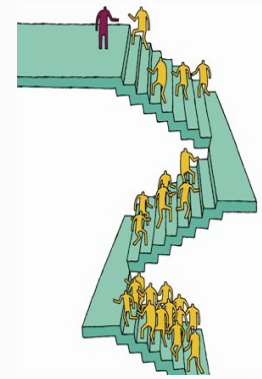
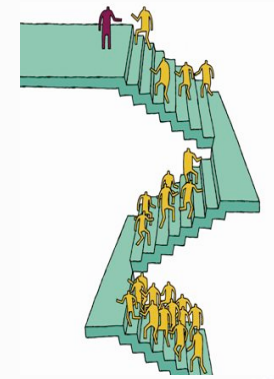


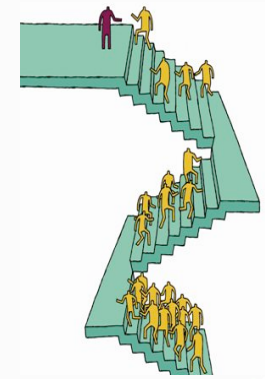
EMPLOYMENT TRIBUNALS



INTRODUCTION TO THE CASE STUDY AND TRIBUNAL TIMELINE

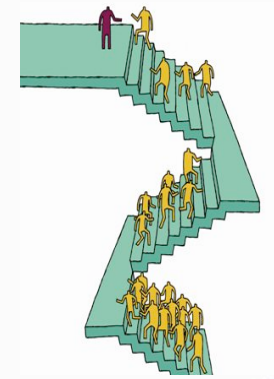


ASSESSING THE RISKS AND FORMULATING A LITIGATION STRATEGY



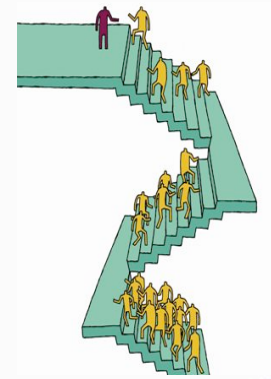
The Litigation Strategy – Assessing the Risks

- Starting point – determine the key issues at stake
- Key issues include:
 - Whether there are jurisdictional / preliminary issues
 - What the substantive or procedural issues of the claim are
 - Whether the claim(s) has/have merit
 - Potential financial exposure for the company (including legal costs and potential award if employee is successful)
 - Whether there are any sensitivities involved in a case



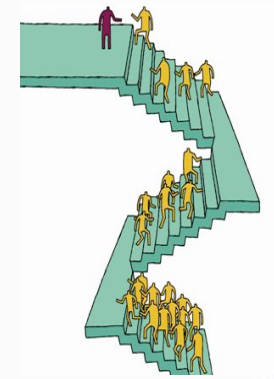
Jurisdictional / Preliminary Points

- Are there any jurisdictional or preliminary points?
 - Time-bar?
 - Disability status?



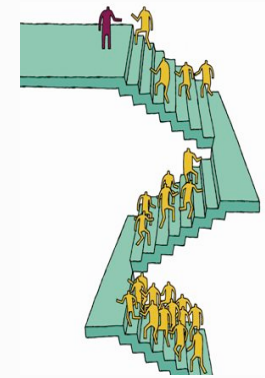
Substantive issues

- Fair reason for dismissal?
- Did the penalty fit the “crime”?



Procedural issues

- Failure to follow fair procedure?
- Compliance with ACAS code? (Statutory procedures abolished for dismissals after 5 April 2009)
- Compliance with Employer's own policies?



Financial Exposure – Potential Awards

Unfair dismissal

Basic Award
statutory
payable

Calculated in same way as
redundancy payment (and not
where SRP already made)

Compensatory Award
of

To compensate employee for loss
earnings - capped at £65,300

Loss of statutory rights

£250 - £500

Reinstatement /
Re-engagement

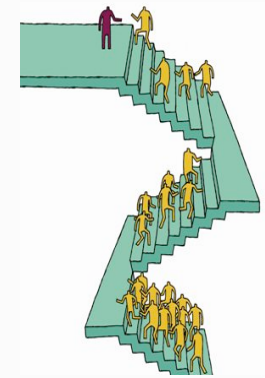
Potentially beats cap

Additional award

If failure to comply with reinstatement /
re-engagement order. Award is
between 26 and 52 weeks' pay

