



Legal Services

Handbook



Dear Colleague

We have put together this Handbook which provides details of the range of services and benefits that are available to all members via the Legal Services Department in partnership with its Approved Panel Solicitors.

Our aim is to provide a one shop system which will accommodate all your legal requirements. We specialise in providing advice and representation in personal injury compensation claims and employment tribunal applications. Members can use the services confident in the knowledge that we have the necessary expertise to ensure the best possible result when processing such claims. This is a totally free service. Members who require any of our services should contact their local branch representative in the first instance who will be able to assist them with their initial enquiry. Additional information is also available on the CWU's website www.cwu.org click on Legal Services.

We are continually looking at ways to improve and expand the range of services we provide which makes being a member of the CWU so beneficial and worthwhile. CWU Legal Services working to protect you and your family.

Kind Regards

Tony Rupa
Head of Legal Services





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A Personal Injury Claims for Damages – LS3 Form & *LS18 Form

The Union scheme provides access to legal advice ordinarily from one of the CWU approved Panel Solicitors. The solicitors will take on cases on behalf of the Union if they have a chance of success of over 50%. This will be determined by the solicitors once they have carried out their initial investigation.

- (I) **Who can make a Personal Injury Claim under the CWU Scheme?**
- i Members can claim for accidents **ON AND OFF** duty.
 - ii Dependents (provided they are not covered by any other Union scheme).
 - iii Retired members and portable members.

(II) **Procedure for Making a Claim on the Member's Behalf**


The member must complete a LS3 form and return it to the Legal Services Department. A form can be obtained from your local Branch Secretary or alternatively you can call the CWU Legal Services Helpline on free phone **0800 804 6674** or complete the form electronically via our website **www.cwu.accidenthelpline.com**. All claims will be registered at CWU Headquarters, which will then be forwarded on to our Panel Solicitors for assessment.

**LS18 This form is provided in conjunction with the LS3 form which contains important information about members' entitlements and further details of other benefits that are available.*

(III) **Evidence Collection**

To assist the Legal Services Department with the investigation of the accident it is helpful if evidence can be obtained as soon after the accident as practicable. Examples of evidence that assists in the assessment of the case are as follows:

- a Copy of the the appropriate accident report, e.g. ERICA.
- b Photographs of any faulty equipment, site of the accident and injuries.
- c Sketch plans of locations of accidents, especially in road traffic accident.

- 
- d Witness names and addresses.
 - e Any overweight bag/equipment should be weighed and the weight noted down.
 - f Details of any previous similar accidents.
 - g In dog bite cases any evidence of previous vicious behaviour by the offending animal.

(IV) Types of Personal Injury Claims Covered Under the Scheme

1 Employers liability industrial accidents

For example, lifting accidents, faulty equipment accidents.

2 Public liability accidents

Including tripping and slipping accidents on and off duty.

3 Road Traffic Accidents

On and off duty.

4 Dog Attacks

The Union has a long history of success in obtaining damages for injuries as a result of dog attacks on duty. The claim is either dealt with in-house by the Legal Services Department at the CWU or in some cases passed onto the panel solicitors. All dog attacks should be reported to the Police.

5 Clinical Negligence Claims – LS3 Form

The Union will give consideration to claims for damages arising from negligent medical treatment. These cases are forwarded to one of the panel solicitors for their assessment as to prospects of success.

6 Industrial disease – LS2 Form

These include asbestos related injuries, occupational stress, deafness and work related upper limb disorders.

7 Fatal Accidents – LS4 Form

It is vitally important that a fatal accident is reported as soon as possible to the Legal Services Department. Representation may be provided at the inquest and it is essential that this date is given to the Department. After all Police investigations have been completed, an adjourned inquest will usually be held and this is the date that should be provided.



(V) Time Limits for Making a Claim

a Accidents

In most cases the Claimant has 3 years from the date of the accident to settle the claim or issue court proceedings. Failure to do so would result in the claim becoming statute barred.

b Clinical Negligence

If the claim is for a clinical negligence matter the primary limitation period is 3 years from the date on which the cause of the action started i.e. the injury, or the date of knowledge (if later) the person injured.

c Occupational Disease

If there is no accident as such – for example the Claimant is suffering for an occupational illness (such as stress at work, dermatitis, deafness or asbestos) then the member has 3 years from the date that they first knew (or should have known):

- a That they were suffering from that illness and
- b That it was potentially compensatable. (Usually this is 3 years from the date of diagnosis).

d Fatal Accidents Limitation

If someone has died the dependents or personal representatives have 3 years from the date of the death to make a claim, if the 3 year period has not passed during the injured person's lifetime.

e Limitation for a Minor

If the victim is under the age of 18, the 3 year period will not start to run until their 18th Birthday.

f What if the 3 years have passed?

Occasionally if there is good reason for the delay the Court will allow a claim to be made out of time. However these incidents are rare and it is a matter of the Court's discretion.

(VI) Basis of a Claim

Compensation can be claimed if the injury was caused because of the fault of someone else. Someone is legally at fault (or liable) if they are negligent and/or if they break a law or regulations (known as a breach of statutory duty). The issue of causation is also considered when assessing damages for an injury.



What is negligence and causation?

- i **Negligence** – is usually defined as behavior or conduct that is blameworthy because it falls short of what a reasonable person would do to protect another person from a foreseeable risk of harm.
- ii **Contributory negligence** – Often the Defendant will admit that they are at fault but deny that the accident was wholly their fault. Instead they will allege that the Claimant was partly to blame for their injuries – this is known as an allegation of contributory negligence. If contributory negligence is accepted or awarded by a Judge it will result in the reduction in the amount of compensation payable that is equivalent to the degree of fault attributed to the Claimant.

Causation

- iii **Expert medical evidence is obtained to assess the extent of the injury that an accident has caused. There are cases where the accident is only responsible for a proportion of the Claimant's ongoing symptoms and the damages will be apportioned accordingly.**

(VII) What do we claim on the Member's behalf?

