Morgan Lewis

INVESTIGATIONS SERIES: A GUIDE FOR UK EMPLOYERS PART 3

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Investigations Series

1. Part 1: Investigation Strategy and Best Practices (17 March 2022)
2. Part 2: Disciplinaries, Grievances, Pre-Litigation Strategy (8 June 2022)
3. **Part 3: Litigation and Tribunal Process and Practice (29 September 2022)**
4. Part 4: Mock Tribunal Hearing (Spring 2023)

Today's topics

1. Case management best practices
2. Lists of issues
3. The scope and pitfalls of disclosure, including how best to manage the disclosure process
4. Selecting witnesses and taking effective witness statements
5. Preliminary hearings:
   - Common types of public and private preliminary hearings
   - Making strategic applications for preliminary hearings
   - Rule 50 applications
6. Trial preparation, including preparation of trial bundles, applications for remote witness evidence and setting expectations for trial

Reminder: Case Study Fact Scenario

- Amy was an assistant to Joe (Head of Investor Relations) at Blue Fox Financial Services (Blue Fox). She had been in the Company for over 3 years
- Amy worked remotely during COVID-19. When asked to return to the office Amy refused. She said she was worried about catching COVID-19 because she suffered from Chronic Obstructive Pulmonary Disease and that she could perform her role from home
- Amy was placed on a PIP after performance concerns were raised by Joe. During the process, Amy told Paul in HR (a friend of Joe's) that this was all because she raised concerns about Joe's expenses practices with him, including accepting F1 tickets from a business acquaintance and not disclosing it to Blue Fox and claiming business expenses while on holiday. Paul told Joe about Amy's allegations and he said "not to listen to that mad woman who is obviously menopausal and losing her mind". Amy's allegations were ignored by Paul
- Blue Fox obtained external legal advice on the situation and was told that "there are some significant risks with the way this matter has been handled and that Blue Fox might want to consider restructuring Amy's role if the business no longer needs her". This was forwarded to Paul. Amy then made a DSAR

What happened next…

- After taking external legal advice, Blue Fox decided to take Amy off her PIP
- Blue Fox did not open up either a grievance or whistleblowing process in response to Amy's complaint and there was no investigation into Joe's conduct
- Amy was moved to another team but did not receive her mid-year bonus. She was very upset
- One month later, Amy saw the response from Blue Fox on her DSAR which included the email from the external lawyers to Blue Fox
- Amy resigned. She said that she was outraged by how she had been treated and warned that Blue Fox would pay dearly
- Two months later, Blue Fox received notice of a claim by Amy from the London Central Employment Tribunal

Key legal claims

- Discrimination claims
- Claims under sections 44 and 100 of the Employment Rights Act
- Constructive dismissal
- Breach of ACAS Code of Practice

Case Management Best Practices & Lists of Issues

Case Management – ET3 Response

- The deadline to present an ET3 runs until midnight on the last day for presentation
- Respondents must:
  - Use the prescribed ET3 form
  - Ensure it contains the required information
  - Either submit its completed ET3 within the 28-day time limit or make an application for an extension of time to do so
- Time limits may be extended by the tribunal where just and equitable to do so
- Respondents should set out their response to each allegation raised by the claimant in the ET1 in sufficient detail to show why it has reasonable prospects of successfully defending the claim:
  - Address each allegation and include all relevant information to avoid the need for amendments (and potential costs orders)
  - Ensure that explanations are consistent with contemporaneous documents (which will have to be disclosed)
  - Arguments can be raised in the alternative

Case Management

- Importance of the overriding objective
- Tribunals will typically hold a case management preliminary hearing in more complex matters such as discrimination or whistleblowing claims to ascertain the case management orders needed to prepare the case for final hearing
- The tribunal may also make case management orders at a preliminary hearing listed to deal with a specific preliminary issue or to consider an application made by a party
- Unless orders: An order may state that if it is not complied with by a specified date, the claim or response will be dismissed, in full or in part, without further order
- Disability claims: It is not uncommon for the respondent to dispute that the claimant was a disabled person for the purposes of the section 6 Equality Act 2010 definition. In such cases, the tribunal will need to make additional directions requiring one or both parties to obtain expert medical evidence concerning the issue of disability

