TELLING THEM WHY *they've* WON *or* LOST

What constitutes a properly constructed Employment Tribunal decision? PETER CLARK *gives some guidance on drafting extended reasons.*

What follows is a personal view as to how an Employment Tribunal chairman may best express the reasoning of the tribunal to support its decision, based on my past five years' experience sitting in the Employment Appeal Tribunal and before that 25 years in practice appearing in employment tribunal cases. I have sought to draw on guidance given by the Court of Appeal and the Employment Appeal Tribunal where appropriate.

Reasons for employment tribunal decisions may be given in summary form or, where requested by a party or required by statute, e.g. in discrimination cases, or where necessary to sufficiently explain the decision, reasons will be given in extended form. This article is principally directed to good practice in drafting extended reasons.

Just as in any properly constructed judicial decision, I have sought to structure these thoughts in some sort of ordered sequence.

Identifying the issues

Employment tribunals frequently have to deal with unrepresented parties. Originating applications prepared by applicants in person rarely reflect the finer touches of a 19th century Chancery pleader. They feel wronged by their opponent but will not always make clear precisely what cause or causes of action fit the facts which they seek to prove. Hence the claim of 'constructive dismissal' often seen in box 1 of the Form ET1 is in reality a claim of unfair dismissal, the dismissal consisting of resignation in response to the employer's repudiatory breach of the contract of employment. In such a case, or indeed in any case in which dismissal is denied by the employer, it will be necessary to determine the ambit of the employment tribunal's enquiry at the hearing. Often there will have been an earlier direction that the question of dismissal be taken as a preliminary issue. If so, well and good. The point is that both the parties and the employment tribunal should know precisely what issues arise for determination at the hearing.

Take a case of multiple complaints. The applicant complains, following his summary dismissal by the respondent, of 'unfair dismissal, breach of contract, holiday pay'. That cryptic shopping list may give rise to a number of separate issues.

First, unfair dismissal: has the respondent shown a potentially fair reason for dismissal? He contends that the applicant was guilty of gross misconduct. If the respondent establishes that was his reason for dismissal, the employment tribunal must then decide whether he acted reasonably in dismissing for that reason. If the dismissal is found to be fair, that part of the complaint fails, but what if it succeeds? Will the employment tribunal go on to deal with the question of contribution? If so, the parties should be told so at the start of the hearing, so that they may lead the evidence relating to that issue and make submissions at the end.

The issue of contribution raises factual questions as to the applicant's conduct which differ from the employer's belief for the purposes of a finding on fairness. Similarly, the issue as to whether the applicant was wrongfully dismissed at common law (the breach of contract claim) raises a factual question as to his conduct.

Finally, 'holiday pay'. Is that a claim of unauthorised deductions from wages or breach of contract or both? Is there an issue as to the express or implied term of the contract as to whether the applicant is entitled to pay in

lieu of holiday not taken during the employment? Alternatively, is the question simply one of fact, how much holiday was taken during the last holiday year or part of the year; how much holiday was he permitted under the contract?

Finding the facts

This is the prime task of the employment tribunal. What is not required is a recitation of the evidence. What matters are the tribunal's findings of fact. It is not necessary to decide every disputed question of fact, however tangential. Only those facts which are material to the employment tribunal's ultimate conclusions. However, all material findings of fact must be made. Failure to resolve a relevant factual issue may amount to an error of law, requiring a further employment tribunal hearing following appeal. An unnecessary cause of added delay and expense all round.

Try to avoid the 'stream of consciousness' school of decision-writing. What is required is an orderly sequence of events, usually chronological, which incorporates those facts which are either not in dispute or as found by the employment tribunal.

The practice of making a blanket statement: 'Where there is a conflict of evidence we prefer the evidence of the applicant/respondent's witnesses' without more is not to be encouraged. It is good practice, in telling the parties why they have won or lost, to explain the thought process that has led the employment tribunal to prefer the evidence of one side to the other on particular issues. It should not be forgotten that on some issues the evidence of one side may be preferred, on other issues, that of the opposing side.

Setting out the law

It is good practice to set out the relevant statutory provisions considered by the employment tribunal. Employment tribunals are creatures of statute. Their jurisdiction is governed by statute. It is as well to identify all relevant provisions that bear on the issues in an individual case. Increasingly, the employment tribunal's decision-making is directed by European Community law. Where necessary, reference should be made to applicable guidance from the European Court of Justice.

