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Employment Tribunal Claims

Legal Guidance for Members
2014



FIRE BRIGADES UNION



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Unfair Dismissal

If you are facing disciplinary or other proceedings that may lead to dismissal, there will be an appeal process as well as the possibility of an Employment Tribunal (ET) claim for unfair dismissal. **If you are dismissed it is important to immediately establish the appeal time limit and ensure an appeal is lodged in time.**

In relation to any ET claim, please note that until you receive a letter from the solicitors confirming that they are acting, after an application for legal assistance has been received by Head Office 28 days or more before expiry of the ET time limit (see below) and approved, you have personal responsibility to ensure that an ET claim is lodged within the time limit. But note the position if the solicitors cease acting – see below.

An application for FBU Legal Assistance i.e. for assistance from the Union Solicitors, under this category can only come after termination of employment. Members should not be applying for Legal Assistance on possible unfair dismissal. Where they are intending to resign and explore the possibility of a claim for Constructive Unfair Dismissal, advice and assistance must be sought from local Officials. Constructive Dismissal claims are extremely difficult to win, and to have any chance of success a member will have to prove a fundamental breach of the contract of employment which gave them no alternative but to resign.

If you are awaiting a disciplinary hearing, and feel that you may be dismissed, it is not grounds for an application for FBU Legal Assistance.

The application for FBU Legal Assistance should be made after the dismissal at the first stage of the process, usually the first hearing, but not straightaway. An appeal should be lodged and four weeks from the initial dismissal allowed for the appeal to conclude. If the appeal concludes unsuccessfully within the four weeks, the application for assistance should be made then. If it takes longer, the application for assistance should be made when four weeks have passed from the initial dismissal.

If four weeks have elapsed, do not delay any further with the application for FBU Legal Assistance. If the appeal was not lodged immediately, but four weeks have elapsed from the dismissal, then even if only a short period has elapsed since lodging the appeal, ensure that the legal assistance application is made immediately. At the internal appeal process, advice and assistance should still be sought from local Officials.

For an FBU Legal Assistance application with regards to dismissal, in **Section 3**, Head Office requires more than “spoke to FBU rep.” It is expected that some sort of formal action, for example lodging an appeal, will have already been taken to address the situation. A copy of the written grounds of appeal should be submitted with the application to Head Office. Dismissed members are firmly advised to appeal any dismissal they wish to challenge. Please note that legal assistance will normally be refused where an appeal has not been lodged. Please also note that even if a claim for

unfair dismissal is successful there is likely to be a deduction of up to 25% compensation for any failure to appeal as this will not adhere to the ACAS Code of Practice. Head Office will also expect to see you have contacted ACAS to start early conciliation (see below).

In **Section 4**, it is **essential** that the details supplied include the date you were first informed of the dismissal – treat that as the date of dismissal, whatever alternative dates or notice the employers may give. Where early conciliation has concluded, the early conciliation certificate (see below) should be provided. Also set out **the reason for dismissal and provide** a copy of the letter of dismissal as a minimum. Ideally a copy of the documents and witness statements considered at the disciplinary hearing should be provided.

Please also note that if you have been employed for less than two years, you will not have the legal right to a claim for unfair dismissal unless you have one year and 50 weeks service and the statutory notice you are entitled to would take the length of service to two years. The only very limited exceptions to the two year requirement are where a dismissal is categorised as automatically unfair, eg dismissal due to union membership, relevant union activities etc.

The date you were first informed of the dismissal is usually the ‘Effective Date of Dismissal’ which is crucial because, regardless of any appeal, the ET will not accept a claim for Unfair Dismissal if it is received more than three months after dismissal (see “Time Limits”, below).