Financial compensation

We claim damages which are split into two categories:

- i **General damages** – This is the lump sum payable to compensate the Claimant for their pain, suffering and loss of amenity. The amount payable is dependent on the seriousness of the harm and extent of the symptoms or disabilities.
- ii **Special damages** – This refers to past and future financial losses that can be proved to be as consequence of the injury. These include, lost earnings, including any retirement pension entitlements, cost of lost or damaged items, costs of medical treatment and medication.

(VIII) Deductions from any Damages

- i **Contributory Negligence** – If contributory negligence is accepted or awarded by the Judge the equivalent percentage will be deducted from the general damages. For example if the Claimant was to receive £1,000.00 general damages but was considered to

be 10% for contributory negligent, then he would receive £900.00 as a result of the 10% deduction.

ii Compensation Recovery Unit – The benefits paid by the Benefits Agency, some of these are recoverable by the Government against loss of earnings. The benefits recoverable are for the 5 years from the accident or injury. In the case of disease the 5 years runs from the date of the first claim for the benefit on the basis of the disease.

iii Repayment of Advances to Employer – If a member incurs paid absences as a result of an accident due to the negligence of a third party, they are contractually bound to refund the basic net part of their earnings during their period of absence. The members sign an undertaking upon release of their earnings details to repay this sum upon receipt for their damages. This is proportionally reduced if contributory negligence is accepted. There is normally no re-payment of wages where a claim is being made via the Motor Insurance Bureau untraced Drivers Scheme but there is a repayment if the claim is being made via the MIB Uninsured Drivers Scheme where the third party who is responsible for the accident/injuries is an uninsured driver.



B Industrial Injuries Benefit Scheme

If you are injured as a result of an accident at work you are eligible to make a claim for Industrial Injuries Benefit. To make a claim you must register your accident with the Department for Work and Pensions as an industrial injury. If you are still suffering from the effects of your injuries 15 weeks after the date of the

accident, you will need to apply to the DWP for disablement benefit. This will involve being called for an independent medical examination by the DWP and your injuries will be assessed as a percentage disability. In order to qualify for this benefit you need to receive an assessment of 14% or above. Assessments are also categorized as provisional, final and life and in the event you are not in agreement with any part of the assessment you have the right to appeal to the DWP which must be lodged within 30 days of the assessment being issued. Assistance with the appeal will be provided by the Legal Department, where appropriate.


C Personal Accident Benefit Scheme

(a) Royal Mail

This is a non contractual discretionary employee benefit provided by Royal Mail. The Scheme is designed to alleviate financial distress where individuals suffer a permanent physical disability as a result of an accident at work. Benefits from the scheme are not dependant on blame, fault or liability. In order to make a claim all accidents must be reported to the employer and recorded in the appropriate accident book (ERICA). Claims must be registered with the PABS Administrators within six months of the date of the accident. This is done automatically by the Legal Department where a member has submitted an LS3 claim form.



In order to establish the extent of any injuries the Scheme uses the medical assessments provided by the Department for Work and Pensions. It is therefore essential that claimants also register their accident with the DWP in line with the process described in claiming Industrial Injuries Benefit. On receipt of the appropriate disability assessment, this should be forwarded to the Legal Department. Claims are settled on the basis of permanent injury. Therefore a life assessment is required, in order to obtain payment. Payments are calculated using the percentage disability against the maximum payment



of £40,000.00. For example, a member who is in receipt of a 10% life assessment will receive 10% of £40,000.00, i.e. £4,000.00. Additionally, payments can be made where a member is in receipt of a provisional assessment which extends in excess of a two year period. In such circumstances, a reduced interim payment may be made. Further details concerning the Scheme were published in LTB 198/06 dated 22nd March 2006.

(b) Personal Accident Insurance Scheme (BT)

BT members are covered on a 24 hour basis for injuries sustained whilst on and off duty. The scheme is presently operated by Zurich Insurance and claims need to be lodged with them within 2 years of the date of the accident. The Claimant has to obtain their own medical evidence usually in the form of a consultant's report which is submitted to the insurance company. The insurance company's medical advisors make an assessment and payment is awarded depending on the extent of the permanent injuries.

Payments are based on the maximum threshold of 4 x basic salary set at a minimum of £10,000 per annum.

D Bandit Attack Scheme – LS7 Form

This scheme was introduced due to the high risk members' face in their duty. The scheme pays £20.00 per week to victims when they off sick as a result of an attack, excluding the first week of absence. Management should provide documentation to confirm that the sick leave was a direct result of the bandit attack. The above scheme is dealt with in-house without the involvement of solicitors and is funded by the Union headquarters. Any bandit attack should be sent to the Legal Services Department on form LS7.



E Criminal Injuries Compensation Scheme 2008

This is a Government funded scheme and compensates victims of crimes of violence, including murder, manslaughter, assault, robberies, personal injuries from acts of arson, rape and muggings. Injuries are assessed based on the appropriate medical evidence and compensation is paid depending on extent of the injuries which are identified within the terms of the Scheme and are classified in tariffs, 1 to 25. Tariff 1 is the minimum payment equivalent to a £1000.00 rising to Tariff 25 which is the maximum payment of £250,000.00.

The Legal Services Department assists with processing these applications to the Criminal Injuries Compensation Authority. Branches should note that the Scheme does not apply to the Channel Island or the Isle of Man.

Claims are processed via regional centres and listed below are some of the basic requirements for a claim.