List of Issues

- Helpful for the parties to agree between themselves and provide to the tribunal a comprehensive list of the legal and factual issues to be decided at the final hearing
- The tribunal may order the preparation of an agreed list of issues
- General rule is that the issues at the hearing will be confined to those on the list

Settlement

- Throughout the proceedings, the parties should be mindful of the costs of litigation. For employer respondents, there is likely to be significant management and witness time required in addition to legal fees
- The right time to make a settlement offer will depend on the specific circumstances
- There is greater incentive to settle early in the proceedings, once a robust ET3 defence is on file but before the costly tasks of disclosure and witness statements are incurred
- Once disclosure has taken place and "cards are on the table" the party in the weaker position might be more incentivised to settle

Disclosure & Witness Statements

Disclosure

- Tribunals will usually make case management orders related to disclosure
- Typically, all documents relevant to an issue in the claim that are in a party's possession, custody, or control should be disclosed
- Parties need to disclose documents on which they plan to rely, and any documents that adversely affect their case or another party's case, or support another party's case – unless any of these documents are privileged or contain "without prejudice" correspondence
- A "document" is anything in which information of any kind is recorded – can include emails, databases, records of audio communications, text messages, and posts on forums like Twitter and Facebook, but also material that is not readily accessible, like electronic documents stored on servers and back-up systems, electronic documents that have been deleted, and even metadata

Disclosure – Reasonable Searches

- Parties must undertake reasonable rather than exhaustive searches for any documents
- What constitutes a reasonable search will depend on the matter and issues, but should include:
  - Considering the potential sources and volume of documents, both physical and electronic. This might involve reaching out to individuals who worked with a claimant and asking them to locate and supply relevant files, diary entries, emails and other documents
  - Preserving documents – once a party is aware of the possibility of litigation, it is under a duty to preserve all documents which may become disclosable. A party should never destroy any potentially relevant documents
  - Addressing document creation and management going forward
  - "Harvesting" documents, including relevant electronic documents
  - Filtering and document review, possibly using a review platform
- It is a good idea to keep a record of any searches undertaken, in case questions are raised about the reasonableness of a particular search

Disclosure - Process

- Once reasonable searches have been completed, the sequence for disclosing documents is usually as follows:
  - Both parties prepare lists or indexes identifying all the relevant documents they have by number, description and date. Normally, this process is led by the respondent
  - The lists or indexes will be exchanged simultaneously/by an agreed date (usually specified in a case management order)
  - Sometimes, copies of the documents to be disclosed are required to be sent with the document list or index. However, if not, each party should request copies of the documents that they want to see from their opponent's list
  - The parties then agree which documents from both lists should be put before the tribunal in a hearing bundle
- Disclosure duties are ongoing – if further documents are discovered after the main disclosure has taken place, these too must be disclosed

Witness Evidence

- Evidence in chief – written statement and cross examination
- Select those witnesses with the best knowledge of the issues and who are likely to perform well under pressure
- Usually simultaneous exchange of witness statements
- Supplemental witness statements are reserved for new allegations or evidence contained in the original witness statements
- A witness order is possible to compel a witness to give evidence

Witness Evidence - Statements

- Balance in taking statements early while memories are fresh and incurring costs early in the proceedings
- Witness statements are typically available for inspection by the public during the trial
- Key considerations:
  - What particular events, areas of dispute, missing information, and/or conflicting evidence would it be helpful for the witness's statement to cover?
  - Are there any documents or other evidence that would be useful for the witness to comment on?
  - What points are the other party's potential witnesses likely to cover in their statements?
  - Remember tribunals are strict about prohibiting questions to witnesses which go beyond matters in their witness statement
- Prepare a list of questions to put to witnesses in advance
- Generally preferable to conduct witness interviews face to face to assess how cogent the witness may be before the tribunal
- Statements should be written in the witness' own words and not the lawyers!

