

Factsheet 45: Expert Evidence in Employment Cases

Last updated: April 2008

Employment tribunals constitute a specialist jurisdiction within the UK's system of civil justice. Being specialist, it is easy to underestimate their importance. Yet they deal with cases brought under increasingly complex, and controversial, areas of legislation, and their workload is growing by leaps and bounds. The number of applications they receive has more than doubled in the past decade, from 44,377 in 1990 to 118,400 in 2000 and 238,546 in 2006/7 (although these figures are somewhat inflated by the fact that not all claims are accepted by the tribunal). Given current concerns about the possibility of a worldwide recession, the total seems likely to increase still further.

One of the supposed advantages of tribunals is that those using them should be able to argue their case in person without the need for specialist advice or legal representation. In the report¹ of his inquiry into the tribunal system published in August 2001, Sir Andrew Leggatt reaffirmed this as a major objective of the reforms he was proposing. By making the regime more user friendly he expressed the hope that the reforms would go a long way towards helping appellants understand the law and put their cases themselves. Consonant with this view, Sir Andrew recommended that public funding for representation should be made available only in exceptional circumstances, and that there should be no extension of the powers of tribunals to award costs.

Whether this is an altogether realistic objective in the case of employment tribunals is to be doubted, given the arcane nature of much of the legislation with which they have to wrestle and the inherent disadvantage suffered by many appellants when faced by their better prepared former employers. In such circumstances, ex-employees may well need legal representation and the ability to call their own expert evidence if that imbalance is to be redressed.

There are concerns, though, about the ways in which expert evidence is sometimes obtained for tribunal hearings, and earlier in 2001 one particular case provoked the Employment Appeal Tribunal (EAT) to issue guidance on its future use in employment cases.

'Scandalous behaviour'

In *Wilson -v- De Keyser Ltd*, the applicant alleged constructive dismissal, claiming that she had a depressive illness brought on by work-induced stress and, in particular, the attitude of her area manager. Her GP supported her view, but the employer contended that the illness resulted from events in her private life.

At a directions hearing, the employee agreed to be seen by an occupational specialist appointed by the employer. The arrangements for this examination were made by an employment consultant acting on the employer's behalf. In his letter of instruction to the specialist, the consultant gave the details of the employee's private life that the employer believed to have been the cause of her illness, and asked for her GP's findings to be examined in that light.

When the contents of this letter were brought to the attention of the tribunal hearing the case, it ruled that the letter of instruction contained material that was irrelevant and abusive. It struck out the employer's defence on the ground that he had conducted his side of the proceedings in a scandalous manner.

The employer appealed. In the event, the EAT set aside the striking out order, holding that it would still be possible to have a fair trial of the issues between the parties if another doctor were to be instructed to carry out the examination and the instructions given were acceptable to the employee. The order to strike out was, in short, disproportionate to the offence, scandalous though the original letter of instruction had been.

The EAT did not leave the matter there, however. It went on to note that it had had occasion in the past to comment on the conduct of, as it put it, 'unqualified representatives'. The EAT concluded that 'the existence of a body of representatives who are untrained and not susceptible to any professional discipline' made it especially important that some guidance should be given as to how expert evidence

should be provided in employment cases. Where such evidence was necessary, the arrangements for obtaining it should be as economical and effective as the requirements of fairness allowed. Pending, then, the development of more formal rules, including provisions as to the costs involved, it set out the guidelines reproduced below.

The guidelines

1. Before instructing an expert, a party should first explore with the tribunal, at a directions hearing or in correspondence, whether, in principle, expert evidence is likely to be acceptable. It by no means follows that because a party wishes such evidence to be admitted, it will be.
2. Except where one side has already committed itself to the use of its own expert (which is to be avoided in the absence of special circumstances), the joint instruction of a single expert is the preferred course.
3. If a joint expert is to be instructed, the terms which the parties need to agree include the incidence of that expert's fees and expenses. Although there is nothing to preclude the parties agreeing that they will abide by such view as the tribunal shall later indicate, the tribunal has currently no power to award costs beyond the general provisions laid down in rule 12 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 1993.
4. If the means available to one side are such that it cannot agree to share the expert's fees and expenses, or if (irrespective of its means) a party refuses to pay or share such costs, the other party can reasonably be expected to instruct its own expert. However, in such a case, the weight to be attached to that expert's evidence (which is a matter entirely for the tribunal to judge) may be increased if the terms of his instruction have been submitted to the other side, for agreement or comment, ahead of their being finalised for sending to the expert.