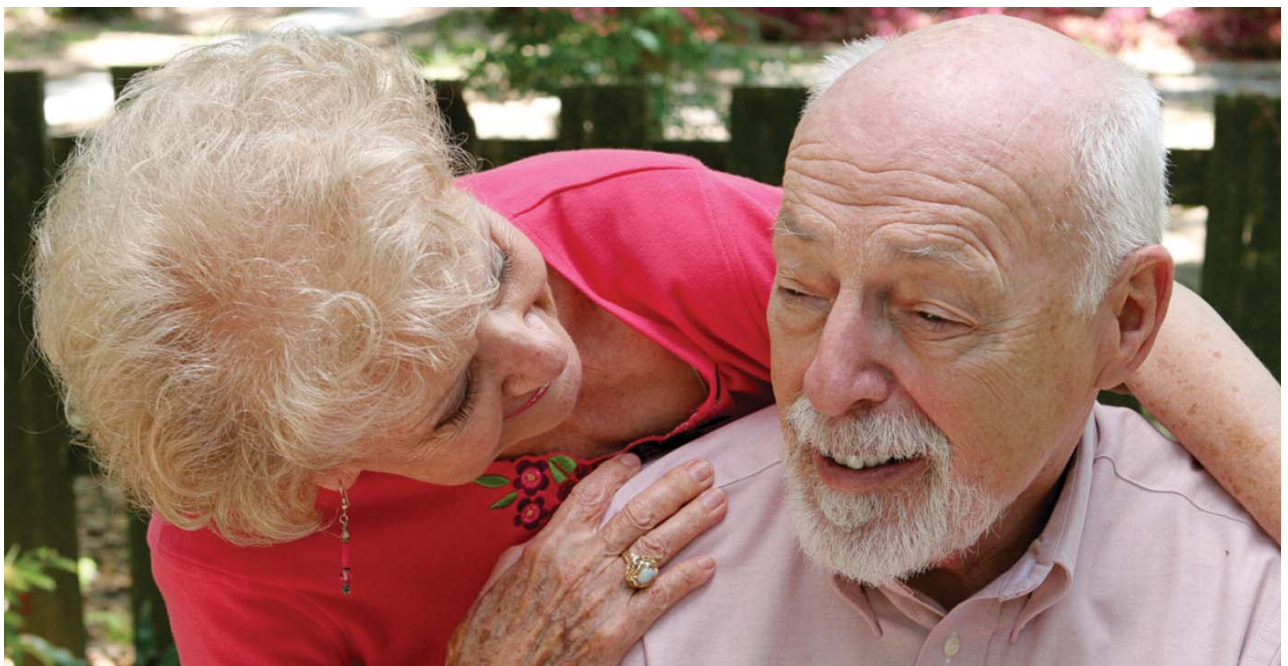
- 1 Time limit for applications:
An application must be made in writing within 2 years of the incident which caused the injury. Some applications outside that period may be accepted in certain circumstances.
- 2 Seriousness of the Injury
The injury must be serious enough to qualify for at least the minimum tariff award and the injury must have lasted for at least 6 weeks, with at least 2 visits to a doctor.
- 3 The victim should have promptly reported the incident at the time.
- 4 The victim did not provoke or agree to the incident.
- 5 The victim did not engage in retaliatory behaviour.
- 6 The victim has co-operated in the police investigation.
- 7 The victim has assisted with the prosecution of the offender.
- 8 The perpetrator of the crime does not need to be identified or prosecuted in order for a victim to obtain compensation.
- 9 Motoring offences are excluded except where the vehicle is used as a weapon.

- 10 A reduction of the order can occur if the victim has a record of unspent criminal convictions.
- 11 Additional losses can be claimed.
 - i Loss of earnings – can be claimed if losses are incurred for a period after 28 weeks absence from work. Nothing is paid for the first 28 weeks.
 - ii Loss or damage to physical aids, national health services costs of treatment, reasonable private treatment, cost of specialized equipment, home help adaptations and care which is not available free of charge.

F Appeal for/against Ill Health Retirement – LS14 Form

Royal Mail

The Union negotiated an agreement with Royal Mail which sets out a procedure under which members could appeal decisions for and against Ill Health Retirement.





Definitions of Ill Health Retirement

“Retirement on ill health grounds with immediate pension” means the cessation of employment as a result of serious physical or mental ill health (not simply a decline in energy or ability) such that, in the opinion of Royal Mail Group or associated employer the member is permanently incapable of:

- a carrying out his current duties;
- b carrying out such other duties for the employer as the employer might reasonably expect the member to perform; and
- c engaging in employment with any other employer of a type which, in the opinion of the present employer, would be reasonable and appropriate for the member.

“Retirement on ill health grounds with lump sum payment” means the cessation of employment as a result of serious physical or mental ill health (not simply a decline in energy or ability) such that, in the opinion of the Royal Mail Group or associated employer, the employee is, for the foreseeable future, incapable of:


- a carrying out his current duties;
- b carrying out such other duties for the employer as the employer might reasonably expect the member to perform.

In applying the above criteria permanent incapacity shall mean up to normal retirement age or for at least 10 years from the date of medical opinion, whichever is the soonest. The foreseeable future shall mean a period of at least 9 months from the date of medical opinion.

Benefits accruing from the Scheme are calculated as follows.

Retirement on Ill Health Grounds with Immediate Pension

Active members of the Royal Mail Pension Plan with 5 years service or more and at least two years qualifying service in the Pension Plan meeting the criteria for retirement on ill-health grounds will have their pension based on their full benefits calculated up to their last day of service plus 75% of future pensionable service up to normal retirement age.



Members with over 2 but less than 5 years reckonable service will receive a pension based on their full benefits calculated up to their last day of service.

Retirement on Ill Health Grounds with Lump Sum Payment

Where an employee has at least one year's service and meets the criteria for retirement on ill health grounds with a lump sum compensation payment, a payment equivalent to 34 weeks' pay will be made.

Formal Notice Period

Retirement on ill health grounds in both cases will be subject to normal contractual notice of termination of employment or 9 weeks notice whichever is the greater (9 weeks notice will also apply to employees on trial where they are being terminated on ill health grounds). This will be with pay.

For details of the Scheme including the Appeals Procedure please refer to LTB 301/2009 dated 3rd April 2009.

BT Long Term Illness Procedures

Under the long terms illness procedures, medical retirement is only available where an employee can provide medical evidence that they are "permanently unfit to do the duties of their post". This requirement is interpreted very strictly by BT Occupational Health Services.

Under the long terms illness procedures, a member's service can be terminated if they are unfit to carry out their duties for a considerable period, but not considered permanently unfit and therefore eligible for medical retirement.

The Legal Department is not responsible for processing applications under the above procedure and members should refer their enquiries to the appropriate Telecoms National Officer.