Unlawful Discrimination

If you contact an Official to represent you following discrimination, it is important that you use the grievance procedure and related appeal process as well as considering an Employment Tribunal (ET) claim. There is usually no time limit for grievances but they should be lodged promptly and, if you are not satisfied with the outcome, it is important to **immediately establish the appeal time limit and ensure an appeal is lodged in time.**

In relation to any ET claim, please note that until you receive a letter from the solicitors confirming that they are acting, after an application for legal assistance has been received by Head Office 28 days or more before expiry of the ET time limit (see below) and approved, you have personal responsibility to ensure that an ET claim is lodged within the time limit. But note the position if the solicitors cease acting – see below.

The application for FBU Legal Assistance should be made after the discrimination, but not straightaway. A grievance should be lodged as outlined and four weeks from the discrimination allowed for that and the appeal to conclude. If the grievance/appeal concludes unsuccessfully within the four weeks, the application for assistance should be made then. If it takes longer, the application for assistance should be made when four weeks

have passed from the discrimination.

If the four weeks have elapsed, do not delay any further with the application for FBU Legal Assistance. If the appeal was not lodged immediately, but four weeks have elapsed from the discrimination, then even if only a short period has elapsed since lodging the appeal, ensure that the legal assistance application is made immediately. At the grievance and appeal process, advice and assistance should still be sought from local Officials.

If on the application for FBU legal assistance you have ticked the discrimination box in **Section 2** of the form, you should be aware that, to win the case, you will have to demonstrate that you were subject to unfavourable treatment contrary to the law. Although members may feel that the Employer has been unfair, this alone does not mean the treatment can be shown to be unlawful. The law prohibits discrimination on the grounds of sex, race and nationality, disability, sexual orientation, religion or belief, trans-sexuality, age, part time working, fixed term workers, agency workers and Trade Union membership.

In **Section 3** of the application form, Head Office will normally expect to see that a grievance has been lodged promptly as required by the ACAS Code of Practice, and either the process has concluded but not to the member's satisfaction, or is ongoing and four weeks have elapsed from the discrimination alleged. Head Office will also expect to see you have contacted ACAS to start early conciliation (see below).

In **Section 4, full details** must be provided including a copy of the written grievance and where early conciliation has concluded, the early conciliation certificate (see below). The grievance should state what type of discrimination you are complaining about for example, disability discrimination. It is not satisfactory to put something as simple as "I have been unlawfully discriminated against". As with Unfair Dismissal, Head Office requires a succinct but sufficiently detailed summary with information regarding events and dates and copies of key documents. **If the discrimination is not ongoing, then if a claim is valid, it must be lodged within the time limit (see "Time Limits" below).**

Other

Other, in general, means other legal issues in relation to a member's employment such as unlawful deduction of wages, flexible working cases etc. Similar considerations as to grievances and time limits apply for these cases as for discrimination – see above.

If you contact an Official to represent you in such a case, it is important that you use the grievance procedure specifying which type of employment claim it relates to and also the related appeal process as well as considering an Employment Tribunal (ET) claim. There is usually no time limit for grievances but they should be lodged promptly and, if you are not satisfied with the outcome, it is important to **immediately establish the appeal time limit and ensure an appeal is lodged in time.**

In relation to any ET claim, please note that until you receive a letter from the solicitors confirming that they are acting, after an application for legal assistance has been received by Head Office 28 days or more before expiry of the ET time limit (see below) and approved, you have personal responsibility to ensure that an ET claim is lodged within the time limit. But note the position if the solicitors cease acting – see below.

The application for FBU Legal Assistance should be made after the event giving rise to the complaint e.g. the deduction of wages, the first refusal of flexible working etc. but not straightaway. A grievance should be lodged as outlined and four weeks from the event giving rise to the complaint allowed for that and the appeal to conclude. If the grievance/appeal concludes unsuccessfully within the four weeks, the application for assistance should be made then. If it takes longer, the application for assistance should be made when four weeks have passed from the event giving rise to the complaint.

If those four weeks have elapsed, do not delay any further with the application for FBU Legal Assistance. If the grievance has not been lodged immediately, but four weeks have elapsed from the event giving rise to the complaint, then even if only a short period has elapsed since lodging the grievance, ensure that the legal assistance application is made immediately. At the grievance and appeal process, advice and assistance should still be sought from local Officials.

