



Department for
Business, Energy
& Industrial Strategy

EMPLOYMENT TRIBUNALS POWERS

Tribunal user guidance on use and
application

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OGL

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Introduction

Feedback from people using employment tribunals suggested there was a lack of awareness or confusion over what powers tribunals have to either act against employment law breaches and poor behaviour in bringing or defending a claim, or the way a case is conducted, and the way those powers are applied.

The aim of this document is to provide an accessible explanation of the powers available and highlight case law which illustrates how tribunals have used them. This should increase confidence that poor behaviour or conduct in bringing or defending a claim can have financial consequences and highlight how you can ask tribunals to make use of those powers. It should also help provide reassurance about the purpose and limits of these powers, so that people are not dissuaded from proceeding with a claim or putting forward a defence to it (referred to commonly as presenting a response) by inaccurate information about their use.

The Government is committed to ensuring people are able to resolve their disputes within the workplace rather than dealing with expense and stress of going to an employment tribunal. Where claims do go to tribunal Government works to ensure that employment tribunals have the case management powers they need to act against employment law breaches or poor conduct during proceedings in line with the tribunal's overriding objectives of:

- ensuring that the parties are on an equal footing;
- dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- avoiding unnecessary formality and seeking flexibility in the proceedings;
- avoiding delay, so far as compatible with proper consideration of the issues; and
- saving expense

This guidance relates to the [employment tribunal rules](#) as at the time of publication. This means that they are applicable in England, Wales and Scotland.

Advice on employment law is available from [Acas](#). General information on employment tribunals can be found on [GOV.UK](#) and detailed information on the tribunal process is available from [HM Courts & Tribunals Service](#) and in [Presidential Guidance](#).

Glossary

Throughout this document are references to terms that may have a slightly different meaning to their use outside of a tribunal.

- **Party** – This refers to anyone who is making a claim or defending a claim, whether they are doing that themselves or by using a representative such as a lawyer.
- **Claim** – A claim refers to one or more complaints that employment law has been breached
- **Response** - A response is the defence put forward challenging the claim of employment law breaches.
- **Claimant** - The person bringing the claim
- **Respondent** – The person or company defending the claim
- **Order** – This is an enforceable demand by the tribunal for a party to take particular action (for example, provide information to the other party) or pay a sum of money.
- **Judgment** - This is the enforceable final tribunal decision regarding liability, compensation (remedy) or costs (in Scotland, legal expenses).
- **ET1** - The name of the form for submitting a claim to an employment tribunal
- **ET3** - The name of the form used to respond to a claim made to an employment tribunal.
- **Deposit Orders** – An order made by the tribunal for a party to pay a deposit to pursue an argument as part of a claim or response.
- **Costs Orders / Expenses Orders** – A costs (expenses in Scotland) order is an order by the tribunal for one side to make a payment to the other side for the legal costs of making or defending a claim.
- **Aggravated Breach Penalty** – A penalty payable to the state where a tribunal finds that an employer has breached a worker's rights and that the breach has one or more aggravating features
- **Wasted Costs Orders** – Similar to costs orders but payable by the party's representative
- **Uplift** - An increase to the amount awarded by the tribunal

General principles:

Employment tribunals have a variety of legal powers to help manage a case. For example,

- A party may make an application to the tribunal or the tribunal itself may decide on its own initiative to make an order – this requires some form of action to be taken by one or both (all) parties.
- Orders for payment of costs (in Scotland, expenses), preparation time or wasted costs may be made on application by a party, or on the tribunal's initiative up to 28 days after the end of the case.
- Before the decision is made the tribunal will invite the person who would have to pay (known in the tribunal rules as 'the paying party') if the order was made to say why they think the order should not be made or should be for a different amount of money than that which is being asked for or
- In deciding whether to make a **deposit, costs (in Scotland, expenses), preparation time, wasted costs**, or an **aggravated breach** order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a **wasted costs** order is made, the representative's) ability to pay.
- This consideration may be based not only on what assets the party already has (including capital or savings) but also their future ability to pay.
- A party may apply for a reconsideration of the tribunal's judgments. A party can request that a tribunal vary or set aside an order.
- If a party believes that the employment tribunal has made an error in law, they can appeal to the Employment Appeal Tribunal.

