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Employment Tribunal – Whether to Fight or Settle

The cost of going to an employment tribunal, without a doubt, can be high so employers must consider the financial implications. So is it better to settle or to fight?

Controlling legal costs

Extensive legal costs are not inevitable. Legal fees can vary enormously; it may not make financial sense to pay for top lawyers if the case itself is mundane and could be handled just as well by a less high-profile legal advisor. Another issue is time. The more preparation that is done and the longer the hearing, the more the case will cost. Decisions need to be taken about how much legal and management resource will be made available. "Do whatever it takes to make sure we win" is not a sensible strategy unless an organisation has very deep pockets.

Factors for consideration

An employer's first instinct may be that a case should be fought rather than settled. Feelings run high and the employer sets a premium on its reputation and the principle that an employee should not be rewarded for an unmeritorious claim.

As the tribunal date approaches, the inconvenience and expense associated with fighting looms larger. The point of principle can give way to straightforward economics. By then, however, the employer has thrown away a considerable amount in legal costs. Better to explore the prospect of settlement from the outset.

Sizing the claim

It is impossible to make sensible decisions about resourcing or settling a claim without having a clear idea of its overall size. Three factors are crucial:

- the chances of success;
- the likely remedy; and
- any wider impact a successful claim would have (in terms of reputation, precedent or employee relations).

The chances of success

Nothing is certain - and this is particularly true of the outcome of employment tribunal claims. However confident you may be that the claim is misplaced, allowance always has to be made for the unexpected. Nevertheless, it is usually possible to make a reasonable prediction of the chances of success. Where the claim is clearly weak then it should be possible to keep legal costs under control. You should not spend too much money in countering allegations that do not actually make out a proper

claim or that are demonstrably untrue. If making a settlement offer, the employer should be in a strong position to offer a modest sum that is somewhat better than the claimant can hope to achieve at the tribunal.

Remedy

It is important not to focus exclusively on whether the claim will be won or lost. What matters just as much is how much will be awarded if the employee wins.

The maximum compensatory award for unfair dismissal is £65,300. Compensation is based on lost earnings and does not include payment for injury to feelings. In discrimination claims there is no cap on compensation and injury to feelings awards are made.

Whether the claim is for unfair dismissal or discrimination, the largest head of compensation is likely to be lost earnings. If the employee has found work before the employment tribunal hearing then the compensation payable if the claim is successful will be greatly reduced.

Crucially, the more highly paid the employee, the higher the stakes in the employment tribunal. An employee who was earning £20,000 would have to show that the dismissal has caused three years' unemployment to approach the maximum amount for unfair dismissal, whereas a senior executive would obviously reach that amount much more easily.

It is important not to neglect the scope the tribunal has for reducing compensation - particularly in unfair dismissal claims. A dismissal may clearly be procedurally unfair, but the employer may have cast-iron evidence that the employee was guilty of gross misconduct. If so, the tribunal would inevitably make a substantial reduction in the compensation awarded - possibly by as much as 100%. It is vital that these factors are taken into account in any settlement negotiation.

Wider impact of the claim

A single tribunal case may have wider consequences. Many employers worry about negative publicity and this is certainly a consideration - although the prospects for it are sometimes exaggerated, but nevertheless, need to be taken into consideration.

It's the principle of the thing

Parties can start out with unrealistic expectations of what an employment tribunal can actually deliver. Employees may seek a chance to clear their name or force the employer to recognise and regret the error of its ways. Employers may seek vindication or to send a clear message to other employees that it does not pay to take them to the tribunal. Both may be disappointed. Full vindication is rare from the tribunal - and winning a case can be a very expensive way of sending a message.

There has undoubtedly been an increase in claims again over the last twelve months, but it is arguable that employers are being more realistic about how they are handled. Where employers realise that there is a realistic prospect of losing, or that the legal costs in defending a claim are likely to outstrip the cost of settlement by a significant margin, employers often take the commercial decision to settle. This is an entirely plausible explanation as to why only a relatively small number of claims proceed to a full hearing and why, of those, only a small number succeed.

Whether cases settle or not, there is still going to be a cost, so it is important that a tight control is kept on employment practices. If, however, the worst happens and employers are faced with a claim then it is important to make an early and realistic assessment. Balance the costs of fighting the claim (factoring in the prospects of success), management time and stress against the cost of settling. Whilst it is inadvisable for employers simply to roll over at the first sign of a claim, it should also be recognised that it makes poor commercial sense to throw money at legal fees if there is a sensible deal to be done.

If you need assistance with an employment tribunal please contact:

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