Head Office will expect to see you have contacted ACAS to start early conciliation (see below). Where early conciliation has concluded, the early conciliation certificate should be included with the application for legal assistance (see below).

Time Limits

Please note first of all that not all legal issues can be resolved in the Employment Tribunal (ET). For those that can, there is a strict time limit of three months, less one day, in which to submit a claim. When the clock starts ticking depends on the specifics of the possible claim. For example, where the issue is unfair dismissal, the time limit is three months less one day from the Effective Date of Termination.

For Discrimination claims, if the unlawful discrimination is not a single act for which the three-month limit would apply, there is the possibility that the unfavourable treatment can be considered “continuing discrimination”. But that should be regarded as a last resort. If in doubt, apply the earliest possible act of discrimination as being when the clock started.

But it is important to remember that the clock starts running as set out, not when the grievance or appeal is lodged or concluded.

The law provides that the internal grievance/appeal procedure should be

used before lodging a Tribunal claim. It will be possible to lodge a Tribunal claim prior to exhausting the grievance/appeal procedure, but providing the grievance/appeal is lodged promptly the matter should not be referred to Head Office until four weeks after the clock started. Members must raise a grievance/appeal about a potential Tribunal complaint as per the ACAS Code of Practice. If not, legal assistance is likely to be refused and even if their claim is subsequently successful they are likely to have a deduction made of 25% from any compensation awarded.

In dismissal cases, always file an appeal and exhaust that procedure, whether or not a legal application is also required four weeks after the initial dismissal. In discrimination and other potential Tribunal cases (for example unauthorised deduction of wages), always file a grievance and exhaust the grievance procedure, whether or not a legal application is also required four weeks after the clock started.

In all cases where a legal challenge is required, lodge the legal application no later than four weeks from when the clock started even if it has only been a short period since the grievance/appeal was filed or if it is only now being filed. An application should be lodged before the four weeks have elapsed only where the internal process has concluded within that period. If the four weeks have already elapsed, lodge the grievance/appeal and legal application at the same time.

Head Office will inform members if the application for legal assistance has been successful, **BUT it remains incumbent on the member to ensure that time limits are met including filing the ET claim with the ET and paying ET fees. The only time when this is not the case is when the solicitors appointed are acting on the member's behalf. This is when the member has received written confirmation from the solicitors that they are acting but applies only whilst they are acting and only applies where the application for legal assistance was received by Head Office 28 days or more before expiry of the ET time limit and approved. The fact that the solicitors are acting does not mean that the application for legal assistance was received by Head Office 28 days or more before expiry of the ET time limit.**

If the application for legal assistance was received by Head Office 28 days or more before expiry of the ET time limit and within the ET time limit, the solicitors advise against proceeding, they will give the member a time limit warning and it will then again be the member's responsibility to file the ET claim in time if he/she rejects that advice and wishes to proceed.

Please note that Employers may not be overly concerned with delays. This is because they can benefit if a potential claim becomes time-barred. Members must always be alert to the issue of time-limits.

Clearly, applications for legal assistance are not lodged in all cases where members are dissatisfied with decisions of the employer. It continues to be the case that legal assistance should only be sought where appropriate.

Early Conciliation

If you believe that you have a possible ET claim, you should first speak to the local FBU official who is dealing with your grievance or appeal against dismissal to discuss the impact of Early Conciliation (EC).

Early conciliation is a mandatory requirement for members (referred to as prospective Claimants) who believe they may have an Employment Tribunal claim, to contact ACAS before lodging any Employment Tribunal claim. Early conciliation applies to all Employment Tribunal claims now being lodged.

Early conciliation begins by the member (the prospective claimant) who thinks they may have an employment tribunal claim, contacting ACAS. The member can contact ACAS in three ways : 1. Complete the Early Conciliation Form online; 2. telephone ACAS (the number is on the EC form online), in which case the ACAS officer will record the information on an EC Form; or 3. by completing the EC Form and sending it by post to a central address in Nottingham.

