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To : All Branches in England/Scotland & Wales

Dear Colleagues

THE BRANCH OFFICERS/REPS GUIDE TO PROCESSING EMPLOYMENT TRIBUNAL CLAIMS

This briefing is to guide Branches when assisting members who are considering taking unfair dismissal/discrimination complaints to an Employment Tribunal. It replaces our previous guidance in LTB 498/2013 and LTB 145/2015.

Members' Entitlements

Members are entitled to the benefits and services of the Legal Services Department as governed by National Rule 4.1.7. ***"Members of the Union are entitled to receive appropriate benefits and as negotiated by the Union either nationally or locally and appropriate legal services at the discretion of the NEC in accordance with published procedures"***. Members should be made aware that the Union is not obliged to support any case unless we consider that it has reasonable prospects of success, i.e. 50% or more. This criterion was agreed by the Union at National Conference.

Members have the right to take a complaint of unfair dismissal or unlawful discrimination and other disputes to a Tribunal provided they meet the qualifying legal conditions. It is mandatory for members who are considering making a claim to notify ACAS first by completing and submitting an Early Conciliation form. Members should always be made aware that an Employment Tribunal hearing is not a re-run of an employer's internal discipline procedure and no matter how much an individual may feel an injustice has occurred, any application to the Employment Tribunal must be based on facts and not simply a desire to have a day in Court. The CWU has an obligation to assist its members. However, representation will only be authorised if a case has the required merit.

Branch Officials' Responsibilities

As Branch Officials, you are responsible for processing requests for assistance from members of your Branch. Also the Employment Tribunal can be accessed independently by members and their advisers. Our advice is that all Branches should have at least one Officer dedicated to these issues and a procedure to facilitate efficient and timely processing of all these ET claims to the Legal Services Department. We will be happy to discuss the practicalities of this advice with Branches, recognising the various internal structures and geographical spread.

Once an approach is made for assistance, Branches should note it is not their responsibility to provide representation to any member until the Employment Tribunal application has been assessed by the Legal Services Department. Branches should assist members with the application process and, once this is complete, all documentation should be forwarded to the Legal Services Department for assessment. This instruction is important as we have had situations where Branches have become involved in representing members within the Tribunal process and have then got into difficulty which has resulted in our members' claims failing and claims being made against the CWU for negligence.

Branches should note it remains the responsibility of the member to submit his or her claims to ACAS for Early Conciliation and any subsequent application to the Employment Tribunal via form ET1. At no point should Branches go on record as the member's representative to either of the above bodies.

Contained within the Appendix attached to this LTB is a Branch Consultation Record document which must be used by the Branch whenever assistance is provided to members. It must be completed, signed and sent to the Legal Services Department along with any request for assistance.

Time Limits

It is vitally important that members are made aware of the time limits for submitting a claim to the Employment Tribunals. For unfair dismissal claims, the 3 month time limit begins from the effective date of termination of employment. Members should not wait for any internal appeals procedure to be completed and should proceed with ACAS Early Conciliation within 3 months less 1 day of the effective date of termination of employment.

In discrimination cases, the time limit begins from the date of the "act" complained of. Again, the ACAS Early Conciliation process must begin within 3 months less 1 day of the date of the "act" complained of.

It is the responsibility of members to lodge Early Conciliation within the relevant time scales.

Starting the ACAS Early Conciliation (EC) process

Members will not be able to make an application to an Employment Tribunal without first making a claim via ACAS for Early Conciliation. This is a mandatory requirement. Once the Early Conciliation process is completed, ACAS will issue the member with an ACAS certificate which contains a unique reference number which must be quoted on the ET1 form otherwise the Tribunal will reject the application.

Members should register with ACAS as soon as they become aware of a dispute that may lead to an Employment Tribunal claim.

The time limits for submitting a claim to the Tribunal office still apply but will be frozen once the application for EC has been received by ACAS. This is a protected period during which time the clock is stopped with regards to the 3 month period for submitting an ET1 claim form.

The ET time limit clock restarts once the conciliation process ceases and the appropriate ACAS certificate has been issued and received by the Claimant.

In cases where a Claimant is required to participate in EC, the ordinary limitation period for their claim(s) is extended to give the parties an opportunity to engage in the process. To achieve this, the limitation clock stops for a specific period, calculated as follows

Day A = Date the claimant submits the EC form (or provides this information to ACAS by telephone)

Clock stops the following day

Day B = Date the claimant receives EC Certificate (or is deemed to receive it)

Clock resumes the following day

Example 1

Claimant X is dismissed on 10 March 2014

Ordinary limitation date: 9 June 2014

4 April Claimant completes EC Form online – Day A is 4 April. The clock stops from 5 April

20 April EC Certificate sent by email – Day B is 20 April

The clock stops from 5 April to 20 April amounting to 16 days (as all days are counted)

That period is added to the ordinary limitation date of 9 June.

Limitation expires on 25 June 2014.

