Employment and Equal Opportunities Service

Chapter 10: Complaints

This chapter will cover the following topics:

Wherever possible, it is good practice – as well as being in the interests of both employer and employee – to seek to resolve any potential complaints under the Ordinance as they arise and before they become major problems through the employee raising a grievance. Grievances can be raised either on a formal or informal basis and can provide an open and fair way for complainants to make their concerns known, and for their issues to be resolved quickly, without having to bring legal proceedings.

For further details on grievance procedures please refer to the Employment Relations Service Guide Raising and Handling Grievances.

The Ordinance recognises that it will not always be possible for an employee who considers they have suffered discrimination to resolve those issues through this method. Therefore, they have a right to make a complaint through the Employment & Discrimination Tribunal. This chapter therefore provides an overview of enforcement the Employment & Discrimination Tribunal, although it is not intended to be a procedural guide as to how to go about presenting a claim.

10.1 Conciliation

When parties are unable to resolve the issues between themselves through a grievance, early resolution of any complaint is encouraged through the Employment and Equal Opportunities Service (EEOS) and a pre-complaint conciliation process, the details of which are set out below.

Pre-complaint conciliation

Before anyone makes a complaint to the Employment & Discrimination Tribunal (Tribunal), they are required to first notify the EEOS of their intended complaint. This process should be started by completing a form. Please follow the link to the complaints form page. Upon receiving a notification, the EEOS will ask both the person who wishes to make the complaint and the other party if they wish to engage in pre-complaint conciliation. If they do then, EEOS will then facilitate the conciliation to see if it is possible to reach a settlement. Any settlement agreement concluded by the EEOS will be legally binding and a party will then be unable to bring a claim before the Tribunal.

In order to make it easier to help parties reach an amicable resolution, any settlement discussions between the parties conducted through the EEOS will take place on a without prejudice basis, which means that anything that is said or any offers made are admissible as evidence as part of any subsequent Tribunal claim, unless both parties agree.

If either party does not wish to engage in pre-complaint conciliation, or the EEOS believes that it is not possible to settle the matter, then a certificate will be issued to the person who wishes to bring the claim. A person is not entitled to bring a claim until they receive a certificate from the EEOS, and if they attempt to do so, then their claim will be rejected by the Tribunal. It is important to note that the period for bringing a complaint will be extended by pre-complaint conciliation – for further details see below.

Ongoing conciliation

When pre-complaint conciliation is unsuccessful, a person can then decide if they wish to proceed with a formal claim. The relevant paperwork would need to be submitted to the Secretary of the Tribunal. The matter will then again be referred to the EEOS and the parties will be given a further period to attempt to settle the matter through conciliation. Normally, six-weeks will be allowed for the parties to settle the complaint before the matter is referred back to the Tribunal. If the complaint is not settled, then the claim may proceed to a hearing. The six-week time period can be extended where negotiations are in progress. The parties can engage in discussion to settle the complaint at any stage up to the conclusion of the final hearing.

Compromise agreements

Alternatively, it is open to the parties to settle complaints between themselves without referring the matter to the EEOS through a compromise agreement. In order for a compromise agreement to be valid:

- The agreement must be in writing;
- It must relate to the particular complaint;
- The person must have received advice from an independent adviser (being a lawyer or a trade union representative) as to the terms and effect of the proposed agreement;
- The agreement must identify the adviser; and
- The agreement has a statement that the above conditions are satisfied.

10.2 Tribunal claims

Following conclusion of the conciliation process, if a person is still dissatisfied then they can bring a claim before the Employment & Discrimination Tribunal (Tribunal).

Responding to a claim

Responses by the employer are also submitted using a prescribed form. The appropriate form is available on the Tribunal website or upon request from the Tribunal.

Time limits

There are strict time limits for bringing claims. The complaint should be raised within a period of three months, beginning on the day when the act complained of was done. However, the period between the person notifying EEOS of the intended complaint in order to initiate pre-complaint conciliation and the date on which they receive a certificate will not count towards the time limit for bringing a claim before the Tribunal. In addition, if the time limit is due to expire within one month of the end of conciliation, it will also be extended so that a person would always have at least a full month in order to present their claim.

Example:

An employee wishes to bring a claim of discrimination for an event which took place on 10 January, and so the last day on which they could bring their claim would be 9 April.

The employee competed the intent to complain form and submitted it to the EEOS on 1 February. Following a period of pre-complaint conciliation, the parties were unable to resolve the matter, so the EEOS issued a certificate to the employee on 8 February. The period of time from the day on which the notification was made to the day on which the certificate was issued was a total of 8 days. So, the final day for bringing a claim would be 17 April.

Alternatively, if the employee contacted the EEOS on 1 April and then received a certificate on 8 April, because even with the extra 8 days the final day for bringing a claim would normally be less than a month* after the end of pre-complaint conciliation, the final day would be extended to be 7 May.

*A month is defined as a calendar month according to the Interpretation and Standards Provision (Bailiwick of Guernsey) Law, 2016

The period of time can sometimes be extended, where the Tribunal is satisfied that it was not reasonably practicable for the complaint to have been made within the 3-month time frame, or that it would be just and equitable in the circumstances of the case to allow the further time.

When does the period for bringing the claim start?

The time for bringing a claim will run from the date on which the act complained of was done. Where the act extends over a period of time, or relates to the term of a contract, then the act is treated as being done either at the end of the conduct or the contract as the case may be.

