in advance. However, if you would like to do so you may attend and this can be a useful opportunity to gain an idea of how Employment Tribunal proceedings are run.

What preparation is needed for preliminary hearings?

Prior to the preliminary hearing the Employment Tribunal will usually require both parties to complete an agenda for the hearing. This is a standard document which is essentially a list of questions about the claim, for example, what the claim is for, what compensation the employee is seeking and what preliminary issues there are that need to be decided, for example whether the employee is disabled. It then also asks both parties to suggest what directions are needed to get the case ready for a final hearing, for example when disclosure of documents should take place, the number of witnesses and when witness statements should be exchanged and how long the final hearing should be listed for.

You are therefore likely to be asked for input on these issues and to provide practical information such as any dates that witnesses are not available to attend a final hearing.

The parties are encouraged to agree the agenda where possible. We will therefore usually recommend that we send a draft of the agenda to the employee or their representative for them to comment on, and ideally confirm their agreement to in good time ahead of the preliminary hearing.

In most cases it will also be helpful for the parties to agree a list of the legal and factual issues in the case that the Employment Tribunal will need to decide at the final hearing.

What is the benefit of a preliminary hearing?

Preparing for and attending a preliminary hearing is generally useful to progress the case. The employee will be required to provide a greater understanding of the issues in their claim if this has otherwise not been clear. It may become apparent that some issues can be resolved without the need for a final hearing, for example if the employee concedes that aspects of their claim cannot proceed.

Although the purpose of a preliminary hearing is not for the Employment Judge to consider the merits of the case, they will sometimes make an "off the cuff" remark or approach matters in a way that gives us an indication of how parts of the claim will be viewed. They can also be useful to give the employee an understanding of the Employment Tribunal process and the tests that they will need to satisfy to succeed in their claim.

Where the preliminary hearing takes place in person, discussions after the preliminary hearing with the employee can also be useful where appropriate to gauge whether there is any benefit in entering into without prejudice discussions.

CHAPTER 6

PREPARING FOR AN EMPLOYMENT TRIBUNAL HEARING

Preparing for a Tribunal

There are now three options for the format of an Employment Tribunal hearing:

- A wholly remote hearing
- A partly remote hearing
- An in-person hearing

You will know well in advance if you are attending in person or remotely. Remote hearings are becoming more common for simple unfair dismissal cases and money claims which can be heard by a single employment judge.

In person hearings are more commonly used where one of the parties is not represented or the issues involve discrimination.

If you are attending remotely you will be told to test the technology in advance and asked to read the guidance on remote hearings. You will need a suitable quiet environment where you will not be interrupted or overheard to take part in the hearing.

You will be sent a copy of your witness statement and the agreed bundle of documents beforehand. It is helpful to have a second screen that you can view these documents on whilst giving evidence.

If you are attending in person you will usually be asked to arrive before 10am on the first day of the hearing. You will need to go through security at the Tribunal building, which will sometimes be attached to the normal court or could be a separate office building. Again, yo will wish to read the Tribunal's guidance on what to expect at the Tribunal hearing.

There will be a clerk assisting the judges who will assist with the administration on the day and will ask you to sign in and give your details.

Be prepared for a lot of waiting around.

The Tribunal will require some reading time and there may be other preliminary matters which they wish to attend to for you to give your evidence.

CHAPTER 7

HOW EMPLOYMENT TRIBUNAL JUDGMENT WORKS

Tribunal judgment

Employment judges can decide unfair dismissal cases alone.

For cases involving discrimination or whistleblowing issues, employment judges are joined by 2 lay members, traditionally one from an employer background, such as HR or business, and one from an employee background, such as a trade union.

The non-legal members' role is similar to magistrates in that there is no requirement for legal training.

They will be led by the employment judge in terms of the legal tests, however they may ask questions and fully participate in proceedings and the ultimate decision.

Before the hearing the parties will have agreed a list of the legal issues the judge will need to decide. They will have also exchanged witness statements and agreed a bundle of documents that will be referred to during the day and will include the claim form and response.

At the start of the day the parties will discuss any administrative matters, like the order of witnesses.

They may make brief opening submissions about the case. The Tribunal will then move to hear the witness statements. The order of witnesses will be agreed in advance.

Once the Tribunal has heard all of the evidence, both parties are asked to make closing submissions. These set out the parties legal arguments and provide an opportunity to highlight key points to the employment judge and any lay members.

The Tribunal will then adjourn to reach a decision. Where time allows, the parties will be called back to the Tribunal either later that day or the following day to hear the judgment verbally. This will be read out to the parties in the Tribunal room, together with the Tribunal's reasons for the decision.

Where there is insufficient time for the Tribunal to reach a decision in the hearing slot, the Tribunal may instead adjourn and provide a written judgment. This will be sent to the parties in writing at an unspecified later date - usually via email.

If the employee's claim is upheld in full or in part, the Tribunal will then go on to reach a decision as to the remedy, or the compensation the employee will be awarded. This can either be decided in the remaining time allocated for the hearing, or a separate remedies hearing will be listed.