Case Study - Update

- The Tribunal orders Amy to provide medical evidence that Chronic Obstructive Pulmonary Disease is a disability within the meaning of the Equality Act 2010. Blue Fox reviews this information and contests that the disease is a relevant disability. A preliminary hearing on the issue is listed. At the preliminary hearing, the judge holds that Chronic Obstructive Pulmonary Disease is a disability for the purposes of the Equality Act 2010
- Paul is very nervous about the proceedings. Blue Fox is worried what Paul might say under pressure, so they decide not to call him as a witness
- The tribunal is critical of the fact that Paul, who holds key information about the issues in the claim, was not called as a witness. The tribunal draws an adverse inference from the failure to call Paul as a witness

Preliminary Hearings & Preparing for Trial

Preliminary Hearings

- The Tribunal may conduct a preliminary consideration of the claim with the parties and make a case management or other order
- Preliminary hearings are typically used to:
  - Clarify the substantive issues the Tribunal will need to determine at the final hearing
  - Issue case management orders laying out steps that must be undertaken to prepare for the final hearing
  - Explore the possibility of settlement or alternative dispute resolution (including mediation)
  - Determine preliminary issues, such as jurisdiction or time limit issues, or whether a claimant's medical condition falls within the meaning of "disability" under section 6 of the Equality Act 2010 and whether they can pursue a claim for disability discrimination

Preliminary Hearings: Making an application

- Preliminary hearings can be ordered by the Tribunal either of its own volition at any time, or as the result of an application by a party
- A party might make an application for a preliminary hearing, or for specific issues to be dealt with at the hearing (such as an extension of time or to strike out a claim)
- Preliminary hearings can be useful for case progression because they can:
  - Narrow the issues in dispute – parties might discover that some issues can be resolved without the need for a final hearing
  - Offer an indication of merits – preliminary hearings do not usually consist of a consideration of the merits, but sometimes judges offer views or remarks on how the tribunal might consider a claim or response
  - Create chances for discussions – this might be between the parties' legal representatives, and could help to further narrow issues in dispute, or give an idea of whether there is a benefit to commencing "without prejudice" settlement negotiations

Preliminary Hearings – public or private?

- The default position for preliminary hearings is that they will be held in private
- But if any part of a hearing relates to the determination of the following issues, the hearing must be conducted in public:
  - Where the employment judge is determining a preliminary issue
  - Where the employment judge is considering whether the claim or any part of the claim should be struck out
- This is unless the following issues are involved, and then the hearing might still be held in private:
  - Provisions concerning the prevention or restriction of disclosure of any aspects of proceedings in the interests of justice or for the protection of rights under the European Convention on Human Rights (rule 50, see next slide)
  - Matters of national security

Rule 50 Applications

- A tribunal may, at any stage of the proceedings, either on its own or following an application, make orders to prevent or restrict the public disclosure of any aspect of those proceedings, so far as the tribunal considers it necessary:
  - In the interests of justice, or
  - In order to protect the European Convention on Human Rights (ECHR) rights of any person, or
  - In the circumstances identified in section 10A of the Employment Tribunals Act 1996
- Tribunal must give full weight to the principle of open justice and the ECHR right to freedom of expression
- The types of order a tribunal can make to protect privacy and anonymity include:
  - Conducting a hearing wholly or partly in private
  - Anonymising the identities of specified parties, witnesses or other persons who are referred to in the proceedings
  - Preventing witnesses at a public hearing being publicly identifiable

Preparing for Trial

- Chronology and cast list
- Skeleton arguments
- Hearing bundle: documents relevant to the issues; potential page limit
- Witnesses:
  - Witness familiarisation not coaching
  - Availability
  - Location: permission from the tribunal is needed to give evidence remotely from abroad and there may be local law considerations
- Tribunal hearings are typically public. Plan any internal and external communications in advance of the hearing
- Remote hearings: preliminary hearings now typically remote; still a preference for final hearings to take place in person

THANK YOU