

EMPLOYMENT TRIBUNALS (SCOTLAND)

GUIDANCE NOTE TO ACCOMPANY AGENDA FOR PRELIMINARY HEARING (Claimant) IN A PUBLIC INTEREST DISCLOSURE ('WHISTLEBLOWING') CLAIM

The preliminary hearing (PH) that has been fixed will involve a discussion between an Employment Judge (referred to in the remainder of this guidance note as the "Judge") and the parties and/or their representatives about the case(s), held in private so that it can be full and frank. You will have the opportunity to ask the Judge anything about how the case will be dealt with and the procedure that will be followed. However the Judge cannot give legal advice.

The purposes of the PH are:

- (1) To identify the nature of the case (i.e. the type of complaint(s) being made and the law that applies).
- (2) To work out what issues need to be dealt with in the case.
- (3) To decide how those issues are to be resolved or decided by the Tribunal.
- (4) To make orders to ensure that the proceedings are as fair, effective and efficiently conducted as possible.
- (5) To list the case for a hearing.

What is meant by "the issues" is simply the questions the Tribunal must answer in order to decide whether or not a claimant should win his or her case. (This is often referred to as a claimant being "entitled to a remedy"). It is important to identify the issues at an early stage so that both parties and the Tribunal understand what has to be addressed and about what matters evidence needs to be led.

Having identified the type of complaint(s) being made and the issues which need to be resolved, the Judge will consider whether there are any legal matters that need to be decided at a further preliminary hearing or whether the case can proceed to a final hearing.

The Judge will then make orders to ensure that any future hearing is as fair and efficient as possible. These orders may require one or both parties to provide information or documents to the other and will usually include fixing a date or dates for future hearings

As a party in the case, you, or your representative, should assist the Judge at the PH by:

- (1) Completing the Agenda as far as possible and relevant to the claim and in accordance with the time scale set out in that document.
- (2) Considering in advance what needs to be discussed and communicating with the other party (or parties) about it. In particular, you should tell all of the other parties about any orders you will request at the PH; what you believe to be the issues; and any views you have about the likely value of the claim.
- (3) Having a detailed knowledge of the history and background of the case and/or having someone present who has that knowledge.
- (4) Having information with you about availability of witnesses and representatives for future hearings.

Completing the Agenda

The purpose of the Agenda is to ensure that both parties have fair notice of the matters to be discussed at the PH and of each other's position on each matter and to ensure that the time allocated for the PH is used efficiently. You and the respondent have different versions. You are asked to complete your version of the Agenda first and send it to the respondent so that the respondent, in its version, can take into account information provided by you which may help to clarify the issues and areas where there may be scope for agreement.

If you are unsure about how to respond to any question, answer as best you can. If you don't think a particular question is relevant to your case, mark it as "not relevant". The answers you provide will not form part of your claim unless the Judge directs that any part is to be accepted as further particulars. However, the Judge will provide a Note of the discussion which takes place at the PH and that Note may refer to the answers you have provided.

You will have the opportunity to discuss your answers with the Judge at the PH. However the Judge cannot give advice to either party. You may therefore wish to seek advice before completing the Agenda. This may be from a solicitor, your local Citizens Advice Bureau or other organisation such as your trade union. ACAS (www.acas.org.uk) and the Equality and Human Rights Commission (www.equalityhumanrights.com) may also be able to provide helpful information.

The following guidance is intended to assist you to complete the Agenda..

1 Parties

1.1 The claimant and respondent(s) are known as the "parties" to the case. It is important to ensure that you have identified the correct respondent (who will usually be your employer.) The respondent must be a "legal person" such as an individual or a registered company. If the respondent is described merely by a trading name, such as "Smith Leisure" any judgment you get is likely to be unenforceable. The correct respondent is likely to be "John Smith, trading as Smith Leisure" or "Smith Leisure Limited". Your payslips and any other documentation you got from your employer may help you to identify the correct name of your employer.

Sometimes it is not clear who the correct respondent should be (e.g. there may be confusion about who actually employed you). Similarly, more than one person or body may be liable legally if something has happened which does breach the relevant legal provisions. If there is more than one person or company which may be liable for any failure to comply with the relevant law, then the Judge may decide that another person or organisation should be added as an additional respondent. The matter of who is in fact liable may need to be resolved later, usually at a further preliminary hearing.

