

VARIOUS WAYS OF FINANCING THE BRINGING OF AN EMPLOYMENT TRIBUNAL CLAIM

Article by Lawrence Rodkin, Partner, Simon Rodkin Litigation Solicitors

This is a practical article, the contents of which you will not find in any text books on Employment Law.

The information is gained from practical experience (acquired over the years) in the filing and running of Employment Tribunal claims.

The claim commences by the filing of Form ET1 with accompanying grounds of complaint and (preferably) a schedule of loss. The employer then subsequently files an ET3 response/ defence.

If there is any potential difficulty or if the claim involves a discrimination head of claim, the Tribunal would normally order preliminary hearing or case management discussion. At this appointment the Tribunal will (where relevant) make directions for the claim to proceed to a hearing, and will also very likely fix the hearing date as well

Otherwise, the Tribunal will issue directions and list a hearing date on its own motion.

The following stages are for the parties to exchange documents and witness statements and to prepare an agreed bundle of documents for use at the hearing.

The parties may need to make use of expert evidence such as medical reports at the hearing and indeed to call expert witnesses. Special directions will need to be given by the Tribunal if expert evidence is to be used in the case.

Running an employment tribunal claim is rarely simple and can, in fact, be fairly difficult and stretching intellectually – especially if the Respondent is well represented by a medium or large firm of solicitors who spare no expense in the defence to the claim.

Also, the Employment Tribunal is a no cost jurisdiction. With the exception of the new Tribunal fees, (which may be recovered from the opponent in the general discretion of the Tribunal), each party will bear their own legal costs in the Tribunal, whatever the outcome- save where a party has acted unreasonably in bring a claim or in its conduct in relation to the claim.

There are a number of different routes in financing the running of an Employment Tribunal claim. I set out below and comment upon some of these routes.

An Employment Tribunal claim can take many hours to properly prepare and accordingly, a client should be particularly wary of any cut price deals which other lawyers may offer. It is obvious to understand how a lawyer can offer a very low price deal and this could be based upon the fact that the lawyer does not expect to spend many hours on the case. My view is that If a lawyer spends the full time required to properly prepare a claim on a budget deal, then he would never make a profit.

A Legal Expense Insurance

Such cover is quite frequently included as part of home contents insurance. Legal Expense Insurers endeavour to make things look very simple and just ask you to fill in a claims form which they will pass to one of their panel solicitors in order to assess the claim.

My experience is that as a matter of practice securing Legal Expense Insurance cover can in fact be very difficult to achieve.

Some insurers do their best to either not grant cover or to delay the granting of cover for a long period of time.



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For cover to be granted there generally requires to be on the merits at least a 51% prospect of success. Insurers own Panel solicitors frequently take a harsh view of the claim and fail the merits test for the claim.

My experience is that it is always best to support an application for Legal Expenses Insurance with a Counsel's written opinion (assuming that counsel is of the view that the claims more than a 51% prospects of success). This would make it fairly difficult for the insurers/their panel solicitors to reject a claim upon the merits. In this scenario insurers commonly send the papers to their own appointed counsel for a second opinion upon the merits by the latter.

You can perhaps understand that securing legal insurance cover may not be an easy task and frequently I am arguing with insurers to grant cover over some period of time.

There is also a statutory right for a Claimant to choose his/her own solicitor once proceedings have been issued. My experience is that the information required by insurers in order to assess a claim, is the same as that which is filed with the Tribunal when beginning the claim process.

Accordingly, it is not unhelpful to file the proceedings and then make a claim for cover supported by Counsel's opinion and a copy of the proceedings.

This has the advantage that the time limit to issue the proceedings (generally 3 months from the termination date or the date of the relevant discrimination) is complied with.

Of course counsel's opinion should be secured prior to issue, to ensure that the claim possesses a reasonable prospects of success.

As stated Insurers commonly take a long time to respond to an application for cover under the policy and indeed not uncommonly, require to see the ET3 response to the Claim Form before making any final decision as to whether or not to grant cover.

The other things to negotiate with insurers in relation to the terms of appointment including their undoubted attempt to secure extremely low hourly rates which no solicitor in the right mind would ever agree to work for, namely £90.00 or £100.00 an hour exclusive of vat. This may seem a lot to lay people, however, the commercial charging rates for employment solicitors of reasonable experience, range from £150.00 to £250.00 per hour exclusive and £90.00 to £100.00 an hour would not even hire a trainee solicitor.

I have generally received from clients (when I take over their case from a panel solicitor) poor reports in relation to panel solicitors undertaking the legal work for insurers. The problem is the very large volume of casework undertaken by the panel solicitors and that it is very difficult to arrange to meet with a panel solicitor to discuss the case in detail etc.

There are a number of procedures which can be adopted for non panel solicitors in order to endeavour to agree a much higher and more reasonable rate with insurers or alternatively accept their offer of £90/£100 per hour on account and then make a formal complaint to the Ombudsman.