Before the hearing

Claims and responses sent to the employment tribunal on ET1 and ET3 forms are considered before the hearing in a sift process. There is a further point offering an opportunity before the need for a full hearing has been determined to test the merit of the claim or response as part of what is known as a preliminary hearing.

Deposit Orders

What is a deposit order?

A **deposit order** may be made by the employment tribunal at a preliminary hearing if it considers that an allegation or argument made in the claim or response has little reasonable prospect of success. The Tribunal has discretion as to whether it will make an order for any such allegation or argument.

It acts as a warning to the party who is ordered to pay the deposit that the allegation or argument is likely to fail based on an initial assessment of the available material. In these situations, the tribunal may order that the party makes a deposit as a condition of continuing to advance such allegations/arguments. The tribunal will give its reasons for the deposit order at the time of making it and warn the potential for costs (in Scotland, expenses) to be awarded if the claim or response subject to a deposit order is unsuccessful. More information on costs (in Scotland, expenses) is available below.

What is the minimum and maximum?

A deposit order can be up to £1,000 for each allegation or argument that the tribunal considers having little reasonable prospect of success.

Can a party be ordered to pay a substantial deposit even if they can't afford to pay?

The tribunal will make reasonable enquiries into, and have regard to, the paying party's ability to pay when deciding whether to make a deposit order and, if they do, how much should be paid.

Whilst the amount can be up to £1,000 for each allegation or argument it considers has little reasonable prospect of success, it can also be a nominal amount.

For example, in a case where the claimant was on a low income, two deposit orders of £1 were made by the Employment Appeal Tribunal following a successful appeal against the original deposit order of £75 per allegation.

While the amount can be nominal, the costs warning (see below for more information) if those allegations were unsuccessful still applied.

What happens if the deposit order is not paid?

The specific allegation or argument subject to the deposit order will be struck out if the deposit is not paid by the date specified in the order. In some cases, this may result in an entire claim or response being struck out.

What if the allegation/argument is successful?

The tribunal will refund the deposit to the paying party.

What if the allegation/argument is unsuccessful?

If the argument or allegation is unsuccessful for substantially the same reasons identified by the tribunal on making the deposit order, the paying party will be treated as having acted unreasonably, unless the contrary is shown, for the purpose of making a costs or preparation time order against them.

If a costs or preparation time order is made, the paying party will forfeit the deposit to the other party. The amount of the deposit will count towards the settlement of the costs/preparation time order.

Details on [costs orders](#) (in Scotland, expenses) are available below.

During / After the hearing

Costs (Expenses in Scotland) / Preparation Time Orders

What are they?

A costs (expenses in Scotland) order is an order by the tribunal for one side to make a payment to the other side for the legal costs of making or defending a claim. Where a party does not have legal representation they can ask the tribunal to make a preparation time order – this is an order that one party pays to the other a sum of money to cover the time they have spent preparing for the hearing.

How are they used?

The purpose of a costs (in Scotland, expenses) order is to compensate a party for the fees, charges, and expenses incurred in respect of the case. Such costs include the fees charged by solicitors and barristers working on the case.

Where a party does not have legal representation, a preparation time order may be made by the Tribunal to compensate for their own time spent preparing their case. This may include, for example, costs for printing, telephone calls or postage.

Unlike in the Civil Courts, the Tribunal will not necessarily make an order for costs/preparation time in favour of the successful party upon making its decision.

That however does not mean that a paying party without means is able to misbehave with impunity without fearing that a costs (in Scotland, expenses) order (or even a significant costs order) will be made.

When can they be applied?