G Drivers' Protection Scheme Road Traffic Act Prosecution – LS1 Form

Under the terms of the above scheme the Union will provide advice and representation, where appropriate, on any prosecution for a Road Traffic offence whilst driving an official vehicle on duty. If a plea of guilty is advised then no representation at the Court hearing will be provided (although assistance can be given with mitigation either by telephone or correspondence).

If a not guilty plea is advised appropriate legal representation will be authorized by the Legal Department who will be responsible for any legal costs incurred but excluding any fines awarded.

The scheme does not cover the following:

- a Speeding offences
- b Driving under the influence of alcohol
- c Drug related charges
- d Infringement of seatbelts laws
- e Infringement of mobile phone laws
- f Parking tickets



H CWU Road Traffic Accident Helpline

This scheme provides a range of benefits in the event that members, their family are involved in an off-duty road traffic accident which was not their fault. This is a nationwide Scheme but excludes the Isle of Man and the Channel Islands.

The scheme is designed as an alternative to using a member's own motor vehicle insurance and is completely free.

Benefits of the Scheme

- 1 In the event of road traffic accident the member only need to make one phone call and, no matter who is at fault, the service will recover the members' vehicle from the scene anywhere in the UK.
- 2 If the accident was **not** the member's fault the scheme will also:
 - i Automatically contact the driver's insurers and advise them of the accident on their behalf.
 - ii Arrange the repairs and the management of the vehicle, preventing any excess payment or effect of no claims bonus.
 - iii Replace the vehicle on a like for like basis for the extent of the vehicle repairs or until the driver has received the total loss payment.
 - iv If a personal injury is sustained, these will be dealt with by a CWU approved panel solicitor
 - v All the legal fees will be covered by the CWU.
 - vi Private rehabilitation and medical treatment can be arranged.
 - vii Compensation for any additional documented losses will be recovered.
 - viii A dedicated 24/7 UK based helpline.

Procedure for Joining the Scheme

E-mail registering can take place by contacting www.cwu.one1one.co.uk or by phoning the free phone number of **0800 804 6674**.



I CWU Legal Helpline

The CWU operates a free phone legal helpline where members can obtain legal advice on non work related matters. The Legal Services helpline telephone number is **0800 804 6674**. Or contact email **www.cwulegalhelpline@simpsonmillar.co.uk**

Types of issues covered by the helpline include consumer affairs, criminal matters, debt management, family and neighbourhood disputes.

NB At the time of this publication we are not able to give advice on the Helpline on Employment Law matters. However, we are hoping to introduce this facility in the future. Suitable publicity will be issued accordingly.

J Criminal Defence Scheme (on duty only) – LS1 Form

This scheme is available for members who face a prosecution for a criminal allegedly committed on duty. Solicitors specializing in criminal matter are engaged by headquarters and representation will be provided under certain circumstances. Members should contact the Legal Services Department once they have been charged. They should contact the duty solicitor at the Police Station prior to interview. They will not be charged for the use of the duty solicitor at the Police Station.

K Employment Law

(I) Introduction

The Department provides an in-house legal service to assist branch representatives and officials at all levels.



There is a panel of advisors who can offer advice, assistance and representation, as appropriate, at Employment Tribunal Hearings. The majority of these experienced panelists are former NEC members or regional/branch officers. They are trained and guided by the Department as specialist advocates at the tribunals and offer an excellent service for branches.

The Department will in certain circumstances instruct specialist employment solicitors from their panel to advise on prospects of success of employment cases and/or provide representation at hearings as appropriate.

The Union will ordinarily provide representation to members whose claims have been assessed by an Employment Tribunal Union representative or a panel solicitor as having prospects of success of 50% or more. All requests for employment representation or advice should be forwarded to the Legal Services Department with the completed branch consultation record, as contained in LTB 447/2009.



a Who Can Make an Employment Tribunal Claim under the Scheme?

The Scheme is open to Members only.

b Procedure for Recording a Member's Complaint

Where a Member makes a request for assistance you should:

- 1 Enter brief details on the **Branch Consultation Record**
- 2 Make a note of the date by which the ET1 must be entered
- 3 Obtain the Member's signature to confirm that he or she has been advised.
- 4 Issue the Member with the standard letter, keeping a dated copy of the letter on file.


The time limits for bringing employment tribunal claims are normally very strict (usually less than three months) so it is important that the Member is advised of their rights and the letter issued as soon as possible. Do not wait for internal procedures to be completed before advising the Member of his or her rights and issuing the standard letter as the Employment Tribunal time limit will **continue to run** regardless of any internal procedures.

c Grievances, Disciplinary and Dismissals

The statutory grievance procedure and disciplinary and dismissal procedure were repealed on 6 April 2009 and replaced with the ACAS Code of Practice: Disciplinary and grievance procedures. This means that the three month extension to the time limit for submitting a claim where an internal procedure is ongoing has also been repealed and will only apply to cases still governed by the old scheme. Under the Code of Practice employees must raise their grievance in writing, make reasonable effort to attend any meetings and appeal otherwise any award the Member receives may be subjected to a 25% decrease. The ET1 can now also be submitted immediately rather than waiting 28 days after the grievance was submitted.

d Procedure for Requesting Assistance

Branches should **not** agree to take responsibility for submitting Employment Tribunal claims as it puts the Union at risk of a negligence claim if it is presented out of time.



Responsibility for the lodging of an Employment Tribunal application **rests firmly with the individual member** concerned. Every advice and assistance will be available from the branch and headquarters' departments, but it is the member who is responsible for their case. Forms and an explanatory booklet are available from Government agencies, as contained in the standard letters and notes in the LTB 447/2009.

The following forms of words can be inserted in the appropriate box 8 of the form: *"I have requested representation from my Trade Union and my request is being given consideration. Until a decision is made, all correspondence should be addressed to me at my home address."* Under no circumstances should a branch officer or representative put, or allow their name to be entered in box 8 as a CWU representative. All requests for assistance must be routed through a Member's branch and made to the Legal Services Department at CWU Headquarters.