Example 2

Claimant X is dismissed on 10 March 2014

Ordinary limitation date: 9 June 2014

4 April Claimant completes EC Form online – Day A is 4 April.

5 April EC Certificate sent by email – Day B is 5 April

The clock stops from 5 April to 5 April amounting to 1 day. That period is added to the ordinary limitation date of 9 June. Limitation expires on 10 June 2014

Example 3

Claimant X is dismissed on 10 March 2014

Ordinary limitation date: 9 June 2014

7 June Claimant completes EC Form online – Day A is 7 June.

1 July EC Certificate sent by email – Day B is 1 July

The clock stops from 8 June to 2 July (24 days). However, because ordinary limitation would have expired between Day A and within one month after Day B, limitation is extended by one month after Day B. Limitation therefore expires on 1 August.

Individuals can complete the Early Conciliation notification form electronically by contacting Acas via their website (this is their preferred option) – <http://www.acas.org.uk/earlyconciliation>

By telephone via their national helpline number **0300 123 1100**

By posting the form to **EC Notifications, ACAS (Phoenix) PO Box 10279, Nottingham, NG2 9PE**

Steps our members must take

- 1 Contact ACAS as soon as possible irrespective of whether the member feels a settlement can be reached.
- 2 Provide ACAS with their contact details along with the contact details of the employer and representative.
- 3 Details of the claim not needed at this stage
- 4 If member requires CWU assistance, provide ACAS with contact details of Legal Services Department
- 5 If settlement can't be reached then ACAS will issue EC certificate
- 6 Members can now submit an Employment Tribunal claim form (ET1) if still pursuing a dispute.

Please refer to LTBs 143/2014 and 044/2015 for further information on ACAS EC.

Some claims are exempt from the requirement to submit an Early Conciliation Form. However, if in doubt, ACAS should be contacted for advice as quickly as possible.

Authorisation of Legal Representation

In order for representation to be considered, the Legal Services Department will require our member's ACAS Early Conciliation certificate, a copy of ET1 claim form, the employer's response (ET3) and all relevant internal discipline/grievance and appeal notes and decisions in order that an initial assessment can be made as to the merits of the claim. All applications will be assessed by the Employment team at Unionline who will provide written legal advice as to the merits of our member's claim. If the advice is positive then arrangements will be made via the Legal Services Department for representation to be provided either by one of the CWU in-house ET Panellists or by Unionline's employment lawyers.

In the event the legal advice is negative the Legal Services Department will either reject the claim outright or authorise one of the CWU in-house ET Panellists to review the claim and where appropriate make arrangements to interview the member along with the branch officials in order to assess the claim from an industrial viewpoint. We have adopted this approach as there are

occasions where we feel our members have been treated unfairly by the employer and there may be circumstances whereby a non-legal view is able to shed new light on our member's claim which, linked with the legal advice provides us with a stronger case. If appropriate the ET Panellist can recommend support. The final decision on providing representation will rest with the Legal Services Department.

On all occasions, Branches should resist from advising members as to the likely outcome of such assessments as this may lead to unrealistic expectations.

Making an Application

It remains the individual's responsibility to submit the ET1 claim form to the Tribunal office and Branches may assist members with this process. Branches must not submit the form on the member's behalf.

Members should submit their ET1 claim form direct to the Employment Tribunal Office. Once they have received an acknowledgement that the claim has been lodged, they should send a copy of the claim form to the Legal Services Department.

Branches should note and explain to members that once the ET application has been lodged with the appropriate Tribunal office, the normal process for assessment will be made by the Legal Services Department as to the merits of the claim. A decision on representation will be made once the application has been assessed.

If a member is making a claim by post in England and Wales, the claim can be sent, to the **Employment Tribunals Central Office, Post Office Box 10218, Leicester, LE1 8EG.**

If the member is making a claim in Scotland, the form should be sent to: **Employment Tribunals Central Office, PO Box 27105, Glasgow, G2 9JR.**

Employment Tribunal Process

Once the Tribunal office has accepted the application the member will receive correspondence direct from the Tribunal and copies should be sent to the Legal Services Department. This usually happens prior to a decision being made regarding representation, and in such circumstances, the members must comply with the Tribunal orders. If the CWU is providing representation then the Union's Solicitors or ET Panellist will notify the Tribunal Office and go on record at which point the Tribunal office will correspond direct to the Solicitors or ET Panellist.

In circumstances where a decision on representation has not yet been made, the Tribunal will still carry on with its procedures and it's at this point Branches may need to assist our member with any orders (instructions) given by the Tribunal office.

The following is a guide to those procedures.

If a claim is accepted by the Tribunal office it will send our member's ET1 application form to the Respondent (the named employer or persons whom the claim is against).

The Respondent must set out the grounds of resistance on the prescribed form, ET3, usually within 28 days and return it to the Tribunal office.

As soon as possible after the ET1 and ET3 have been accepted by the Tribunal an Employment Judge will carry out an initial consideration of the documents to confirm whether there are arguable complaints and defences that can be considered by the Tribunal.