As to case law: it is my conviction that this area of law is over-reported. The ICR and IRLR publications must be filled with cases every month. Employment Appeal Tribunal decisions are now published on the Employment Appeal Tribunal website. It follows that in many instances it will be possible for the advocates to find conflicting Employment Appeal Tribunal decisions supporting diametrically opposed submissions.

My experience is that apart from the most obvious cases, such as *Burchell* and *Great Britain China Centre*, employment tribunals do not generally embark on a detailed analysis of the cases, unless a particular point arises on authorities cited to the employment tribunal. I endorse that practice; what matters is that the employment tribunal clearly identifies the *principles* of law applied to the facts as found in each case.

Summarising submissions

It is helpful for the employment tribunal to summarise the rival contentions of the parties in argument, not least so that on appeal the Employment Appeal Tribunal can see what points were or were not taken below. The rules on permitting a new point to be taken for the first time on appeal are fairly strict. It is also desirable that the parties see from the employment tribunal's reasons that their arguments were considered and why they were accepted or rejected.

Stating the conclusions

Having set out the issues, the findings of fact, the law and the parties' submissions, the critical task for the employment tribunal is to put them all together so as to state the employment tribunal's conclusions on the disputed issues and how those conclusions have been reached.

It is inevitably at this point that an employment tribunal's reasons are most vulnerable to attack. What is

required to be shown is a logical process of reasoning which leads to a permissible conclusion.

Appeals to the Employment Appeal Tribunal and beyond are on points of law only. Unless there is no evidence to support a finding of fact those findings lie solely within the judgment of the employment tribunal. There will be occasions where the higher tribunal or court takes a different view of the law. That is an occupational hazard which all of us must bear with as much fortitude as we can muster. What is to be avoided is the case where an employment tribunal decision is set aside because the reasons are inadequate to explain their conclusion. That leads to unnecessary expense and delay to the parties.

Majority decisions

There will be occasions when the members of the panel cannot agree on the result. It should be remembered that the obligation to write the employment tribunal reasons rests with the chairman. There is an understandable tendency, particular if the chairman is in the minority, for him or her to leave it to the lay members who dissent to write their own dissenting judgment. That is to be discouraged. It is the chairman who has the expertise in writing the employment tribunal's decision. Even if he disagrees with his colleagues, it is his duty to ensure that their views are properly expressed in the decision.

Interlocutory rulings and orders

During the course of a substantive hearing, procedural questions may arise. Where ruling is made on such matters as application to amend, the admissibility of evidence, the question of witness orders or an application for disclosure, it is helpful if the employment tribunal's rulings and short reasons for that ruling are incorporated in the reasons for the decision.

The position with interlocutory hearings is less satisfactory. Under Rule 12 of the 2001 Rules, there is no requirement to provide either extended or summary reasons for an interlocutory order. However, it is good practice for a chairman to explain why he or she has granted or refused a postponement application or an application for discovery or witness orders. This follows the general practice, following a directions hearing, of the chairman setting out the orders made on that occasion, with short reasons showing why disputed issues were decided as they were.

Disruptive behaviour

Not every litigant treats the employment tribunal with the respect which it deserves as an independent judicial body. In the extreme case such behaviour may lead to a strike-out order under Rule 15(2)(e) of the Employment Tribunal Rules of Procedure 2001. Short of that, consideration may be given to a costs order under Rule 14(1).

In such cases, it is helpful to give a detailed account, with timings of the behaviour to which exception is taken. Make a note of the times of a party's attendance if he is persistently late for the hearing. Identify precisely any disruptive behaviour in the form of shouting or refusal to accept the chairman's rulings and the chairman's reaction in dealing with that behaviour, particularly any warnings as to that party or his representative's future conduct in the proceedings.

Adequacy of reasons

The foregoing represents a basic and practical guide to the main ingredients in a properly constructed employment tribunal decision. It is not and cannot be a comprehensive check-list for every possible eventuality.

Employment tribunal decisions are not designed to be 'an elaborate formalistic product of refined legal draughtsmanship'. What is required is an outline of the story, a summary of the employment tribunal's basic factual conclusions and a statement of the reasons leading the employment tribunal to reach the conclusions which they do on those facts. The parties are entitled to be told why they have won or lost. *Meek v Birmingham District Council* [1987] IRLR 250.
It is as simple as that.

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