However, once cover is granted this is well worth it. Counsel's fees and medical expert fees are also all covered, but they need to be pre-authorized by insurers. Again, insurers have agreed special rates with various counsel Chambers and if you are aware of these rates, it is possible to appoint your own Counsel of your own choice but who will have to agree to act at these reduced rates.

It is also the case that legal costs incurred prior to issue of cover will not be paid under the policy. Again, a complaint can be made if insurers have spent an undue amount of time in granting cover under the policy – which does happen. As I have indicated, securing cover under a Legal Expense Insurance policy may be a battle and in my view, there are no short cuts and all applications should be supported by (favourable) Counsel's opinion.



Also, in conducting the claim, if there is Legal Expense cover you are obliged to act as a private person who would act in litigating, using their own funds for the purposes of the proceedings. Accordingly, if your employers are insolvent or there is not likely to be any money recovered, then cover will not be granted and the same position would apply if the cost of bringing a claim is disproportionate to the amount of the value of the claim. Accordingly, it is important to try and arrange for estimates of costs to match the value of the claim and if necessary, by using more junior Counsel than you would otherwise use, in order to ensure that issues of reasonable cost proportionality are complied with.

Private Time Basis

This is the traditional way of financing claims.

You pay your lawyer on a time rate basis. Typically fees of lawyers for employment cases range from £150.00 to £250.00 per hour exclusive.

However, a number of Barristers are now offering direct access. Our experience is that barristers are not able to run a claim by themselves, without the help of a firm of solicitors. Barrister usually spend most of their time in Court and are not able to correspond with the other side, answer telephone calls etc., especially when they are in Court for other clients.

We have overcome this problem through the engagement of in-house employment law counsel, and so a client can have the advantages of direct access for initial work or preliminary advice etc. via my firm if they wish

Time charge rate can be very useful if a claim is settled relatively quickly.

However to run a complete claim on a time basis can be fairly expensive – again depending upon the value of the claim. Again, the skill of a solicitor in such case is to endeavour to ensure that the cost of running a claim is proportionate to its value.

Fixed Fees

We have developed fixed fee schemes for both Claimants and Respondents

Under such schemes it is clear from the outset what the costs will be for the defined sections of work.

Fixed fees are however really only useful for claims of reasonable value.

Please look at the fixed fees schemes contained upon my firms website. This is sub-split into different sections of work required to run a claim and with any work carried out outside of these sections to be charged on a time charge basis.

Time outside the fixed fee schemes includes such items as settlement negotiations, instructing medical experts or making applications to the Tribunal for disclosure of additional documents by the Respondent etc.

However, a fixed fee arrangement provides more control of the ultimate costs.

We reserve the right not to take a case on the fixed fee if we feel that we cannot undertake the claim properly because of the level of work which will be involved.

No Win No Fee

The normal model is a damages based agreement with a solicitor of 29% plus VAT of the settlement/award. So accordingly, if £10,000.00 compensation is received the solicitors fees are £2,900.00 plus VAT. The disadvantage to the client in a no win no fee, is if the matter settles quickly. The disadvantage to the solicitors is if the matter proceeds to a fully contested hearing when all the work has to be carried out and more besides, and in particular if the claim is lost. No win no fee agreements are undoubtedly risky and accordingly the merits must be particularly high, say at least 60% before a solicitor would normally agree to take a case on, on such a basis.

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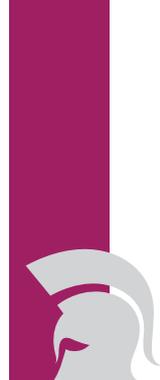
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Counsel is also signed up on a no win no fee arrangement but on a time basis with a successful uplift so accordingly, if a barrister is working on a 50% success fee uplift, if their fees would be £500.00 plus vat then their total fees of the case when we won would be £750.00 plus VAT.

It is also quite common to fix an upper limit on Counsel's fees in comparison to the amount of compensation received, so that Counsel's fees do not exceed the amount of compensation etc.

Costs and Fees

It used to be, until very recently, that there were no fees required to issue claims in Employment Tribunal. This has changed and there is currently a filing fee of £250.00 to issue a claim and £950.00 hearing fee to be paid closer to the hearing.

The Tribunal is also as stated a no cost jurisdiction, and unless one party has acted unreasonably, then each party would normally bear their own costs. Accordingly, the cost of running an Employment Tribunal claim is a very serious factor to take into account in relation to a settlement and indeed whether to commence a claim in the first place.

Schedule of Loss

It is not possible to work out the value of an Employment Tribunal claim without preparing a schedule of loss. This is normally the first thing a solicitor does when he receives instructions, either in connection with settlement/compromise agreement negotiations or potential Employment Tribunal claim. Only when the value of the claim has been scientifically worked out, can the various funding options be meaningfully discussed and also how the case is to be run and with what level/seniority of solicitor/counsel.

I hope that this note has been of assistance and if you have a claim or potential Settlement Agreement which you wish to discuss with us, then we can arrange an initial fixed fee meeting or telephone conference with yourself- with either a solicitor or counsel.

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