

Advocacy Tips

Employment Tribunals

Does advocacy in the employment tribunal differ from that in court?

Practical tips on presenting your case in the Employment Tribunal.

Obviously, the employment tribunal is a less formal forum than court and as such any degree of pomposity in presentation does not go down well. Another major difference is that you may be presenting the case against an unrepresented party – usually an applicant but respondent companies often choose to present their own case. This makes the tribunal hearing less structured and it is likely to take longer than you may have anticipated, given that the tribunal Chairman will often assist in explanation of legal principles and with questions.

At the very start of any employment tribunal hearing it is important to ensure in a forthright and practical way that the tribunal has all the papers you believe it should and to ascertain whether they have had time to read them as this may affect your delivery. Particularly when the applicant is unrepresented it is likely that papers will only have been handed to you and to the tribunal that morning.

You should deal with any practical aspects at this point before beginning presentation of the substantive case. Of course, if possible you should already have reached agreement on these points with the other party. Examples include the difficulty of timing for any particular witness, the wish to interpose a witness at an unusual point in the proceedings and any other logistical matters.

The party upon whom the burden of proof rests will always open. Thus the employer will open the unfair dismissal case to show that the dismissal was

fair, whilst the applicant will open a discrimination case to establish that discrimination occurred. Again, where there is an unrepresented applicant you might expect the tribunal to spend some considerable time outlining the legal issues and ensuring that the applicant understands his or her own case before proceeding.

Employment tribunals do not, on the whole, appreciate a long opening speech, unless there are legal issues that must be set out before the case begins. It is always advisable to ask the tribunal Chairman, if he has not already indicated his preference, if he would like you to open with a description of the legal principles involved. Only in a complex disability or equal pay case is it likely that your opening will be welcomed. Because it is unlikely that you will get a chance at the beginning of the hearing to set out your client's case giving a framework in which the tribunal is to hear the evidence, it is extremely useful to provide the tribunal with a detailed opening skeleton argument. This is almost always welcomed. It should map out how your case is structured and refer to the main witnesses and evidence in respect of each legal point.

Thus the first action you are likely to take is to call your client's witnesses to give examination in chief. The witness gives evidence by confirming his/her signature on the witness statement and reading it out. The tribunal is reluctant to allow many additional questions and therefore you should try to ensure that all points are dealt with in the written statement so far as is possible. Call your own witnesses in the order you have identified in your skeleton argument and after cross-examination only re-examine after careful consideration. The tribunal themselves often ask questions following the conclusion of a witness giving evidence and may pick up any points themselves. It is always a risk to re-examine in that it indicates your witness got something wrong and it provides a dangerous opportunity for the witness to dig a bigger hole (with your assistance) than he or she did under cross examination. A tribunal will rarely allow lengthy re-examination.

When cross examining the other party's witnesses it is best to keep a non-theatrical, measured approach, particularly as tribunal cases (in that they deal with personal relationships) often become highly charged with emotion. If you maintain an unfruitful line of questioning you will be told by the tribunal Chairman to move on. The tribunal is pro-active in controlling timing in a hearing and may well indicate that you have a certain amount of time to deal with a witness at the beginning of the hearing. If the other party is unrepresented, you will be cross-examining without the benefit of advance notice of what they will be saying and careful preparation is required to ensure that you have already identified the areas which need to be addressed from your knowledge of the case. You may also, alternatively, be handed a detailed statement half an hour before the hearing and be required to digest this quickly.

Finally, closing speeches: the tribunal will almost invariably limit the time for these to 30 minutes each or possibly less on a one day hearing. If you have the opportunity to do so then presenting a closing skeleton for the employment tribunal set out in the way that you would like them to make their decision is helpful. Do not be tempted to include too many case authorities. The tribunal will be familiar with all the main ones. If you have no time to prepare a closing skeleton, then use your opening skeleton expanding on this verbally at the points where evidence has been given which supports your case and dealing with any unhelpful evidence in the best way possible.

Prepared on behalf of SAHCA