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5. If a joint expert is to be used, the tribunal may fix a period within which the parties are to seek to agree the identity of the expert and the terms of a joint letter of instruction, and the tribunal may fix a date by which the joint expert's report is to be made available.

6. Any letter of instruction should specify, in as much detail as can be given, any particular questions the expert is to be invited to answer and all the more general subjects he is to be asked addressed.

7. Such instructions should, as far as possible, avoid partisanship and tendentiousness. In so far as the expert is asked to make assumptions of fact, they should be spelt out. The letter should emphasise that, in preparing his evidence, the expert's principal and overriding duty is to the tribunal rather than to any party.

8. Where a joint expert is to be used, the tribunal may specify, if his identity or instructions have not been agreed between the parties by a specified date, that the matter is to be restored to the tribunal, which may then assist the parties to settle that identity and those instructions.

9. The tribunal may give formal directions regarding the issues to which the expert is or is not to address himself, whether or not he is a joint expert.

10. Where there is no joint expert, the tribunal should, in the absence of appropriate agreement between the parties, specify a timetable for disclosure or exchange of experts' reports and, where there are two or more experts, for meetings.

11. Any timetable may provide for the raising of supplementary questions with the expert(s), whether there is a joint expert or not, and for the disclosure or exchange of answers in good time before the hearing.

12. In the event of separate experts being instructed, the tribunal should encourage arrangements for them to meet on a 'without prejudice' basis with a view to their seeking to resolve any conflict between them and, where possible, to their producing and disclosing a schedule of agreed issues and points of dispute between them.

13. If a party fails, without good reason, to follow these guidelines and if, in consequence, another party suffers delay or is put to expense which a due performance of the guidelines would have been likely to avoid, then the tribunal may wish to consider whether, on that party's part, within the meaning of rule 12(1) of the 1993 Regulations as to costs.²

Comment

From even a cursory reading of these guidelines it is clear that the EAT was intent on importing into employment tribunal procedure the more significant requirements of Part 35 of the Civil Procedure Rules. Although much less well phrased, the main thrust of the guidance is the same:

- the calling of expert evidence is to be under the control of the tribunal
- the parties are to co-operate with the tribunal in securing that evidence, and
- wherever possible, evidence is to be provided by a single expert jointly appointed by the parties.

There is also the threat of sanctions if a party should wilfully fail to observe the guidelines and its opponent suffers delay or expense as a result.

In view of the ever-increasing number of employment cases being brought each year, and – despite Sir Andrew Leggatt's views to the contrary – the importance of expert evidence in securing a just result in so many of them, one could wish that the guidelines had been ordered more logically. Thus it might appear from their position that clauses 6 and 7 relate to single joint experts, whereas it must be the case that they apply to all experts, however appointed.

Employment Tribunals Regulations 2004

In October 2004 a statutory instrument was passed that seeks to regulate and control the use of expert evidence in the tribunal. *The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004* go some way towards redressing previous difficulties and uncertainties.

Schedule 6 to the main Regulations gives the tribunal new case management powers in relation to equal value claims. It also aims to simplify the Rules of Procedure for equal value claims and to speed up such claims. These rules and their application to experts may be summarised as follows.

Rule 6 of Schedule 6 deals with the involvement of the independent expert in fact finding. It applies only to proceedings in relation to which the tribunal has decided to require an independent expert to prepare a report on the question. The rule provides that a tribunal or chairman may if he considers it appropriate at any stage of the proceedings order an independent expert to assist the tribunal in establishing the facts on which the independent expert may rely in preparing his report. Examples of the circumstances in which the tribunal or chairman may make such an order described include:

- (a) a party not being legally represented;
- (b) the parties are unable to reach agreement as required by an order of the tribunal or chairman;
- (c) the tribunal or chairman considers that insufficient information may have been disclosed by a party and this may impair the ability of the independent expert to prepare a report on the question;
- (d) the tribunal or chairman considers that the involvement of the independent expert may promote fuller compliance with orders made by the tribunal or a chairman.