The request will then be assessed. To allow the request to be assessed adequately, the following documentation will need to be provided:

- 1 Dismissal letter or response by manager to grievance/harassment claim
- 2 Initial dismissal/grievance or harassment hearing notes and appeal decisions
- 3 All relevant correspondence
- 4 ET1 application form
- 5 ET3 employer's response
- 6 Discrimination questionnaire and response (if applicable).
- 7 Other Tribunal/legal correspondence in the member's possession
- 8 Equal Opportunities Department correspondence or reports.

(II) Employment Tribunal Procedure

When a member brings an Employment Tribunal claim and this is supported by the Union based on its prospects of success, the Legal Services Department will either provide representation from one of the Union's experienced panelists or (in some cases) specialist employment solicitors.



Initial Stages: Starting a Claim

The parties to Employment Tribunal claims are called “claimant” and “respondent”. The Employment Tribunal process begins with the claimant sending an ET1 form to the appropriate Employment Tribunal. The ET1 form is the document in which the claimant sets out the details of his/her claim. Which Employment Tribunal is the appropriate one for the ET1 to be sent depends on where the claimant works (or used to work) for the respondent. The claimant should send his/her ET1 to the Tribunal which is closest to their place of work. The Employment Tribunal Service website (www.employmenttribunals.gov.uk) provides the address of the appropriate Employment Tribunal office based on the postcode of the place of work. The ET1 form can also be downloaded from the Employment Tribunal Service website.


Please note that if a member wants to make an Employment Tribunal claim then, because of the very short time limits involved, a safe approach is for the member to submit the ET1 with the assistance of their branch if appropriate before requesting representation or advice from the Legal Services Department.

Initial Stages: The Response

Once an ET1 has been received by the Employment Tribunal a copy is sent to the Respondent. The Respondent then has 28 days to complete a response (the ET3 form) and send it to the Employment Tribunal. Once received, the Employment Tribunal sends a copy of the ET3 to the claimant. If the claimant has given details on his/her ET1 form of a representative (e.g. a Union panelist or solicitors) who is acting for them, then all correspondence from the Employment Tribunal and the respondent will be sent to the representative rather than directly to the claimant.

Directions

After these initial stages have been completed, in all but the most straightforward of cases, the Employment Tribunal will give directions. Directions are instructions from the Employment Tribunal on the steps that



both sides need to take in order to prepare for the hearing. The steps covered by directions typically include:

- 1 both parties disclosing all relevant documents (including electronic documents) that they have in their possession or control;
- 2 the claimant preparing a schedule of loss, meaning a document setting out the amount that he/she is claiming and the basis on which this is claimed;
- 3 the parties agreeing a bundle of documents to be used at the hearing; and
- 4 The parties preparing written witness statements and exchanging them in advance of the hearing. Generally speaking only witnesses who have prepared and exchanged written statements of their evidence in advance are allowed to give evidence at an Employment Tribunal hearing.

In some cases, directions are discussed between the parties at a case management discussion either held at the Tribunal or by telephone. In addition, the Tribunal sometimes holds a pre hearing review which is a mini hearing considering a preliminary point that impacts on the rest of the case. Examples of issues considered at pre hearing reviews include whether the claim was brought in time or whether the claimant is eligible to bring the claim in question, by examining “employee” vs. “worker” status or the claimant’s length of service.

Complying with the Tribunal’s directions on time is crucial. Failure by either party to comply at the specified time can have very serious consequences including the striking out of the claim (or the respondent’s defence to the claim). There is generally a period of anything between three and twelve months between the ET1 and ET3 being sent and the hearing itself during which the steps covered by the directions are taken. The time that it takes the Employment Tribunal to list a hearing will depend on how busy that particular Tribunal is and how many days the Employment Tribunal and the parties think the case needs depending on things like the complexity of the issues and the amount of documents and witness evidence involved. A longer hearing with one of the busier Tribunals can unfortunately take significantly longer than twelve months to get heard.



Settlement


Settlement is possible at any time from the outset of a Tribunal claim, right up until the hearing itself. Settlement can be negotiated directly by the parties, by their representatives or through ACAS. An ACAS officer is assigned to every Employment Tribunal claim and, generally speaking, using the ACAS officer to negotiate settlement is a good idea, not least because if the parties do agree the ACAS officer can quickly and easily record the settlement in a formal document which is binding on both parties. In many cases the ACAS officer will play a helpful and proactive part in encouraging the parties to settle.

The Hearing

If the claim is not settled, then a hearing will be held. The Employment Tribunal panel hearing in almost all cases will be made up of three members - a legally qualified chairperson called an Employment Judge and two non-qualified members, one of which will have an employer related background (for example a senior manager, HR officer etc) and the other an employee background (often experienced union officials).

At the hearing the party with the burden of proof presents their evidence first. Which party has the burden of proof depends on the type of claim being made. Each party's witnesses will either be asked to read out their witness statements or the Employment Tribunal panel will read the statements themselves. Once a particular witness' evidence has been read, the witness is cross-examined by the representative for the other party. The Employment Tribunal panel also asks any questions that they want to ask, and then the representative for the witnesses' side can ask limited re-examination questions. Once this process has completed for one side's witnesses it is repeated for the other side witnesses.

The parties' representatives then each make submissions, which are arguments in support of their respective cases based on the evidence that has been heard and the relevant law. Submissions are the last part of the hearing before the Tribunal gives its decision. The approach taken by most Tribunals is that there should be sufficient time within the days of the hearing



itself for the Tribunal to deliberate and to give its decision. However, in many cases the hearing of the evidence and submissions takes longer than anticipated and so there is not time for the Tribunal's decision on the day. If this happens then the decision is "reserved" and sent to the parties in writing on a later date.

Further information and leaflets about various aspects of Employment Tribunal procedure and what happens at an Employment Tribunal hearing can be found on the Employment Tribunal Service website (www.employmenttribunals.gov.uk).