The Employment Judge may seek further information from the parties before reaching a decision.

The Tribunal Judge may set a date for a Preliminary Hearing.

There are two types of Preliminary Hearing, known as,

1. Case Management Discussions (CMD)
2. Pre Hearing Reviews (mini hearing) (PHR)

Branches should note that the Legal Services Department would not expect Branch Officials to attend PHRs, as decisions can be made on the day regarding the merits of the case. If a PHR is listed the Legal Services Department will make every effort to ensure our member has suitable advice.

If, however, a CMD is listed, Branches should be able to assist our member.

A CMD is usually called to explore the issues of a case and set a timeline for the progression and administration of the claim by the Tribunal. The CMD can be arranged as a face to face meeting with the Judge, which is held in private, or, as in many cases, as a telephone conference.

A key part of the CMD is the need to complete a form known as Agenda For Case Management At Preliminary Hearing which will be sent out by the Tribunal office.

The form has to be completed by the Claimant and the Respondent. This form can be an agreed form with the Respondent (this is usually not possible) or as two separate forms, which should be sent to the Tribunal Office and the Respondent/s no later than 2 days before the Preliminary Hearing.

It is essentially a time-tabling exercise which enables the Tribunal to set dates by which pieces of work need to be completed in advance of the claim going to a full Tribunal Hearing.

Completing the form is an important part of the process because it will prepare the member for the hearing and the questions asked enable both parties to concentrate on the relevant issues which includes the correct name of the parties, the complaint, documents relied on, witnesses to be

called, dates to avoid and the remedy (this will require the completion of a separate form known as Claimant's Schedule of Loss). Copies of both forms are attached at the appendix.

There are a number of specific case management powers the Employment Judge has which include,

- Power to order disclosure of documents and information
- Power to order production of witness statements
- Power to compel the attendance of a person at a hearing (witness order)
- Power to add, substitute or remove a party from the proceeding
- Power to strike out all or part of a claim or response
- Power to make an unless order (can strike out the claim if either party fail to respond)
- Power to make a deposit order (This is a monetary payment that a party has to pay if he/she pursues a weak claim)
- Power to deal with nonpayment of a deposit order.

CLAIMANT'S SCHEDULE OF LOSS

This document is the one which causes our members the most concern as it details the amount of compensation they wish to claim as part of any settlement.

Most of the details required should already be available to our members such as their basic pay, length of service, notice period, loss of earnings, etc.

The areas that they will need assistance fall into 2 categories.

- Basic Award
- Compensatory Award

These awards are calculated applying a detailed formula which is contained within the form itself. Some areas are more difficult to quantify such as future pension loss. It is important to understand that the information supplied in the schedule of loss is only an estimate of what our members feel they are entitled to claim and if they are unsure what amount to put down or if the figure is inaccurate it doesn't matter as details can be added later. In any case it will be the Employment Judge who decides the level of compensation to award.

Pre Hearing Review (PHR)

Preliminary Hearings are mini hearings, which may be held in public and either at the Employment Judge's request or an application of one of the parties involved, to determine any preliminary issue, for example:

1. Decide whether to strike out the whole or part of the claim or response
2. Any substantive issue which may determine liability
3. An issue as to jurisdiction (has the claim been submitted within the agreed time limits)
4. Whether the employee was dismissed or not

5. Whether the claimant was an employee; or
6. Whether the claimant was disabled

A Tribunal must give 14 days notice if a Hearing is to determine a Preliminary issue and in all other cases, the tribunal must give reasonable notice.

Once the Preliminary Hearing has been concluded, the Tribunal will issue Case Management Orders which will be sent direct to the member (the Claimant) or a decision depending on what the Hearing was called to determine. These orders will detail what action needs to be taken by the Claimant and/or the Respondent and the time scales for doing so. These orders include requests for further and better particulars of the Claimant's claim; requests for further and better particulars of the Respondent's claim; the date upon which witness statements need to be exchanged between the Claimant and the Respondent; the date for disclosure of any relevant documentation which can include medical notes and reports which are to be relied upon; the date and time for the preparation of the Tribunal bundle and a date and duration of the Tribunal Hearing.

Branches should be aware that there are consequences for the non-compliance of such orders, which include a fine of up to £1000.00 being imposed upon the person being in default. Non-compliance could lead to the claim being struck out.

In any event, if you are unsure about any issue contained within this guide please contact the Legal Services Department who will provide to necessary assistance.

Details contained within this LTB are for information purposes only and members should be made aware that it is not given as qualified legal advice. Such legal advice can only be provided by a solicitor.

If you have any further enquiries regarding the above then please contact Mr. Tony Rupa, Head of Legal Services, Communication Workers Union, 150 The Broadway, London, SW19 1RX. Telephone 0208 971 7444 or via email trupa@cwu.org

Yours sincerely

Tony Rupa
HEAD OF LEGAL SERVICES

Useful sources of information :

www.justice.gov.uk/tribunals/employment
www.acas.org.uk
www.equalityhumanrights.com

Attachment :