CHAPTER 8

WHAT TO EXPECT WHEN GIVING AN EMPLOYMENT TRIBUNAL WITNESS STATEMENT

Giving evidence at a Tribunal

Employment Tribunals are less formal than the High Court and County Courts. For example, no-one wears wigs or gowns. However, they are still a formal setting. You should always address the judge as Sir or Madam.

If you are at a hearing in person you will be asked to come to the witness table.

You can't bring documents to the table and will only have the witness statements and agreed bundle of documents.

If you are at home attending remotely you should also have no other documents with you.

You will be asked to swear an oath or to give an affirmation that you will tell the truth.

Once you are under oath you cannot communicate with anyone involved in the case until you have finished your evidence. For example, if you are attending remotely, you should not send or receive messages with others until your evidence has ended.

Many witnesses are anxious about what to wear. It is best to be neat and smart, if you are representing the company you will usually be asked to wear a business dress or your work uniform. Bear in mind that even when you are not giving evidence yourself you are on show to the Tribunal during the hearing.

Witness statements are taken as read in the Employment Tribunal, so you won't have to read your statement out – you will just go straight into being cross examined.

Cross examination is the low point of a party's case, and is designed to focus on the weakest parts of each witness's arguments. The other side will ask you questions about your witness evidence.

These are usually closed questions, designed to limit you to a yes or no answer. The judge and any lay members may also ask questions. They may refer you to documents that contradict what you have said, or suggest that what you have said in your witness statement is incorrect.

After the cross examination there is the option of a brief re-examination, which is where your representative can ask some limited open questions to try and fix any damage caused during cross examination. Re-examination tends to be brief if it occurs at all.

CHAPTER 9

TIPS FOR GIVING AN EMPLOYMENT TRIBUNAL WITNESS STATEMENT

Ensure you are familiar with your statement

The starting point is to be as familiar as possible with the case and the evidence you are providing. When agreeing your witness statement ensure that this is in your own words and that you are comfortable it covers everything relevant.

Whilst you are not expected to have memorised your witness statement or the documents, ensure you read through everything in advance so it is fresh in your mind. This includes the bundle of documents prepared for the hearing, which you will be referred to whilst giving your witness evidence.

> When you agree your statement, make sure that you are comfortable with it and it is in your own words.

If there's something not mentioned, or a document is missed out that you think is relevant, make sure the solicitor is aware of it.

Invest the time to ensure your statement is your own and you are happy with it. You will not be able to refer to a new document or piece of evidence on the day.

Be open, honest and calm

It's really important to act respectfully at all times. Try not to react loudly or obviously to evidence you disagree with. Instead, note the point and pass this on to your representative discretely.

Try not to second guess things too much. It is your job to give your evidence and say what you recall. It is your representative's job to present your case. Try and stay calm, take your time and appear open and honest.

If you don't remember, explain this or refer to the documents if you can to jog your memory. However, make sure you do answer the question – otherwise you may appear evasive.

If the question asks for a yes or no answer but you need to clarify your answer, give that answer and then explain if you need to but try and keep it simple and to the point.

It can be helpful to look at the representative asking you the question when you are asked the question, but then give your answer while looking at the judge (and/or Tribunal members).

The judge and Tribunal members will ultimately be deciding your case so you are presenting yourself to them. This technique also has the effect of breaking the flow of the discussion and reminding yourself that you are not in a conversation.

CHAPTER 10

EMPLOYMENT TRIBUNAL APPEALS

Either party can appeal to the Employment Appeal Tribunal (EAT) if they believe a legal mistake was made by the Employment Tribunal when it reached its decision.

For example, you may be able to submit an appeal if you believe that the Tribunal:

- got the law wrong;
- did not apply the correct law;
- had no evidence to support its decision;
- was unfairly biased towards one party; or
- did not follow the correct procedures and this affected the decision.

There are strict rules governing the submission and consideration of appeals.

It is not enough that a party is unhappy with the decision. The Employment Appeal Tribunals role is to ensure that the law was correctly applied and they will not usually deal with questions of fact.

In order to appeal the party will need to ask the Tribunal to provide written reasons for its decision, if these have not already been provided. They will then need to submit a notice of appeal to the EAT, usually within 42 days of the decision.

The EAT will carry out an initial review of the notice of appeal (known as the sift stage) and decide whether it meets the criteria to proceed or should be rejected (for example because there are not adequate grounds to appeal). If it can proceed, the EAT will set directions for the preparation of the appeal case and ultimately an appeal hearing will be arranged.

Either party can continue to appeal to the higher courts if there continues to be a dispute on a point of law and the EAT agrees that permission to appeal should be granted. In this case, appeals will be submitted next to the court of Appeal and finally to the Supreme Court. This usually only occurs on new points of law.