Types of claims


(III) Unfair / Constructive Dismissal

Employees with one year's continuous service who have been dismissed (with or without notice) or resigned in response to the employer's repudiatory conduct/fundamental breach of contract (i.e. constructive dismissal) may be able to make a claim for unfair dismissal. Any claim for unfair dismissal must be received by an Employment Tribunal within 3 months of the dismissal. For example, someone dismissed on 15 June would have to submit their ET1 before midnight on 14 September, while someone dismissed on 1 December would have to submit a claim before midnight on 28 February.

(a) Permitted Reasons for Dismissal

Employers are only able to dismiss an employee for one (or more) of the permitted reasons outlined in section 98 of the Employment Rights Act. Those reasons are:

- Capability – e.g. poor performance; ill health
- Conduct – e.g. fighting at work; stealing
- Retirement
- Redundancy
- Illegality
- Some other substantial reason



The Employment Tribunal must then decide if it was reasonable for the employer to dismiss in all of the circumstances, including the size and resources of the employer. The Tribunal will look at what the employer knew at the time and consider if the action it took was in the reasonable range of responses.

i Capability

Poor performance: check what the employer has done to keep the employee in work. Have they offered training? Support? A less demanding position? Have any warnings been given?

Ill health: check if the employee is disabled within the definition of the Disability Discrimination Act, as disabled employees are entitled to ask their employer to make reasonable adjustments to accommodate their disability. Keep the employer informed as the condition may improve. Is the employee able to perform a different duty?

ii Conduct

The employer must have a genuine belief of the employee's guilt which must be based on reasonable grounds usually following an investigation. The Tribunal's function is to examine the fairness, not the correctness, of the decision. Check the contract of employment as this normally provides examples of what constitutes misconduct. Check the employee's history – have they received any warnings? Are they still valid? Are they clear and applied consistently?


iii Redundancy

Applies if the employer is:

- Closing down an establishment
- Ceasing or intends to cease business
- Ceasing or intends to cease work of a particular kind

The position is made redundant not the person. The employer must

- i Select the pool from which redundancies are to be made

- 
- ii Select individuals from that pool. Any selection from the pool must be fair and based on neutral criteria.

The employees should be offered any alternative positions available.

iv Retirement

The question of whether retirement is the reason for dismissal is determined by the Tribunal looking at the dismissal procedure that the employer has followed. Employees should be notified six months to one year prior to the proposed date of retirement of that date and of the right to request working beyond it. If this is requested the employer has to hold a meeting and consider the request and if it refuses offer an appeal. Provided the employer follows this procedure and the employee is aged 65 or over then there is no scope for an unfair dismissal claim or any other type of claim if the request to work beyond the retirement date is refused.

v Illegality

This is where illegality prevents an employee from doing their job. The classic example is a driver losing their licence. A process involving a meeting before any decision is made plus consideration of any alternatives to dismissal will generally be required for a fair dismissal.

vi Some other Substantial Reason (SOSR)

This is the “catch all” category allowing employers to dismiss for reasons other than the specific ones listed in section 98 of the Employment Rights Act 1996. The employer has to follow a fair procedure and the Tribunal must agree that the reason was “substantial” on the facts of the particular case, meaning that cases are very fact specific and a reason that is “substantial” in one case will not necessarily be in another. Reasons which have been held to be substantial in past cases include business reorganisations that were not redundancies, protection of a business where the employee refused to sign restrictive covenants and serious personality clashes between employees who had to work in close proximity.



(b) Automatically Unfair Dismissals

Certain dismissals will be automatically unfair if the reason for the dismissal relates to:

- Pregnancy and childbirth
- Parental leave
- Health and safety reasons
- Whistleblowing
- Victimisation
- Seeking flexible working

(c) Procedure

The employer will give evidence first if they concede that there has been a dismissal. If there is a dispute about a dismissal, normally in cases of constructive dismissal, then the employee will go first.

(d) Remedies

Basic Award: calculated in the same way as the redundancy calculation
<http://www.berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page33157.html>

Compensatory award: Can claim losses resulting from dismissal including loss of earnings and additional benefits such as pensions.

(IV) Redundancy, TUPE and Collective Consultation

(a) Redundancy

Redundancy is one of the six legally permitted reasons for dismissal.

Redundancy is the permitted reason for dismissal where

- 1 an employer ceases operations altogether,
- 2 closes down a particular location,
- 3 has a reduction in its needs for employees to do work of a particular kind (which includes reductions in the workforce to save the employer money)



(i) Fair procedure

If an employer is making less than 20 people redundant in a period of 90 days then in order to avoid successful unfair dismissal claims it needs to have followed a fair procedure. The precise procedure that is required will differ from case to case, but in general terms a fair redundancy procedure usually involves;

- 1 advance warning of the risk of redundancies
- 2 consultation with the individuals affected
- 3 consideration of alternatives to dismissal
- 4 a fair method of selection

Where the method of selection used is a number of selection criteria against which employees are scored, the scoring exercise should be carried out fairly and the selection criteria should be reasonably objective.

(ii) Collective Redundancies

In cases of collective redundancies (i.e. where 20 or more employees are to be dismissed within a 90 day period) there are more stringent requirements. In such cases the employer is required to;

- 1 consult in advance with representatives of the affected employees
- 2 complete consultation before notices of dismissal are given

The Union

Wherever a Union is recognised, redundancy consultation has to take place with an authorised official of that Union. The majority of the CWU's members work for employers that recognise the CWU.

In cases where the Union is not recognised, the employer can choose to hold elections for representatives for the purposes of collective consultation or it can consult with other appropriate representatives appointed by the employees and there is no reason why these representatives cannot be Union members.



The Consultation Period

If the employer is proposing to dismiss between 20 and 99 employees in the 90 day period then the consultation must last at least 30 days. If the employer is proposing to dismiss 100 or more employees then the consultation must last at least 90 days.

The Consultation Process

The consultation process requires that the employer gives the representatives certain information in writing, including;

- 1 the reasons for the proposed redundancies,
- 2 the number and description of employees they propose to dismiss,
- 3 the proposed method of selection and carrying out the dismissals
- 4 the proposed method of calculating any redundancy payments (if the employer is intending to pay more than the statutory minimum)

The consultation should include ways of avoiding the redundancy situation or the need for dismissals altogether, or of reducing the number of dismissals and mitigating their effects.