Whether to make a cost / preparation time order is generally at the discretion of the Tribunal.

The Tribunal may make a cost / preparation time order on the basis of:

- The vexatious, abusive, disruptive or otherwise unreasonable conduct of a party, or their legal representative, in bringing or conducting proceedings;
- Whether a claim was made in the proceedings which had no reasonable prospect of success;
- Breach of an order or practice direction by a party and;
- The postponement or adjournment of a hearing following a party's application made less than 7 days before the hearing was due to begin.

Costs (in Scotland, expenses) orders can apply to a party based on the behaviour of the party or their representative.

What is the maximum value of a costs (in Scotland, expenses) order?

A tribunal can make a costs (expenses) order of a specified amount up to £20,000. If the amount claimed by the receiving party is higher, the tribunal may decide to refer the costs calculation to the County Court (England & Wales) or the Sheriff Court (Scotland) for detailed assessment. Tribunals are also able to determine amounts higher than £20,000 applying the same principles of detailed assessment.

How much is allowed for preparation time?

The current hourly rate is £38. This increases by £1 each year on 6 April. As with cost orders, the tribunal will consider the number of hours claimed for and whether that is a reasonable and proportionate amount of time to spend on preparation. As part of this they may consider the complexity of the proceedings, number of witnesses and documentation required.

What is needed for a costs (in Scotland, expenses) or preparation time order?

In order to make an application for a costs (in Scotland, expenses) or preparation time order, the party will need to provide a detailed breakdown of the costs incurred at each stage of the case (i.e. a schedule of costs / expenses).

What type of conduct may be considered for a costs (expenses) / preparation time order?

The tribunal will look at the whole picture, to ask whether there has been unreasonable conduct in bringing the case or in the way the case has been conducted. The Tribunal will not necessarily make an order even if unreasonable conduct is identified. The Tribunal must consider whether to exercise its discretion in light of all the circumstances of the case.

When have they been used?

In a case involving an appeal against a National Minimum Wage notice of underpayment the tribunal awarded costs as the appeal had no reasonable prospect of success and the party had already been warned about this at the preliminary hearing. They had the opportunity to withdraw the appeal but chose to continue leading to unnecessary hearing costs.

A tribunal awarded costs against a claimant pursuing a claim with no reasonable chance of success. The tribunal's view was that the claim should never have been brought and continuing with it was unreasonable.

Wasted costs orders

What are they?

A wasted costs order is made by the Tribunal against a representative to require them to make a payment for the receiving party's costs or, if the receiving party is the client of the representative, to disallow a cost that would be otherwise payable to the representative by their client.

How are they used?

They are used to order a representative to reimburse a party for cost incurred as a result of an improper, unreasonable or negligent act or omission by that representative. The receiving party could be the opposing side or even the representative's own client.

What is meant by the terms improper, unreasonable or negligent?

- "improper" covers but is not confined to conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice and other serious professional penalty;
- "unreasonable" describes conduct that is vexatious or designed to harass the other side rather than advance the resolution of the case; and
- "negligent" should be understood in a non-technical way to denote failure to act with the competence reasonably expected of ordinary members of the legal profession.

Where have they been used?

A tribunal applied wasted costs orders where the failure of the claimant's representative to submit a claim on time, and check it had been received, resulted in costs for the respondent. Deciding to lodge it by post so close to the limitation date and then failing to check that it had arrived was, in the tribunal's view, outside the standards of competence expected of ordinary members of the legal profession.

What is meant by representative?

"Representative" means a party's legal or other representative or any employee of such representative. It does **not** include a representative who is not acting in pursuit of profit regarding the proceedings.

A person acting on a contingency or conditional fee arrangement (sometimes known as "No Win No Fee") is considered to be acting in pursuit of profit.

A wasted costs order may **not** be made against a representative where that representative represents a party in their capacity as an **employee** of that party.

When might such an order be made?