Equally if a person has been named as a respondent and it is now agreed that he/she was not the correct respondent then it is appropriate that he/she be removed from the proceedings. Most claims can only be made against the claimant's employer. However, claims of discrimination may be made against the employer and other individuals (most commonly other employees of the employer) or can be made against other organisations such as trade unions and professional bodies of various types.

1.2 If claims arise out of the same facts, it may be convenient for those claims to be heard together or for a lead case to be selected. This avoids duplication of evidence and usually saves expense. If you are aware of other claims which may be similar you should indicate this and whether you consider any other claim could conveniently be combined with the claim which is being considered at the PH You may also wish to object to claims being combined if you consider that they do not arise out of the same facts or it would be unjust to hear them together.

2 Details of the claim

It is important that both parties and the tribunal understand what the claim is about. Where a claimant is legally represented, it is expected that the claim form will make reference to the relevant statutory provisions upon which the claim is based. Where a claimant is not legally represented, it is appreciated that this may not be possible. However, it is important that the basis of the claim is made clear.

2.1 , 2.2 and 2.3

It appears that you complain that you have been dismissed or otherwise disadvantaged because you have made a protected disclosure under s43A of the Employment Rights Act 1996. This type of complaint is often called whistle blowing. You can only make this kind of claim if you have made a “protected disclosure”. 2.1 and 2.2 ask questions to find out if you have made the kind of complaint that attracts this special protection and 2.3 asks what disadvantage you say you have suffered as a result of making the disclosure.

It is important that you only include in the Agenda matters that you intended to raise in your claim form. If you now wish to add in other complaints or otherwise change your claim, you need to seek permission from the tribunal to amend your claim. You can include this in box 9 under “Any other matters”

2.4 If you are making other complaints, it is helpful if you can identify the relevant legal provision under which you are claiming. However, it is recognised that if you do not have legal representation you may find that difficult. You can therefore just put here “unfair dismissal”, “holiday pay” etc and say why you think you should win your case. (This is often referred to as being “entitled to a remedy” from the tribunal).

2.5 It may be that having considered matters further or following discussion at the PH, you are prepared to withdraw part of your claim. You cannot be forced to do so but if you are found to have acted unreasonably in bringing or conducting the claim or part of the claim is found to be misconceived, that may result in an award of expenses against you, although these are not common. (Similar provisions apply to a respondent).

2.6 You may ask the Tribunal for an order for information or documents to be provided either by the respondent or a third party. The Judge will usually expect that you have sought this information on a voluntary basis first. S/he will also require to be satisfied that the information is relevant and necessary to decide your case. You will need to explain what the information is that you seek to recover. You will not be permitted to undertake a “fishing expedition” if you have no real knowledge of what information there may be or what it may contain.

3 Remedy

3.1 If you win your case, the Employment Tribunal will be able to award what is known legally as a “remedy”. The remedy most often sought by a claimant is financial compensation. However in unfair dismissal cases it is possible to ask to be reinstated (get your old job back) or re-engaged (get another job with the same employer) and in discrimination cases you might ask for the tribunal to make a recommendation that the respondent takes action of a particular type designed to reduce the impact of any discrimination as well as award compensation.

3.2 You should try to work out what you have lost as a result of what you say has happened to you. This may be ongoing if you have lost your job and are still unemployed. If that is so you should work out your wage loss so far and set out how much you consider your ongoing loss is on a weekly basis.

3.3 You should explain how you worked out the sum you are claiming to have lost and consider how you might be able to prove your loss by providing documents such as wage slips from your previous employment. Setting out your loss and how you have calculated it is often referred to as preparing a Schedule of Loss.

You have an obligation to take reasonable steps to minimise (often referred to legally as “mitigate”) your loss. This means, for example, if you have been dismissed, you need to try to find alternative employment and you will be asked to provide evidence of the efforts you have made at the Hearing. You should keep copies of all documents which show the efforts you have made so that you can produce these at the Hearing.

4 The issues

If parties are legally represented they are expected to provide the tribunal with a list of proposed issues. Representatives should seek to agree what the issues are and come prepared to explain to the Tribunal what efforts they have made in this regard. If there is a failure to agree on the issues, representatives

should be prepared to explain why agreement has not proved possible. If you are unrepresented, look at the other party's claim or response as appropriate and see if there are any statements that you agree with. Matters that are not in dispute will not be "issues" so it is helpful to have that noted here. Once the list of issues is fixed by the Tribunal that will normally set the extent of the matters that will be dealt with at the final hearing.