(iii) The Protective Award

If an employer fails to comply with its collective consultation obligations then the representatives can make a claim for a “protective award”. In most cases involving CWU members, the Union will be the representatives for consultation purposes and it would be for the Union to bring a protective award claim. Therefore if there are redundancies proposed in relation to members that you represent and you think that the collective consultation obligations apply and have not been complied with you should notify the Legal Services Department immediately.

Time Limits

There are two time limits for making a protective award claim - either;

- 1 before the date on which the last of the dismissals to which the complaint relates takes effect, OR
- 2 within three months of the date on which the last of the dismissals to which the complaint relates takes effect



The Tribunal will only consider a complaint out of time if it is satisfied that it was not reasonably practicable for the claim to be made in time.

Defence

The employer can defend a claim for a protective award only on the basis that there were “special circumstances” which meant that it could not comply with its collective consultation obligations. Employment Tribunals generally take a fairly robust approach to the “special circumstances” defence, meaning that in most cases where the employer has not fully complied with its collective consultation obligations (including having a consultation period for thirty or ninety days as appropriate) the prospects of the Employment Tribunal making a protective award will be good.


Remedy

If an Employment Tribunal upholds a protective award claim, it will make an award in respect of a class of employees which it will identify by a general description. Case law says that if the complaint is brought by the Union then only Union members should be covered by the award. The legislation allows for an award of up to ninety days pay for each of the affected employees irrespective of their financial loss. Where there has been some consultation but not for the full statutory period, a common approach that Employment Tribunals take is to make a protective award of pay for the balance of the consultation period.

Enforcement of the Protective Award

If the Employment Tribunal has made a protective award but the employer fails to pay one or more employees a protective award at all, or pays less than those employees are entitled to, in order to enforce their individual entitlements, those employees have to make a further claim to the Employment Tribunal. This could be done with the assistance of the Union’s Legal Services Department but has to be in the name of the individual member(s) and not in the Union’s name.

The Employment Tribunal claim has to be made within three months of the failure to pay. Generally the Employment Tribunal’s original protective



award will have specified when the employer should pay and this is the date that time starts to run from. If the Employment Tribunal's award does not specify a date by which the employer must pay, then the time limit should be calculated from the date of the award itself. If a member misses the three month deadline then the member's entitlement to their protective award payment is lost unless the Employment Tribunal is satisfied that it was not reasonably practicable for the member's claim to be made within three months.

(b) TUPE (The Transfer of Undertakings (Protection of Employment) Regulations 2006)

The purpose of the TUPE legislation is to protect employees when the "undertaking" for which they work is transferred from one legal person (which includes a company) to another. The legislation recognises two types of TUPE transfer:

- 1 a business transfer which involves the transfer of an "economic entity which retains its identity" ("economic entity" is defined as "an organised grouping of resources which has the objective of pursuing any economic activity, whether or not that activity is central or ancillary");
- 2 service provision changes which cover contracting in, contracting out and changes of contractor

TUPE therefore applies to a wide variety of situations including takeovers, mergers, management buy outs and contracting in, contracting out and re tendering. TUPE does not apply to transactions which are share sales only.

The parties to a TUPE transfer are called the transferor and transferee. In some cases the fact that TUPE applies will be obvious and not disputed. In more difficult cases the transferor, the transferee (or both) may claim that TUPE does not apply. The question of whether or not TUPE does apply in such cases is resolved by the Tribunal examining precisely what has been



transferred. The application and meaning of TUPE is one of the most complex and often uncertain areas in employment law and so TUPE questions can be referred to the Legal Services Department.

Rights of Employees


If TUPE does apply then employees have a number of rights, including;

- 1 the right to transfer along with the undertaking in which they are employed on the same terms and conditions (and with their continuity of service protected)
- 2 the right to object to the transfer if they do not want to transfer (but in many cases this will mean that their employment terminates without the right to claim unfair dismissal)

Other than where employees object to the transfer, any dismissal for a reason connected to a TUPE transfer will be automatically unfair, unless the employer has an “economic, technical or organisational” reason for the dismissal which entails changes in the workforce. The practical effect of this is that an employer can make redundancies that are connected to a TUPE transfer provided it goes through a fair procedure first. Employees are also protected against transfer connected changes to their terms and conditions unless the employer has an economic, technical or organisational reason which entails changes in the workforce for making the changes.

Consultation

In addition TUPE requires information and consultation. The requirements are very similar to those for collective redundancies (see above). If the Union is recognised then the information and consultation has to take place with an authorised official of the Union. For those members who work for employers that do not recognise the Union, representatives need to be appointed or elected, but there is no reason why these representatives cannot be union members.



The employer is obliged to inform and consult the representatives of the “affected employees”. The employer must inform those representatives of:

- 1 the fact of the transfer, approximately when it is to take place and why;
- 2 the legal, economic and social implications of the transfer for the employees;
- 3 whether the employer envisages taking any action in connection with the transfer which will affect the employees (and if so what action – e.g. a reorganisation);
- 4 in the case of the transferor, any information that the transferee has given to it about any action which the transferee envisages taking that will affect the employees

Remedy

If either the transferor or the transferee fails in their information and consultation obligations then a protective award claim can be made. The rules and time limits for a TUPE protective award claim are the same as for redundancy protective award claims; however the maximum award for a TUPE protective award is thirteen weeks pay.

(V) Contract of employment

Procedure

The Union’s Legal Services Department assists members, branch representatives and officials in assessing and pursuing breach of contract claims. All requests for advice, assistance or representation in breach of contract claims should be made to the Legal Services Department. The Legal Services Department may refer the matter either to the panel of trained representatives or instruct specialist employment solicitors from their panel to advise on prospects and/or represent the member(s).

Breach of contract claims can be run either in the Employment Tribunal for unlawful deduction of wages claims or for breaches of contract outstanding or arising at the termination of employment, or in the county court for any breach of contract claim.