CHAPTER 11

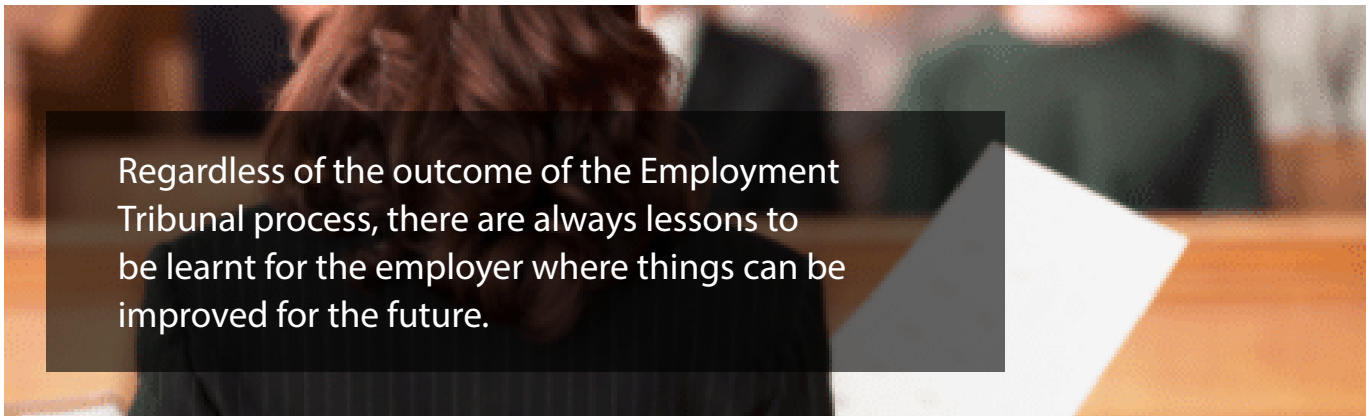
LEARNING POINTS AND IMPROVING BEST PRACTICE

Regardless of the outcome of the Employment Tribunal process, there are always lessons to be learnt for the employer where things can be improved for the future. This could be improving outdated procedures, implementing training for managers, or altering the messages that you communicate to employees about what behaviour is considered to amount to gross misconduct.

Often, this may be resolving to put more importance on ensuring managers have the skills to manage disciplinary and performance issues effectively at both an early stage, and when they escalate to the formal process. It may also be ensuring that internal written correspondence, for example, emails between managers and with HR, use appropriate language.

At the end of every Tribunal claim, we will look with you at the learning points that can be taken from the process and how we can help ensure that you prevent similar issues from occurring.

If you have any concerns regarding an upcoming Tribunal hearing or advice on best practice to help avoid claims being made please contact a member of our Employment team.



CHAPTER 12

EMPLOYMENT TRIBUNAL FREQUENTLY ASKED QUESTIONS

Q: Can you recover costs if you successfully defend a claim?

A: It is unlikely that, even if an employer successfully defends the claim, the Tribunal will make an order requiring the employee to pay their legal costs, or vice versa.

The Employment Tribunal will only order that one party pay the other party's costs in limited circumstances, usually where it considers that a party or their representative has acted "vexatiously, abusively, disruptively, or otherwise unreasonably", or that they have been "misconceived" in bringing or defending the proceedings.

Q: How long does an Employment Tribunal take?

A: Ideally the Employment Tribunal process should take 6 – 12 months from start to finish. Unfortunately, at the moment the Employment Tribunal system is struggling to cope with the volume of claims it has received, coupled with the fact that it has faced closures and changes due to COVID-19.

It is now taking several months for a preliminary hearing to be listed, and cases now are being listed for final hearings in spring 2022. It is therefore likely to take over 1 year for a case to be heard in the Tribunal.

Q: What happens at an Employment Tribunal?

A: The Employment Tribunal's role is to determine employment disputes between employees and employers. They can determine a set list of potential claims from unpaid wages to discrimination claims. Claims are ultimately decided by the Tribunal at a final hearing at which both parties will be required to attend and the Tribunal will hear witness evidence and review the relevant documents.

They will also hear legal arguments. At the end of the hearing, either on the day or in writing the Employment Judge will provide a judgment determining whether the employee's claims are successful and if so the amount awarded. There are several different stages which the parties need to go through to prepare a case for a final hearing which is set out in further detail in our guide to the Employment Tribunal.

Q: How much can an Employment Tribunal award?

A: Awards vary depending on the type of claim brought and the specific circumstances.

For an unfair dismissal claim the award is split into two parts, the basic and compensatory award. The basic award is calculated in the same way as a statutory redundancy payment, based on the employee's weekly pay, length of service and age, with a cap on weekly pay which is adjusted yearly.

The compensatory award is then based on the employee's loss of earnings until they find another role, subject to a cap of 52 weeks' pay or a set cap (currently £89,493). Deductions can also be made, for example if an employer successfully demonstrates that the employee contributed to their dismissal by their conduct.

In a discrimination claim the amount of the compensatory award is uncapped and further awards can be made to reflect injury to feelings.

Speak to an expert

If you are unsure of any of the steps or would like to discuss the case you are involved in do pick up the phone and speak to one of us.

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