Interim relief
employment

Order for continuation of contract of



Financial Exposure – Potential Awards

Discrimination

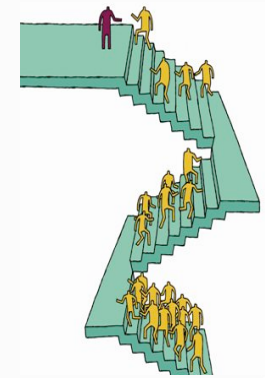
Loss of Earnings Claimant can claim loss of earnings (past and future) arising from a discriminatory act - purpose is to put the Claimant into the financial position that they would have been had it not been for discriminatory action(s)

Injury to Feelings *Vento* guidelines

Personal Injury If discrimination has caused injury to health, this could be a head of claim

Aggravated Damages (England and Wales only) Additional compensation for malicious, high-handed or oppressive discriminatory act

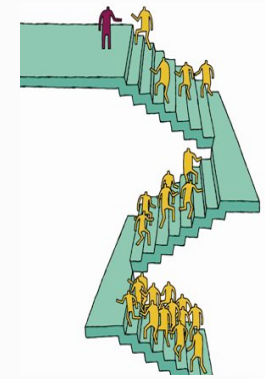
All awards potentially unlimited



Financial Exposure – Potential Awards

Other types of fixed awards

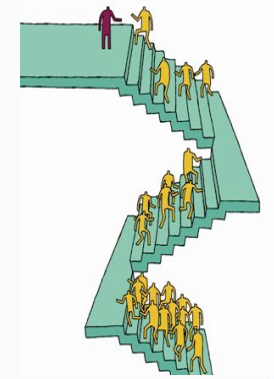
Protective Award (failure to inform or consult)	up to 90 days pay (uncapped)
Breach of Contract	Capped at £25,000
Breach of right to be accompanied	Up to 2 weeks' pay
Failure to provide Employment particulars	4 weeks' pay
Breach of Flexible Working Regulations	8 weeks' pay



Financial Exposure – Potential Awards

Other things to think about

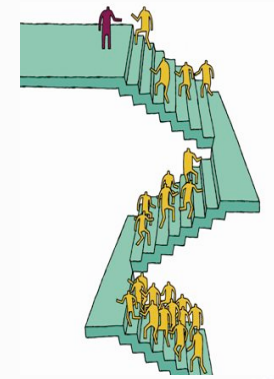
- Has the employee mitigated his or her loss?
- Do you need Further and Better Particulars to assess what the Claimant's losses are?
- Is there a potential 25% uplift or decrease in compensation for “unreasonable failure” to follow the ACAS Code on Disciplinary and Grievance Procedures?
- Legal costs v potential financial award if employee is successful



Sensitivities

- Are there any sensitivities in this case?
- Sensitivities could include:
 - Discrimination angle to case
 - Potential negative PR for the company
 - Case involves sensitive / confidential information which the company would be reluctant to disclose
 - Potential witness issues
 - Risk re other claims
 - Encouraging claims culture

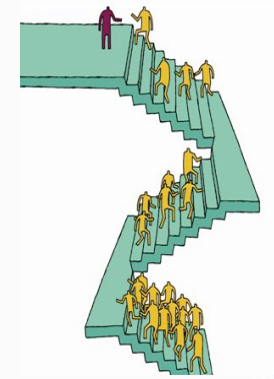
Balancing the Risks and Determining Strategy



- Now that you know key issues and risks you need to develop a litigation strategy...

Do you:

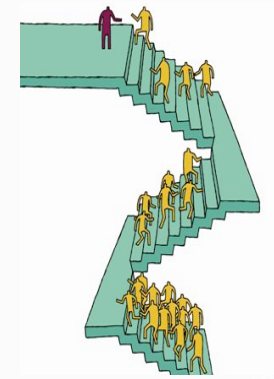
- Attempt to settle?
- Opt for mediation?
- Fight the fight?



Pre-Hearing Procedure - Disclosure

- Scotland:
 - No automatic requirement for disclosure
 - Can still apply for disclosure orders
 - Legally represented party to intimate list of documents to be relied upon at merits hearing to other party or representative not later than 14 days before hearing

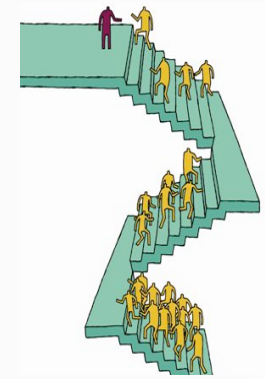
- England:
 - Different approach applies.



