# Disability Law Service

advice and legal representation for disabled people

# Employment tribunal hearings – tips for litigants in person*

*A litigant in person is someone who is presenting their own case at tribunal, without a professional representative

## PREPARING FOR A FINAL HEARING AS A LITIGANT IN PERSON

- Go and observe a hearing if you are new to the process (hearings are generally in public)

  Although hearings can be informal, it can be very stressful if one is unfamiliar with the legal jargon and procedures. It will help demystify some of the process and at least take the edge of complete unfamiliarity off proceedings. If your opponent is likely to be represented by a solicitor or a barrister, try to sit in on a hearing where the respondent is professionally represented, as this will give you a better idea of how to present a case and, more importantly, the process of cross examination. The clerks on duty at the tribunal should be able to point you to such a hearing.

- Get familiar with the Tribunal Bundle of Documents

  Even if you think you already know the documents quite well, it is still a good idea to proceed at this point as if the case was new to you.

  Set yourself up in a quiet room with all the papers on a decent sized desk or table. Equip yourself with a couple of highlighters, a pen, a pad of sticky notes or several in different colours – and either a notebook or computer.

  Work your way methodically through the papers, probably starting with the pleadings (that is, the ET1 and the ET3 and any requests for additional information and replies to those requests), then going on to the witness statements, and finally the bundle. Highlight anything you think is important. Stick a sticky note on any document you think is particularly significant. You may want to write brief labels on the sticky notes, or colour-code them in some way. Cross-reference the statements and the bundle: so, for instance, if you think paragraph 23 of Mr Ali's witness statement is inconsistent with something on page 47 of the bundle, annotate both so that you remember. Remember the tribunal will only be interested in relevant matters – that is, matters that pertain to the legal and factual issues in question. Ideally, these will all have been set out in the 'list of issues' defined by an employment judge at a preliminary hearing or sent through by the tribunal (or possibly agreed by the parties beforehand). Remember that the hearing is about whether there has been *unlawful* behaviour by your opponent, not about what feels unfair to you.

  At the same time as you are going through the papers, start to create three documents: a chronology, a set of written submissions, and a set of questions for witnesses. So when you notice the inconsistency between paragraph 23 of Mr Ali's witness statement and page 47 of the bundle, make that point in your

draft submissions: and write down some questions to ask Mr Ali about it. Each time you turn a page, you will probably find another date to put in your chronology. An excel spreadsheet or a table in Word will make writing the chronology easier, because you will be able to write the dates down in any order and then sort them automatically into date order at the end.

By the time you have got to the end of your bundle of documents this way, you should have a complete chronology of the case, quite a lot of questions for witnesses, and the beginning of some written submissions. The next thing is probably to organise your questions for the witnesses. Think about which question is for which witness and the order you want to ask the questions.
Once you have finished this – or when you want a change- turn to your written submissions, filling in gaps, adding headings or structure, editing out repetition and so on. In the course of doing this if you think of further questions, you can add it to your list of questions for each witness.

There is no quick way of preparing a case. This process will take several hours even for a one-day case. If your case is listed for several days and you have a huge bundle, you can expect to spend many hours working through the papers and gradually refining your cross-examination notes and your draft submissions. But by the time you have finished, you should have a detailed chronology of the case, a first draft of your submissions, and a list of questions for witnesses.

You should also in the process have become thoroughly familiar with all the statements on both sides, and with all the relevant documents. In some ways preparing for a hearing is like revising for an exam: it is necessary to know the material well enough to realise at once when a witness has said something that is inconsistent with his own statement or with the statement of another witness on the same side, or with one of the documents in the bundle.

**Questions for witnesses**

There are two views on whether or not it is a good idea to prepare a detailed list of questions for witnesses. Those against say a list of prepared questions reduces your ability to adapt to changing circumstances in the course of the hearing. Those in favour point out that producing a list of questions allows you to prepare in a degree of detail that is hard to achieve in any other way.

We recommend producing Lists of questions if you are a beginner, representing yourself or only appear before a tribunal occasionally.