The information which you need to provide is your name, address, contact details and the employer's name, address and contact details. The EC form does not ask you for your FBU representative's details. However, your FBU representative's details (e.g name, email and telephone number) can be put in Box B which asks how ACAS should contact you. If ACAS is contacted by phone you should inform ACAS to contact your Union representative.

Early conciliation process is not a substitute for the normal grievance and disciplinary process and members will still need to follow the disciplinary and grievance procedures. Remember that a failure to comply with the ACAS code of practice on disciplinary and grievance can result in a tribunal reducing any award where a claim is successful by up to 25%.

The first contact will be by an Early Conciliation Support Officer (ECSO) who will contact you by close of business the next day after ACAS has received the EC form or telephone call. There is no obligation on the employer to enter into the early conciliation process since this part of the process is voluntary, but it may be a good opportunity to see if settlement can be reached with guidance from your local Official.

If the matter is not settled or only some of the claims are settled by way of a COT3 agreement, ACAS will issue an Early Conciliation Certificate. ACAS will issue the Certificate to you and the employer. The Certificate will be sent by email where an email address has been provided otherwise it will be sent by post.

The most important aspect of the process is obtaining the Early Conciliation Certificate and, more specifically, the unique reference number. This is because an ET claim cannot now be lodged without this unique reference number. Where it is the responsibility of the FBU Solicitors to lodge the ET claim in time (see below) ensure you forward the Certificate to them straightaway. Please note that obtaining the Certificate and reference number does not mean that you will be provided with legal assistance. This will still depend on whether your case has reasonable prospects of success.

The other important aspect of the early conciliation process is the impact

it will have on time limits. Early conciliation may result in a short extension to the time limit for lodging an ET claim. However, the Rules are complex and it is safest to work on the basis of normal time limits which are usually 3 months less 1 day from the dismissal or act of discrimination.

It is likely that the time limit will become the focus of legal action and it is, therefore, important to ensure that you seek advice from the local Official who is dealing with your case well within the normal time limit as set out.

Employment Tribunal (ET) Claims

It will rarely be necessary for members to file their own ET claims with the ET and pay the ET fees. But it is your responsibility to ensure that this is done on time in any case you wish to take to the ET.

If the above is followed, no difficulties will arise. The application for FBU Legal Assistance will be submitted to Head Office four weeks after the dismissal, discrimination etc. That will be acknowledged by Head Office and you will be informed well within the time limit whether assistance is granted for the solicitors to investigate the case. If not it will be a decision for you whether to accept that and proceed no further or take the case to the ET without FBU Legal Assistance.

If Legal Assistance is granted, that will be confirmed and it will then be the responsibility of the FBU Solicitors to lodge the ET claim in time and ensure payment of the fees on your behalf provided the application was received by Head Office 28 days or more before expiry of the ET time limit and provided they have advised that course of action. If, within the time limit, they advise against proceeding they will give you a time limit warning and it will then again be your responsibility to file the ET claim in time, pay the fees (and pursue the ET case) if you reject that advice and wish to proceed.

If the time limit expires whilst the Solicitors have the case but before they have had time to advise, they will file the claim with the Tribunal, pay the fees and continue with the case provided the application for FBU legal assistance was received by Head Office 28 days or more before expiry of the ET time limit. But if they then advise against proceeding they will seek your agreement to withdraw the case. If you agree, the claim will be withdrawn. If not, it will then be your responsibility to pursue the ET claim and pay any further fees.

But there will be circumstances where it may be necessary for members to file their own ET claims with the ET. For example, if the above has not been followed and you only submit your application for FBU Legal Assistance so that it is received by Head Office less than 28 days before the time limit expires. Any member filing their own ET claim must say on the ET form that they are representing themselves - it is important not to put the union or solicitors down as that will not be correct and may lead to confusion resulting in possible rejection of the claim by the ET for which the responsibility will rest with that member.