Time Limits

A claim for unlawful deduction of wages must arrive at the Employment Tribunal no later than 3 months less one day from the date the deduction was made (that is, when payment should have been made and wasn't or when the wrong amount was paid). If there was a series of similar deductions time runs from the date of the last deduction.

Other breach of contract claims can be made in the Employment Tribunal after the employment has ended. Such claims must be lodged with the tribunal within 3 months of the date employment was terminated.

The time limit for breach of contract claims in the county court is 6 years from the date of the breach of contract.

Evidence Required

The contract of employment is made up of the following:

- 1 the standard letter of appointment / contract / statement of particulars of terms and conditions,
- 2 documents / agreements referred to in the contract as being part of it
- 3 terms implied by law or by custom and practice


In order to assess whether or not there has been a breach of contract, the Legal Services Department therefore need copies of all relevant documents including:

- 1 the latest applicable standard contract/statement of terms
- 2 any relevant instruction/policies or national and/or local agreements
- 3 evidence of the alleged breach of contract, for example, pay slips

It would also be useful for Legal Services Department to be sent copies of any correspondence and/or notes of meetings about the matter.

Remedies

The remedy for an unlawful deduction of wages claim is a declaration that the complaint is well founded and an order to reimburse the amount outstanding.



The compensation for breach of contract is calculated by assessing what the claimant would have received had the contract been properly complied with. The claimant is expected to “mitigate their loss” (that is, to do all they can to minimise their loss) for example, by seeking alternative employment where there has been a dismissal without proper notice.

In the Employment Tribunal, the maximum that can be awarded from breach of contract is £25,000.00. There is no maximum for the amount that can be claimed in the county court.

(VI) Compromise agreements

If, on the termination of the employee’s employment, or in settlement of potential claims in other circumstances, the employer pays more than the strict legal entitlement; the employer often wants to make sure that the employee cannot, after receiving the extra payment, still bring claims against the employer, whether statutory or otherwise. The employer will, therefore, require the employee to sign an agreement.

An agreement to waive statutory employment rights is not valid unless it is made through either ACAS or what is known as a Compromise Agreement. This is an agreement which meets certain statutory requirements, one of which is that the person signing away their rights has received independent legal advice on the effect of what they are agreeing to. This advice can be given by a Solicitor or a Union Official trained and certified specifically for this purpose. The employer will pay for the employee to receive independent legal advice to make sure that the agreement is valid and enforceable against the employee.

Although the employer may suggest a firm of Solicitors for this purpose, the member can instruct any Solicitor of his/her choice. If Members need advice on a Compromise Agreement, any request should be made in the first instance to the Union’s Legal Services Department. The Union’s Legal Services Department may refer such cases to their panel of specialist employment solicitors to give the independent legal advice to the member

at no cost to the member or to the Union. By using a panel of solicitors, the Union's members can be sure of receiving advice that is not only independent and from someone who specialises in employment law, but also from someone who has experience of the arrangements applicable in the postal and telecoms industry.

Other Benefits

L Wills

CWU's Legal Services Department offers a FREE will-writing service for members and their partners.

You can take advantage of this service by telephoning us on **020 8971 7444** or via email **freewills@cwu.org**.

We will send a free will pack to the member explaining all they need to know and it includes a questionnaire for them to complete and send to our Panel Solicitors. Our Solicitors will then draft a standard will for the



member (and partner if they wish) based on the information contained in the questionnaire. It may be that the member requires something more complex than a standard will. For example, they may need inheritance tax advice or perhaps they own a property abroad. If that is so, then our Solicitors will contact them to discuss their needs. Non-standard wills may incur a charge although this would be agreed with the member in advance with the solicitor and will be at a discounted rate obtained by the CWU.



M Discounted Conveyancing

All members are entitled to discounted conveyancing from one of panel firms of solicitors. The member should contact the helpline on **0800 804 6674** to obtain details of this service.

N Investment Advice

Members are entitled to financial advice including at competitive rates from the panel solicitors. They should contact the helpline on **0800 804 6674** to be directed to the appropriate department. Advice provided on:

- 1 Investment advice on lump sums and regular savings.
- 2 Inheritance tax savings.
- 3 Planning for long term care fees and asset protection.
- 4 Independent mortgage advice.
- 5 Life assurance and income protection.

The benefits and services provided by the Legal Department are governed by the Union's national rules and procedures, as agreed by the National Executive Committee and Annual Conference.

NB: Some of the services and benefits may vary depending on the various legal jurisdictions applicable within the UK, Isle of Man and the Channel Islands. Clarification on all aspects can be obtained via the Legal Services Department on **020 8971 7444** or email **trupa@cwu.org**



CWU Approved Panel Solicitors

Please find below a list of CWU Approved Panel Solicitors.
You may wish to visit their websites to view the services.

England

Edwards Duthie

www.edwardsduthie.com

Irwin Mitchell

www.irwinmitchell.com

McCool Patterson Hemsli

www.mphsolicitors.co.uk

Shakespeare Putsmans LLP

www.sp-legal.co.uk

Simpson Millar LLP

www.simpsonmillar.co.uk

Walker Smith Way

www.walkersmithway.com

Scotland

Brodies LLP

www.brodies.co.uk

Email: david.armstrong@brodies.co.uk

Lindsays

www.lindsays.co.uk

Raeburn Christie Clark & Wallace

www.raeburns.co.uk

Northern Ireland

Dermot Walker Madden & Co

dwalkerandcosols@btconnect.com

O'Hare Sols

www.jgohare.com

Isle of Man

Gelling Johnson Farrant

Email: gjf@manxlaw.com

Guernsey

Babbe le Pelley Tostevin

www.blргуernsey.com

Jersey

Backhurst Dorey & Crane

www.bdc.je



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or visit www.cwu.org
Legal Services Department

To register a claim or for any legal advice:



CALL FREEPHONE 0800 804 6674



VISIT www.cwuaccidenthelpline.com



CONTACT your local branch official

For further information contact Tony Rupa on 020 8971 7444 Head of Legal Services

*Personal Injury Claims only **Members only