<u>Examination-in-chief</u>

Since most witnesses give their evidence by way of a written witness statement (which the tribunal now generally reads before the hearing), there should not normally be a great deal to do in the way of examination-in-chief. Supplementary questions may be needed to respond to points made for the first time in the other side's witness statements. It is not a good idea to rely on supplementary questions to 'fill in the gaps' in your witness statements, as tribunals take the view that the witness statement should encompass all the evidence that that witness wishes to give, and may refuse to allow you to rectify any omissions this way – plus your opponent could refer in their submissions to the fact that what may be important evidence has not been put in a witness statement and make submissions about your credibility and/or your recollection of events.

Please note that leading questions are frowned upon in examination-in chief, i.e. you cannot put a question to a witness that gives a clue to the response you expect.

Cross-examination: (Best to use leading questions here)

Cross-examination will normally require much more detailed preparation. This is probably the most difficult job you have to do.

There are essentially two things you are you are trying to do in cross-examination. The first is to get the witness to give evidence that the tribunal will accept, but which will assist your case more than theirs. So, for if you are acting for Said Ali, when you cross examine John Spencer, you will want him to confirm that he congratulated Mr Ali on his performance at his probationary review, that he had had feedback that the patients liked his gentle and respectful manner with them, that he was generally happy with Mr Ali's work thereafter, and that he though highly enough of him to promote him in June 2014. John Spencer probably won't deny any of this, especially the parts that are clear on the face of the documents, but he is unlikely to have seen fit to emphasis these points of his own accord either.

This is quite a good example of the kind of situation in which the order of questions can be important. If you just start by asking John to confirm that he thought well of Mr Ali, he may be inclined to hedge. But if you set this up by asking him specific factual questions about patient feedback, the probationary review and the promotion, it will be much harder for him to do anything but agree with your follow-up – "So you must have had quite a high opinion of Mr Ali at this point?"

The second purpose of cross examination is to undermine the parts of the witness's evidence that harm your case, by demonstrating that it is careless, mistaken or untruthful. **PS: Do not call a witness a liar!**

The aim of all cross-examination is to persuade the tribunal to find in your favour. Claimants are often disappointed that Respondent witnesses rarely admit to have having been untruthful, and continue to insist on their version of events even after the holes in their story have been pointed out. This is to be expected. By the time a witness gives his evidence, she has either decided to lie or, more likely, convinced him or herself that their version of events is true. If cross-examination has shown that the respondent's evidence is inconsistent with the documents in ways their witnesses cannot coherently explain, that is enough. It is worth pushing witnesses far enough to demonstrate to the tribunal that their story is thoroughly implausible; but there is no need to go further than that and try and bully them into admitting that they have been lying or talking nonsense.

**Sample Cross Examination:**

*The witness is a manager who claims to have been unaware that the claimant, whom she appointed, was disabled at the time she dismissed him for poor performance. In the papers, there are two probationary appraisals conducted by the manager that say that the claimant was trying his best and was responsive to feedback. The job is not a difficult one, and on paper, the claimant is over qualified for it. The manager says that she knew the claimant was dyslexic, but did not think it was serious enough to amount to a disability for the purposes of the Equality Act 2010.*

***Wrong way to go about questions –***
***Q: You knew Derek was dyslexic didn't you? (This much is uncontroversial)***

***Q: You knew he was intelligent enough to get a first class degree in history? (This will give the witness an opportunity to wriggle with something like s/he interviews lots of new staff and couldn't remember his exact qualifications)***

***Q: So if he was underachieving in this junior role it must have been because of his dyslexia? (This is an open invitation to the witness to think of some other plausible reason – like s/he thought he was over-qualified for the role and not very well motivated. She can be challenged on her own assessment in his probationary reviews that he was doing his best, but now she knows where the questioning is going she may say that this was an over-generous assessment in an attempt to motivate him.)***

***Right way to cross-examine a witness:***

***Q: You appointed Derek? (There is no reason why she should deny this).***

***Q: You read his CV? (Reading his CV before interview or appointing him was obviously the right thing to do, so 9 out of 10 personnel managers will say "yes" even if they have no specific memory of having done so).***

***Q: So you knew he had a first class degree? (This is hard to deny – the CV is there in the bundle, and she has just admitted to having read it).***