5 Documents and expert evidence

5.1 Each party is entitled to receive fair notice of any documents that the other intends to rely upon. A date is often fixed at a PH by which time a list of such documents, or the documents themselves are to be exchanged. You should insert here the date when you think you will have all your documents ready to exchange with the other party.

5.2 It is helpful to the tribunal if both sides' documents (in Scotland often called "productions") can be combined into one "bundle" (which may be referred to in Scotland as a "set of productions") rather than having two separate sets of documents. At the PH it will be discussed who should prepare this. In practice this is usually the respondent as respondents most frequently have most of the relevant productions. If you have a view on who should undertake these tasks and when then insert it here.

5.3 If the case requires medical evidence, the Judge will want to fix a timetable for your medical records to be disclosed and, if a joint expert is to be appointed to prepare a report on your medical condition, the process for doing so. This will be discussed at the PH but if you have any views about the need for medical evidence and how it can be obtained please include these here. Other expert evidence might be needed in a case (for example, in connection with pension loss). If you think such evidence might be needed then set that out here.

6 Witnesses

6.1 Each party is responsible for arranging for the attendance of any witnesses that it wishes to call. Only relevant witnesses will be allowed. The Judge will want to know how many witnesses each side intends to call, what they will give evidence about and how this is relevant to the case. It will be up to the Judge to decide whether the evidence of any witness is likely to be relevant to the issues to be decided by the tribunal.

6.2 The Tribunal can issue witness orders. These will only be issued if the Judge is satisfied that attendance of the witness is necessary and that they can give relevant evidence. You are expected to ask witnesses to attend on a voluntary basis before asking for an order. If an order is to be granted, you will need to provide the name and address of the witness.

6.3 A witness statement sets out in writing what a witness will say in evidence. These are not normally ordered in Scotland. However, they may be helpful in an appropriate case, for example if the evidence is particularly technical. If they are ordered, the Judge will set down a timetable for the exchange of these statements and give directions about how they are to be used in the Hearing.

7 The final hearing

7.1 & 7.2 You are asked to estimate how long you think it will take to present your case. Parties will be asked to agree the order and a realistic timetable for witnesses. You should set out here if possible how long you think you will need to question each witness you would like to call and how long their answers are likely to take.

7.3 You should provide any dates on which you, your representatives and any witnesses are unavailable within the period during which you have been informed that the case is likely to be heard. On the basis of all of this, a final hearing will be fixed.

7.4 You can have your case heard by:

- A judge; or
- A judge with two non-legal members, known as a 'panel'.

Non-legal members are lay people appointed because of their particular experience in the workplace as either workers or managers. A panel will consist of a judge, a member with worker or union experience, and a member with management experience. Each has an equal say in the decision.

A judge will decide whether your case is heard by a judge or by a panel. When making this decision, the judge will consider whether the case involves the sort of legal or factual problem where the experience of the non-legal members may help the tribunal reach its decision. Presidential Guidance explains the types of cases where this experience may help. It is available here:

<https://www.judiciary.uk/guidance-and-resources/practice-direction-from-the-spt-panel-composition-in-the-employment-tribunals-and-employment-appeal-tribunal/>

8 Judicial mediation

Judicial mediation is a process in which a specially trained Judge takes on the role of judicial mediator and tries to assist parties to resolve the case through structured discussions which take place in private. Any settlement agreed can be made legally binding. If successful a formal Hearing of the case will not need to take place. Cases involving discrimination or more complex unfair dismissal claims that are expected to last three days or more may be suitable for judicial mediation. If the Judge thinks the case might be suitable, you will be asked whether you are interested in pursuing this option. If you think that the case might be suitable for judicial mediation then you can note this here. Where parties are represented, it would be of assistance for the representatives to attend the PH with their client's instructions on this possibility.

9 Privacy

Although this first PH will take place in private, as it is for case management, most hearings in an employment tribunal take place in public. Any judgments issued are placed on the online public register. The Tribunal may restrict publicity, for example by ordering that aspects of the case may not be reported or by anonymising a witness or a party in the public record. This requires a careful consideration by the Tribunal of all the relevant circumstances, including any rights under the European Convention. This is set out in rule 49 of the Procedure Rules. The Tribunal must give full weight to the important principle of open justice and the right to freedom of expression. It is not enough that a party would simply prefer to have the proceedings kept private. Such orders are unusual but if you think the circumstances of your case fall into this category you can ask the Judge to make such an order at the preliminary hearing.

10 Any other matters

While you may refer to any matter in this section you might, for example, include an application to amend your claim or response or any application for orders not already covered.