A Case Management Discussion

- Approach to a CMD
- Listing issues (clarify and narrow)
- Seeking/ Resisting Orders
 - Further particulars/additional information
 - Witness orders
 - Specific disclosure
 - Restricted Reported order?- only on very limited grounds

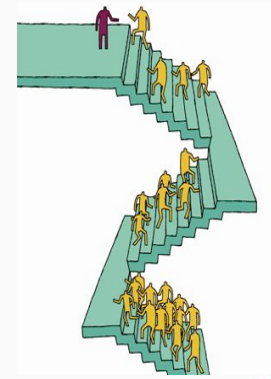
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Case Management Discussion Role Play

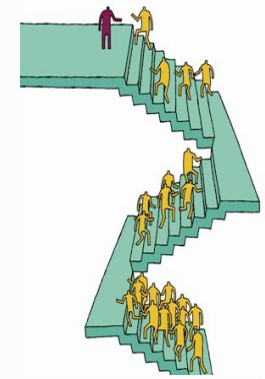


Tribunals Service
Employment



Compliance with Directions

- What happens if there is a failure to comply with an Order?
- Application for strike out
- Application for costs



Compliance with Directions

Unless Order

- Application for an Unless Order under Rule 13(2) of the ET Rules
- An Unless Order can be issued by a Tribunal which states that unless the party complies with the Order by a certain date, the case will be struck-out on the date of non-compliance without the need for any further action

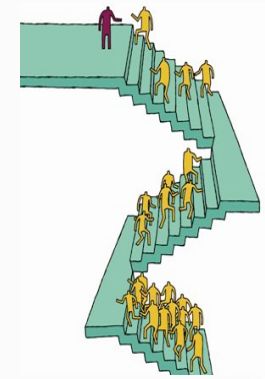
Advantages

Exerts pressure on Claimant

Ensures compliance with Order

Disadvantages

EAT seems to be discouraging
automatic strike-out of cases



Pre-Hearing Review

Generally

- For consideration of preliminary issues (e.g. jurisdiction / potential strike-out)

Scenario:

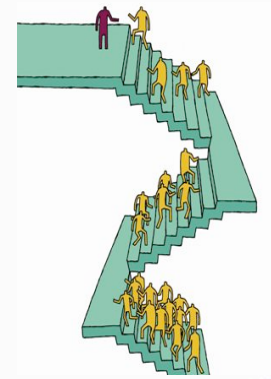
- The Claimant claims disability discrimination. However, to succeed he must first prove that he is a disabled person terms of the DDA

Who is there:

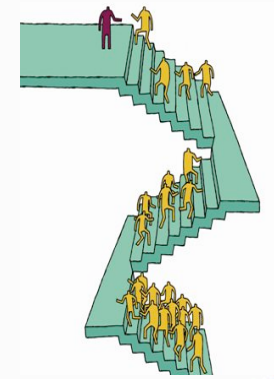
- Employment Judge (sitting alone);
- the parties' representatives; and
- the Claimant (usually)

What happens:

- The judge will outline the matters to be considered;
- evidence will be given by the Claimant explaining how his condition affects his day-to-day activities. Medical experts may be called on to give evidence on the Claimant's condition
- parties' representatives will put forward their legal arguments in support of their case;
- the judge will give his judgment (normally orally on the day or he can reserve judgment and then write to the parties at a later date)

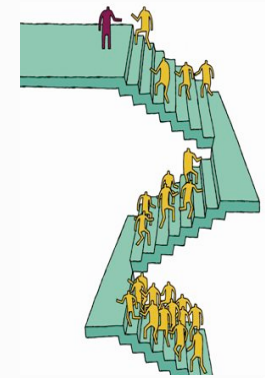


PREPARING FOR A FULL HEARING



Witness Evidence

- **Scotland:** No witness statements. Precognitions are taken in advance so that you have an understanding of what the witness will say.
- **England:** Witness statements.
- **Uncooperative witnesses**
 - Possible to apply to the ET for a witness order requiring attendance.



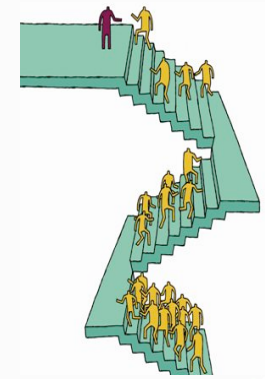
Reassessing the risk and determining the Final Strategy

- Assessing the prospects of a case is an “evolutionary” process: reassess once witness statements have been taken.

Options:

(A) Settle

- **Negotiate settlement:** knowledge is key – know what the claim is worth, projected legal costs and value of time to the business.
- **Mechanics of settlement:** through solicitor / ACAS.
- **Documenting settlement:** compromise agreement or ACAS COT3 agreement.
- **Compromise agreement:** employee will need independent legal advice – adds to expense. Necessary to tailor to specific circumstances – be specific in relation to the claims to be compromised.
- **COT3:** negotiated through ACAS. Can be completed without the need for the employee to involve a solicitor. Range of matters covered not as comprehensive as a compromise agreement.