***Q. You did not require a graduate at all in this role? (She is unlikely to deny this – she knows that the person specification is in the bundle).***
***Q: You conducted the two probationary reviews? Again, she cannot sensibly deny this.***
***Q: Did you conduct them fairly and accurately to the best of your ability? Again, there is only one answer to this.***
***Q: So you stand by your assessment that Derek was doing his best? (Now she is in a place where it is difficult for her to deny this too).***
***Q: And that he was responsive to feedback? (Similarly).***
***Q: But he was under-performing so badly that you had to dismiss him? (She has to say yes to this because it is at the heart of her case).***
***Q: You knew he was dyslexic? (In this context, the question is going somewhere).***
***Q: Given that you knew Derek was able and doing his best, that was the obvious explanation for his difficulties wasn't it? (All the likely alternative explanations have been ruled out, so it is difficult for the witness to deny this now!)***

Cross-examine on the documents, where they are relevant – for example, pointing out any inconsistencies between them and/or oral evidence. If there is a document that supports your case, make sure that you draw the tribunal's attention to it – do not just assume that the tribunal will read the document of its own accord (unless it is referred to in a witness statement, when the tribunal will certainly read it).

On the day, keep a note of the responses given by your opponent's witnesses – this can be difficult if you do not have anyone to assist you in this, but it can be very important, as you can add their actual responses to the points you wish to make in submission at the end of the hearing, and the submissions thereby become more weighty and convincing. A tribunal will always give you time to note down answers, and if you have 'scored a point' off your opponent (ie, they

have admitted something that is crucial to your case), it can be unnerving for them for you to obviously take this point by writing it down.

You may end up with lengthy notes – it is a good idea to write the time at the end of each page of your notes (and the day if it is a multiday hearing). This is so you can quickly cross-reference your notes to your submissions. So, for example, if the manager in the above example makes a crucial concession at 11.30am on Day 2 of the hearing, note this on your draft submissions.

The tribunal will generally take full notes of the hearing itself.

(You are also given an opportunity to re-examine your own witnesses – the purpose of this is to 'salvage' damaging evidence that may have been given in cross-examination, for example, by clarifying what your witness (including you) really meant. You do not have to use this opportunity to 'rebuild' your case, if you feel no real damage has been done by the process of cross-examination)

**Submissions**

This is your final opportunity to persuade the tribunal of your case. You will be given time at the end of the hearing to address the tribunal – the time 'slot' allocated may have been discussed at the start of the hearing.

Your starting point should be the list of issues (even if these were not agreed at a preliminary hearing, many tribunal hearings start, especially if there is a litigant in person, with the employment judge defining the legal issues to be decided). State the facts you rely on to support your claim, and the evidence that has come out to support those facts, and why (if you can) you feel the legal tests you have to meet have been satisfied (the tribunal will do this in any event, however). For example, if you need to establish that your opponent should have been aware that the effects of a disability were responsible for poor performance, as in the above example, briefly cite the facts that support this contention, together with the relevant evidence, whether from the documents or from oral evidence, to support this. Include submissions as to why your evidence should be preferred – for example, was a witness evasive in giving evidence, did you have to put a question to them several times, are there any contradictions in the evidence, whose version of events is, on the balance of probabilities, more plausible?

Please note you will not be permitted to raise new evidence in submissions, only refer to evidence given during the process of examination in chief, cross-examination and re-examination.

You may, if time permits, write down all the points you want to make in submissions, and either read them out to the tribunal or give them to the tribunal (and your opponent) to read themselves.

On the day, once the tribunal has heard the submissions, it will adjourn for a period to make its decision. If an oral judgment is given at the end of the hearing, the employment judge will always give full reasons for the tribunal decision. You can ask for written reasons if this is the case, though you might also want to note down at the time why you have won/lost. Sometimes, if there is insufficient time to give the judgment orally on the day, judgment will be 'reserved', ie, a written judgment with reasons sent to the parties later.

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**Disability Law Service**

The Foundry,

17 Oval Way,

Vauxhall,

London

SE11 5RR

Telephone: **020 7791 9800**

Minicom: **020 7791 9801**

Email: **advice@dls.org.uk**

Website: **www.dls.org.uk**



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