



Defending legal claims at work

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The last thing an employer needs at time like this is an employee dispute: legal costs disruption and strategic risk (diverting information/contacts away etc.) not to mention compensation awards. There's no upside. But if this happens there are many ways to limit or defeat the problem altogether. There are also simple steps you can take to manage legal costs and so here's something to help you organise your thoughts...This article is based on 30 years' experience of dealing with every conceivable type of claim.

Defending a claim now may seem like nothing but a burden but if you do it well it could send out a valuable message, deterring future challenges.

Creating the right impression

Most disputes don't go to tribunal, but you do have to prepare yourself for a potential claim and positioning yourself well early on is the best way of preventing them...Many employees say, 'They never go to tribunal' or 'They won't want the publicity.' This is often on the back of other claims where another employee has been paid off..

You have to make it clear that you do have the resolve to face unjustified claims.

Here are some things you can do:

1. **Don't overreact**- some employees are looking to force your hand. If you snap this maybe used as a 'last straw' in a constructive dismissal case or as a detriment/victimisation in discrimination and whistleblowing cases.
2. **Legal training**- a short training session on discrimination, for example, can be a great defence ('reasonable steps' defence) leaving only the perpetrator of the discrimination personally liable. Better still it stops people discriminating in the first place.
3. **Contracts and handbooks/management instructions**- Updating documents is a way of enforcing standards; this also shows that you are ahead of the game. Employees must also follow reasonable management instructions so a clear written instruction- ideally to everyone- can also be an excellent defence if an employee chooses to disregard it and is then disciplined.
4. **Investigations**- the *ACAS Code of Practice (1)* sets out the standards required. A fair and balanced investigation will put you in good stead and may identify issues you need to work on. One of the most common errors is an investigation which only looks for points in favour of the employer, leaving the Tribunal to fill in all the gaps.
5. **Take action**- If the investigation does unearth a problem (eg: discriminatory/offensive emails or banter) don't try to deny or diminish this...sort it out! A genuine apology or an offer of

counselling can reduce awards of compensation in the tribunal or even better persuade the employee not to bring a claim.

6. **Responding to legalistic communications-** if an employee is acting unusually (look out for uncharacteristic emails and words like 'trust and confidence') then what you say or don't say at the time is very important. An employee who raises legal concerns ('whistleblowing') needs to be treated carefully; they may rely on the way you respond as part of their case. This is the most important time to take legal advice. I can advise on whether the legal complaints are actually valid or fit the description of 'whistleblowing' and the scope of any investigation.
7. **Look out for simple solutions-** as well as taking *practical* steps to address the employee's complaint, it is worth speaking to me about legal strategy which might reduce the burden on you. Here are some examples:
 - a. **Misrepresentation-** in a case of mine, the employee brought 60 grievances, but close analysis of his CV revealed that he had lied to get the job. This material misrepresentation allowed my client to rescind (set aside) the entire contract releasing it from all obligations, preventing the employee from bringing any claims related to it.
 - b. **Characterising allegations-** just because an employee uses legal words ('discrimination' or 'protected disclosure') doesn't mean that they actually have a legal case. In a recent case of mine, an employee described a comment he heard at a meeting as a breach of a legal obligation and the HR team (before speaking to me) began a massive investigation but at the tribunal struck out the whole case applying the correct test (it wasn't a 'protected disclosure' in the first place!) ... far better to have pinned this down at the outset.
 - c. **Evidence-** in another recent case of mine the employee brought multiple complaints based on being disabled. The case was struck out at a preliminary hearing because her medical evidence didn't satisfy the legal tests- excusing my client from wading through lots of irrelevant material.
 - d. **Time limits-** most tribunal claims have to be brought within 3 months (see chronology below).

8. Investigations and case planning

The investigation stage is where a client really can help. Done properly this can defeat potential claims before they kick off but if the case does go to tribunal a well investigated case will be on narrower grounds, with less evidence and a greater chance of success.

Here are some tips:

1. **Respond-** confirm receipt of any legal complaint and pin down a timescale for responding and where delays are necessary explain *why*. Delays in a grievance process can on their own amount to a constructive dismissal or in discrimination cases can lead to awards of aggravated damages. Tell the employee what you are going to do and when and provide

appropriate instructions such as the need for confidentiality. Tell them which procedures will apply.

2. **Contain**- everyone in the employee's team needs to be briefed on management strategy. An errant email from someone outside the loop could spoil your chances! The employee needs to receive a confidentiality instruction (breach of this might give you a separate ground for dismissal).
3. **Suspension and other steps**- take advice before suspending or placing an employee on 'garden leave'. Contrary to popular belief sending an employee home on full pay is not a neutral act and done in an oppressive way, could be a constructive dismissal. Similarly, with suspension of access to email accounts etc. take care to position these steps as proportionate and reasonable.
4. **Managing facts/information**- rather than letting the employee expand at length you need to highlight the topics suggest you:
 - a. **Meet** informally to get an overview of the alleged claims.
 - b. **Characterise** the claims with headings (eg: harassment related to pregnancy/work-related stress) so when you discuss facts, you can ask which of the topics does this help with? Some employees present facts which are completely unrelated to any legal case. After any key meetings always confirm your understanding of the issues to the employee and prompt them to comment if this is incorrect.
 - c. **Chronology**- legal claims always require consideration of what lawyers call 'particulars'- dates when something happened, core facts and evidence. This is essential to assessing the issues (a tribunal will want to know 'why' something happened and the chronology is the best guide for this). Just as importantly, it puts you in charge and prevents you having to absorb confusing amounts of information. You can email me this as a Word document and I will build your case around it.
 - d. **Documents**- to prevent vast amounts of documentation and last- minute discovery of relevant information (and all the avoidable legal costs that go with that) you can do prepare the bundle as follows:
 - i. Create a Word document index with a creation date on it (so we use the correct one at the correct time!)
 - ii. Add any potentially relevant documents but do try to sift them. If the employee complaint is only about paternity leave, then that part of the policy and the grievance section is all I need. With email trails removing all the repeat emails is very important.
 - iii. Prompt the employee to provide any missing information early on.

- iv. The index needs to be simple to follow:
 - 1. Contractual & Handbook
 - 2. Medical
 - 3. General evidence: relevant instructions, warnings, emails from employee and responses
- v. Check all known means of communications such as W/app and sift for strictly *relevant* exchanges.

e. **External HR**- the ACAS Code gives guidance on this but the key to good investigations is to be open minded and proactive. Also, look out for conflict of interest. A person complained about shouldn't be conducting the procedure. It can be very helpful (and also good for your business) to engage an external HR consultant. Use your chronology as a reference point during investigations.

- 5. **Other procedures**- once you have investigated you need to decide if there is a sound basis for going to the next stage (disciplinary and grievance appeal). Notify the employee of your decision with reasoning and clarification of the procedure. I can advise on that.

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