Example

An employee brings a claim for victimisation which relates to a series of related acts taking place over the last 6 months leading to their eventual dismissal. Even though the first of these acts took place more than three months ago, the period of time for bringing a claim will run from the final act of victimisation, which was their dismissal.

Where the complaint is about a failure to do something, then the Ordinance has specific rules for the purposes of time limits. If the employer explicitly decides not to take the step, such as making a reasonable adjustment, then the time for bringing a claim will run from that point. Where there is not an express decision, then time will begin to run either from the point at which the employer acts inconsistently, or after the passage of what would be considered to be a reasonable period of time.

Example

An employee with carpal tunnel syndrome asks their employer to provide an adapted keyboard as an auxiliary aid. The employer initially agrees to the request, but never actually orders the aid. After a period in which it would have been reasonable for the employer to obtain the keyboard, they will be treated as having failed to do so.

Liability of employers and employees

Claims for discrimination can often be brought against both the employer (who is deemed to be liable for the acts of their employees carried out in the course of their employment), as well as the individuals themselves who commit the act.

An employer will still be liable for the acts of their employees, even if they were done without their knowledge or approval, unless the employer can demonstrate

that they took all such steps as were reasonably practicable to prevent the employee from doing that act. This is sometimes referred to as the “statutory defence”.

As a minimum this would require employers to:

- have an equal opportunities policy;
- provide equality training to staff; and
- seek to address issues when they became aware of them.

Example

An employee raises a grievance in respect of harassment on the grounds of race by their manager. The manager attended the company’s equality and diversity training and is fully aware of the company’s policy. The company provided adequate equality training to staff and the manager attended all of the sessions. The company has a strong record of dealing with any examples of harassment when they arise, as well as promoting equality and diversity in the workplace, and in this instance takes disciplinary action against the manager and deals fully with the grievance by the employee.

In this scenario the employer may be able to rely on the statutory defence that it did everything it should have, but the manager may be personally liable for their actions.

Burden of proof

Where an employee brings a claim, they must prove that there are facts from which the Tribunal could decide or draw an inference that there has been discrimination. This is sometimes referred to as demonstrating a prima facie case.

If an employee has satisfied the Tribunal that there are facts from which the Tribunal could conclude that there has been discrimination, then the burden of proof shifts to the employer. In order to be able to defend a claim, the employer will have to prove, on the balance of probabilities, that they did not act

unlawfully. If the employer's explanation is inadequate or unsatisfactory, the Tribunal may decide that the act was unlawful.

Awards

Where the Tribunal upholds a complaint of discrimination, it can either make an award of compensation, a non-financial award or both.

A non-financial award means an order that the employer take, within a specified period, such steps that the Tribunal is satisfied are:

- practical;
- will not impose a disproportionate burden;
- relates to the discriminatory act; and
- will reduce the impact of that discrimination on the employee.

Example

The Tribunal upholds a claim for harassment on the grounds of sexual orientation due to a series of inappropriate comments made by a number of different members of staff. None of the staff have ever received any equality training, therefore the Tribunal makes an order requiring this training to take place.

Compensation

The basic compensation for claims of discrimination relating to employment (other than claims of equal pay) is that a person is entitled to an award of:

- Up to six months' pay, or 26 weeks' pay if paid weekly; and
- An amount payable for injury to feelings up to £10,000.

The normal position in calculating either a month or a week's pay for the purpose, is that it is based on the person's average pay during the preceding six-month period. However, the Tribunal does retain a discretion to calculate this on such other basis as it determines is just and equitable, if it determines it would be

inappropriate to calculate the award in the usual way.

Compensation for injury to feelings will be awarded using a series of payment bands depending upon the seriousness of the discrimination and impact on the individual. For further details please see Legislation page Number 4 and number 5.

In addition, the Tribunal has further discretion to reduce any award, if it determines the person has unreasonably refused an offer by the employer, which if it had been accepted, would have had the effect of putting the person in the position in which they would have been, had the act of discrimination not occurred.

Joined complaints

Where a person makes more than one complaint against the same employer, or against a number of connected persons, for example an employer and a number of individuals who all work for that employer, then the Tribunal may hear those complaints together (known as joined complaints). In addition, the Tribunal can also join claims brought by the employee for unfair dismissal and sex discrimination to a complaint under the Prevention of Discrimination Ordinance.

Where there are joined complaints against connected respondents then the maximum award the Tribunal can make is:

- Up to nine months' pay, or 39 weeks' pay if paid weekly; and
- An amount payable for injury to feelings up to £10,000.

The exception to this is where in addition to other complaints, there is a claim or multiple claims of victimisation, in which case the Tribunal may make a further award of:

- Up to six months' pay, or 26 weeks' pay if paid weekly; and
- An amount payable for injury to feelings up to £10,000.

Example

An employee successfully brings a claim for direct discrimination and harassment on the grounds of sex and race, victimisation in relation to a grievance they raised and unfair dismissal. The maximum the Tribunal could award the person would be up to 15 months' pay and an award of injury to feelings of up to £20,000

Compensation in equal pay cases

Where an employee brings a claim for equal pay, then this is calculated on a different basis, and is not subject to the limits set out above. The employee is entitled to an award of arrears of pay, based on the difference between the pay they actually received compared to the pay they should had received up to a maximum period of six years, but this can only run from the point the Ordinance came into force on 1 October 2023.