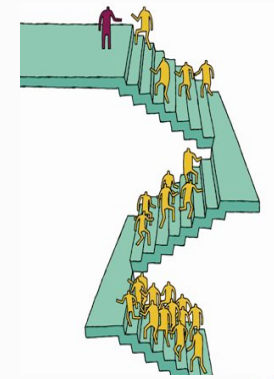


Final Strategy (continued)

(B) Fight on:

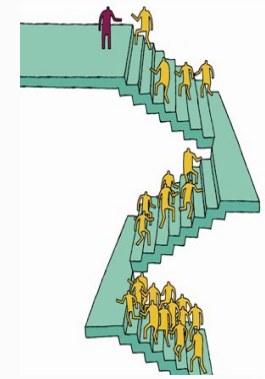
Tactics – “*shot across the bow*”:

- **Cost warning letter:** - letter detailing why you are of the view that the claim has no reasonable prospects of success. Contains a warning that will pursue for costs if the claim fails.
- **Calderbank letter:** contains an offer to settle for a specific sum. However, if the claim fails or the Claimant is awarded a lesser sum, then letter can be presented to the ET to argue that the Claimant’s conduct was unreasonable by not accepting the offer for purposes of seeking costs award against Claimant.



THE FULL HEARING – THE END GAME

- Evidence in chief
- Cross examination
- Re-examination
- Panel questions
- Submissions



Witnesses – do's and don'ts

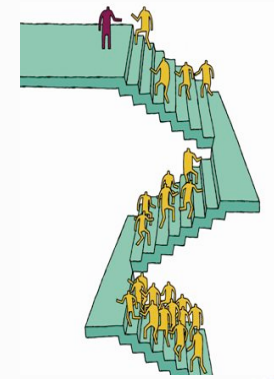
Do

- Study the bundle of documents in detail.
- Address the panel as “Sir” and “Madam”.
- Answer only the question that you are asked.
- Take time to consider your answers - a Tribunal will be persuaded by a considered answer.
- Direct your answers to the panel.
- Watch the panel to make sure they are still with you – you may have to slow down with your responses.
- Adopt open body language.

Don't

- Go beyond what is necessary to answer the question.
- Worry if you don't know the answer to the question or can't remember – feel free to say so.
- Get angry, frustrated or emotional. As much as possible, remain calm at all times.
- Come across as evasive.

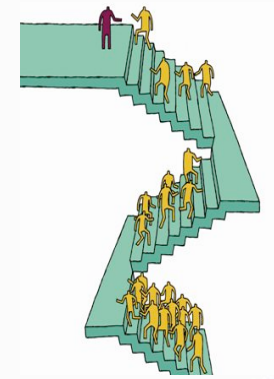
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Judgment Day – Role Play



Tribunals Service
Employment

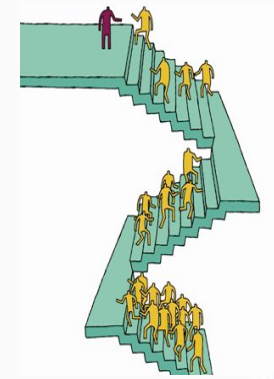


Lost?

- Request for Written Reasons

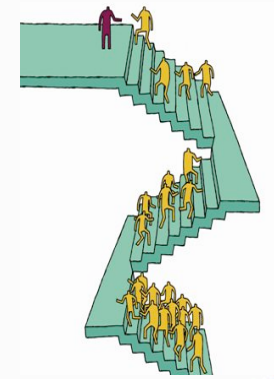
Reviews

- Within 14 days
- Very limited grounds:
 - Administrative error
 - No notice of proceedings
 - New evidence has become available
 - The interests of justice



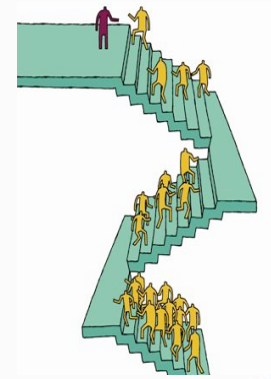
Appeals

- Only error of law or perversity (a high test)
- Appeal to the EAT within 42 days of date Judgment sent to parties
- Further appeal to Court of Session (Court of Appeal in England/Wales)
- Further Appeal to the new Supreme Court



Costs/Expenses

- These do not automatically follow success.
- Limited grounds to claim costs/expenses:
 - “Vexatiously”
 - Abusively
 - Disruptively
 - Unreasonably
 - Misconceived- includes “having no reasonable prospects of success.”



QUESTIONS?