The Court of Appeal advocates a three-stage test:

- Has the legal representative acted improperly, unreasonably or negligently?
- If so, did such conduct cause the party to incur unnecessary costs?
- If so, is it, in the circumstances, just to order the representative to compensate the party for the whole or any part of the relevant costs?

Powers relating to employment law breach

These powers relate to conduct leading to the claim such as aggravated employment law breach or failure to comply with statutory guidelines / codes of practice.

Aggravated Breach financial penalty

What is it?

Where a tribunal finds that an employer has breached a worker's rights and that the breach has aggravating features they may decide to order a financial penalty against a respondent. This penalty is payable to the State.

How is it applied?

The penalty awarded can range from a minimum of £100 up to a maximum of £5,000 (and where a financial award has also been made on a claim, the penalty will be linked to the level of the award). This maximum amount will increase to £20,000 as soon as Parliamentary time allows. If the penalty is paid within 21 days the employer can pay a discounted rate of 50% of the penalty amount.

What are aggravating features?

The law does not define what constitutes an aggravating feature but if, for example, it was shown that the employer had deliberately breached the law or were motivated by malice in behaving as they did that might be something considered relevant when the tribunal considers the issue.

The employment tribunal should only take into account information of which it has become aware during its consideration of the claim.

An employment tribunal may consider different factors in deciding whether to impose a financial penalty, for example:

- the size of the employer;
- the duration of the breach of the employment right; and
- the behaviour of the employer and of the employee.

An employment tribunal may be more likely to find that the employer's behaviour in breaching the law had aggravating features where:

- the action was deliberate or committed with malice,
- the employer was an organisation with a dedicated human resources team, and/or
- where the employer had repeatedly breached the employment right concerned.

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What mitigating circumstances might a tribunal consider?

The employment tribunal may be less likely to find that the employer's behaviour in breaching the law had aggravating features where an employer has been in operation for only a short period of time, is a micro business, has only a limited human resources function, or the breach was a genuine mistake.

When have they been used?

The tribunal applied a financial penalty where the employer not only made unlawful deductions from the claimant but, following a judgment on the same issue, then doubled deductions. This was seen as not only a breach of employment law but a disregard for the tribunal's judgment.

In a different case, the tribunal considered that an employment law breach had aggravating features in that the employer was a well-resourced company with clear policies and procedures and access to HR advice and support and its failure to follow its own policies was deliberate.

Adjustments to compensation (Acas code of practice)

What is it?

In a case involving unfair dismissal where a party fails to comply with the [Acas disciplinary and grievance code of practice](#), and the employment tribunal finds that the failure is unreasonable, the compensation awarded to the claimant can be increased (or decreased if the claimant is at fault) by up to 25%.

What is in the code of practice?

It provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace.

The Code does not apply to dismissals due to redundancy or the non-renewal of fixed-term contracts on their expiry

How is it considered in tribunals?

A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, employment tribunals will take the Code into account when considering relevant cases. Tribunals will also be able to adjust any awards made in relevant cases by up to 25 per cent for unreasonable failure to comply with any provision of the Code.

This means that if the tribunal decides that an employer has unreasonably failed to follow the guidance set out in the Code they can increase any award they have made by up to 25 per cent. Conversely, if they consider an employee has unreasonably failed to follow the guidance set out in the Code they can reduce any award they have made by up to 25 per cent.

What sort of things are covered by the code?

The Acas code sets out some simple principles:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions
- Employers and employees should act consistently.
- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.

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What is meant by unreasonable?

Tribunals have awarded uplifts to compensation where there has been a failure to comply with what the tribunal saw as the simple, common sense principles of fairness and consideration set out in the Acas Code of Practice on Discipline and Grievances at Work.

A tribunal applied an uplift where the respondent failed to arrange a meeting to address a grievance without reasonable explanation for the failure. The tribunal's view was that this was unreasonable as the requirement to arrange a meeting is not particularly onerous.

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