Even if you submit the application for FBU Legal Assistance in good time, it could be lost in the post before it reaches Head Office or the Solicitors. As

outlined, it remains incumbent on the member to ensure that time limits are met including filing the ET claim with the ET and paying ET fees. The only time when this is not the case is when the solicitors appointed are acting on the member's behalf provided the application for FBU legal assistance was received by Head Office 28 days or more before expiry of the ET time limit. So, if you submitted the application for FBU Legal Assistance but have not heard from the solicitors confirming that they are acting, then the responsibility remains with you. Similarly, whether or not you have heard from the solicitors, if you have not had confirmation that the application for FBU legal assistance was received by Head Office 28 days or more before expiry of the ET time limit then the responsibility remains with you.

Employment Tribunal (ET) Fees

ET fees were introduced for all claims issued on or after 29th July 2013. Remissions i.e. full or partial waiver of fees by/on behalf of the ET Service, are means tested by them and will be available only in cases of severe financial hardship. Any member seeking a remission should apply in good time as the ET proceedings will still have to be commenced within the time limit and the fee paid whether or not a remission application is outstanding. Details of the remission procedure will be provided on the Union website once confirmed.

A member whose application for legal assistance has been received by Head Office 28 days or more before expiry of the ET time limit will have the ET issue fee advanced by the Union and the case lodged with the ET by the solicitors where they have advised that the case has reasonable prospects. This is subject to the Union's discretion under Rule, but if the Union is not supporting such a case, the member will be notified in good time so that he/she can then either not pursue the matter or lodge ET proceedings, pay the fee and pursue the case without FBU support.

The solicitors will then review the case at the later stage when the hearing fee is payable. If the case still has reasonable prospects the member will have the ET hearing fee advanced by the Union. This is subject to the Union's discretion under Rule but if the Union is not supporting such a case, the member will be notified in good time so that he/she can then either not pursue the matter or lodge the ET hearing fee and pursue the case without FBU support.

A member whose application for legal assistance HAS NOT been received by Head Office 28 days or more before expiry of the ET time limit WILL NOT have the ET issue fee advanced by the Union or the case lodged with the ET by the solicitors. In such a case, the member will need to decide either not to pursue the matter (informing Head Office and the solicitors) or lodge ET proceedings, pay the fee and pursue the case initially without FBU support pending the legal advice.

That advice on whether the case has reasonable prospects will normally be after the ET time limit has expired. If the advice is that the case has reasonable prospects the Union will normally instruct Thompsons to act. The

procedure above will then apply in relation to the hearing fee and they will also seek to recover the issue fee paid by the member if the case succeeds.

The solicitors will ask employers to ensure settlement proposals include compensation plus payment of ET fees. Where only an inclusive lump sum is offered, that will be regarded as an offer of the net amount of compensation to the member after deduction of fees paid. If the solicitors consider that is inadequate, the member will be advised to proceed to the hearing or until an acceptable offer is made. **Any member accepting an offer contrary to the advice given will receive the net amount after deduction of fees paid.**

Any member who on his/her own account withdraws from legal assistance or decides not to pursue the claim after fees have been paid, remains liable to repay those fees to the Union. The same applies to a member where legal assistance is withdrawn e.g. breach of relevant conditions.

Where an ET claim is withdrawn on legal or Head Office advice, the member is not liable to repay the fees to the Union provided the relevant conditions have been complied with.

Where the case proceeds to a hearing and the case fails, the member will not be required to repay the advance provided the relevant conditions have been complied with. Where the case succeeds, the solicitors will ask the ET to require the employers to reimburse the fees paid. The sums recovered for fees will then be used to reimburse the Union the fees paid. Where recovery is not ordered by the ET, the member will receive the net amount of compensation after deduction of ET fees paid but this is subject to Union discretion to waive the deduction taking into account the reasons given by the ET for their decision.

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