Rule 7 of Schedule 6 provides that in cases where an independent expert has been required by the tribunal to prepare a report, the tribunal must hold a stage 2 equal value hearing. The rule lists the matters to be dealt with at such a hearing.

Rule 8 of Schedule 6 sets out the standard orders that may be made, added to, varied or omitted by the tribunal.

Rule 9 makes provision for the admitting in evidence at a hearing of a report prepared by the independent expert. It also provides that the tribunal may refuse to admit at the hearing evidence which has not been disclosed to the other parties before the hearing.

Rule 10 sets out the duties and powers of independent experts. The rule states that:

The independent expert shall have a duty to the tribunal to:

- (a) assist it in furthering the overriding objective in regulation 3;
- (b) comply with the requirements of these rules and any orders made by the tribunal or a chairman in relation to the proceedings;

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- (c) keep the tribunal informed of any delay in complying with any order in the proceedings with the exception of minor or insignificant delays in compliance;
- (d) comply with any timetable imposed by the tribunal or chairman in so far as this is reasonably practicable;
- (e) inform the tribunal or a chairman on request by it or him of progress in the preparation of the independent expert's report;
- (f) prepare a report on the question based on the facts relating to the question and (subject to rule 14) send it to the tribunal and the parties;
- (g) make himself available to attend hearings in the proceedings.

Rule 11 provides that other expert evidence may not be admitted in evidence without the permission of the tribunal. It also makes further provision in relation to other expert evidence and how expert evidence should be used. The rule is analogous to those governing experts in the civil courts and states that:

- (1) Expert evidence shall be restricted to that which, in the opinion of the tribunal, is reasonably required to resolve the proceedings.
- (2) An expert shall have a duty to assist the tribunal on matters within his expertise. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.
- (3) No party may call an expert or put in evidence an expert's report without the permission of the tribunal. No expert report shall be put in evidence unless it has been

disclosed to all other parties and any independent expert at least 28 days prior to the Hearing.

- (4) In proceedings in which an independent expert has been required to prepare a report on the question, the tribunal shall not admit evidence of another expert on the question unless such evidence is based on the facts relating to the question. Unless the tribunal considers it inappropriate to do so, any such expert report shall be disclosed to all parties and to the tribunal on the same date on which the independent expert is required to send his report to the parties and to the tribunal.
- (5) If an expert (other than an independent expert) does not comply with these rules or an order made by the tribunal or a chairman, the tribunal may order that the evidence of that expert shall not be admitted.
- (6) Where two or more parties wish to submit expert evidence on a particular issue, the tribunal may order that the evidence on that issue is to be given by one joint expert only. When such an order has been made, if the parties wishing to instruct the joint expert cannot agree who should be the expert, the tribunal may select the expert.

Rule 12 of Schedule 6 establishes a procedure for putting written questions to experts and for the answers to those questions to be treated as part of the expert's report.

Rule 14 of Schedule 6 provides that the procedures contained in rule 10 of Schedule 2 to the main Regulations are to apply to independent expert reports and answers to written questions in equal value claims which are also national security proceedings.

Footnotes

¹The report, *Tribunals for Users*, is to be found on the Ministry of Justice's web site: www.justice.gov.uk.

²Rule 12(1) of the 1993 Regulations reads in part:

Where in the opinion of the tribunal, a party has in bringing or conducting proceedings acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably, the tribunal may make

- (a) an order containing an award against the party in respect of the costs incurred by the other party...

In 1993 the maximum amount of costs that a tribunal could award for this reason was fixed at £500, but in April 2001 the ceiling figure was raised to £10,000. The threat of sanctions for failure to observe the EAT's guidelines on expert evidence has thus become a far from negligible consideration.

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