

**THE DETERMINATION OF COMPLAINTS
BY THE CERTIFICATION OFFICER
UNDER
THE TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992
("the 1992 Act")**

GUIDANCE ON PROCEDURE

Introduction

The Certification Officer has the power under section 256(1) of the 1992 Act to regulate the procedure to be followed in relation to applications or complaints before him.

Overriding Objective

1. It is the Certification Officer's intention to determine all complaints fairly and justly. This includes, so far as is practicable:-
 - a) dealing with the issues in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties.
 - b) avoiding unnecessary formality and allowing flexibility in the proceedings where appropriate.
 - c) avoiding delay, so far as is compatible with a proper consideration of the issues.
 - d) ensuring the parties are able to participate fully in the proceedings.
2. The parties must conduct themselves in such a way as to further the Overriding Objectives and must co-operate with the Certification Officer generally.

Procedures

3. The procedures that will be used in the preparation of a case for a hearing and at the hearing itself will usually follow those given below. The Certification Officer may direct that other procedures be adopted in any particular case if he considers this to be appropriate.

The Issues

4. The issues to be determined by the Certification Officer will be identified in correspondence with the claimant before the hearing and forwarded to the union or employers' association for comment. Any dispute as to the correct identification of those issues must be raised prior to the hearing. It is essential that there is no misunderstanding at the hearing about the nature of the allegations that are being made (i.e. precisely which statutory provisions and/or union rules are alleged to have been breached) and the grounds upon which those allegations are being made.

Directions

5. The Certification Officer will issue directions for the management of each case. These directions will normally:-
 - a) set the date for the hearing
 - b) require the parties to submit to the Certification Office copies of all

relevant documents in their possession by a specific date.

- c) require the parties to produce written statements for any witness who is to give oral evidence by a specific date. A statement will be required from the claimant if he/she is to give evidence.
- d) require the parties to produce written skeleton arguments by a specific date.
- e) require the parties to specify and produce copies of any legal authorities relied upon by the same date specified under d).

The Hearing Date

- 6. The Certification Officer will set a hearing date in accordance with his estimate of the likely length of time required for the hearing. If either party considers the hearing length is likely to be longer or shorter than the estimated length, that party should consult with the other side and propose, if possible, a revised estimate as agreed between the parties. If no revised estimate is proposed, whether agreed with the other party or not, the Certification Officer may case-manage the hearing so that it concludes within the allocated period. This may include time-limited cross-examination and/or submissions.

APPLICATION TO POSTPONE

- 7. If it is not possible for either party to attend the hearing on the date set by the Certification Officer, an application, in writing, must be made for a revised hearing date. Any such application must:-
 - a) be made within the period specified in the directions.
 - b) state the reason why attendance on the hearing date is not possible and include any relevant supporting evidence (e.g. copy hospital appointment, airplane ticket, travel itinerary etc) and
 - c) provide the dates in the two months period following the hearing date on which that party cannot attend a hearing

The Certification Officer will determine if the hearing date is to be postponed and the case re-listed.

Documentary Evidence/the Bundle

- 8. The parties are required to submit to the Certification Office all relevant documents for inclusion in the hearing bundle by the date specified in the directions issued by the Certification Office ('the specified date'). Any document not submitted by the specified date may be excluded from the hearing.
- 9. Prior to the hearing, the Certification Office will prepare a set of documents (referred to as 'the bundle') for use at the hearing. The bundle will be issued to the parties before the hearing date. It will consist of the relevant documentation submitted by both parties, together with correspondence between the parties and the Certification Officer. Only those documents included in the bundle will be considered by the Certification Officer at the hearing, unless permission is given for any further document to be admitted.

Each page of the bundle will be numbered in the bottom right hand corner. References to any document at the hearing should be made to that number.

10. Late Submission of Documents

10.1 Should a party wish to submit a document for consideration at the hearing after the date specified in the directions, an application must be made to the Certification Officer for permission to do so. The Certification Officer may grant or refuse such an application.

10.2 Applications prior to the date of the hearing. An application for the late admission of documents prior to the date of the hearing must be made in writing to the Certification Officer as soon as possible after the specified date. Any such application must:-

- a) enclose the documents that are sought to be included;
- b) explain why the documents are relevant;
- c) explain why they were not submitted by the specified date; and
- d) be accompanied with a copy of a letter to the other party in which copies of the further documents have been sent to that other party together with a request that the other party informs the Certification Office within three days whether he or she consents to the admission of the additional document(s) or, alternatively, to state the grounds of any objection.

10.3 Applications at the Hearing. An application for the late admission of documents at the hearing must be made orally to the Certification Officer at the commencement of the hearing. The party making such an application must bring three copies of the additional documents to the hearing. It shall explain the relevance of the additional documents and why they were not submitted in accordance with either paragraph 8 or 10.2.

11. Documentary evidence is not to be exhibited to a witness statement without the permission of the Certification Officer.
12. The Certification Officer has no powers to order the production of any document by either party.

Witness Statements

13. Both the claimant and the trade union may call witnesses.
14. The directions issued by the Certification Officer will normally require all witnesses who are to give oral evidence, including the claimant, to produce a written witness statement by a specified date (see paragraph 5c).
15. A claimant who does not submit a witness statement may be restricted to relying upon the facts which appear in the documents in the bundle and in the evidence given by those witnesses who have given witness statements.
16. Witness statements are to be set out in numbered paragraphs and contain

page numbers. They are to record only the factual evidence to be given by that witness. They are not to deal with issues of law. So far as practicable, the factual issues are to be set out in chronological order so as to 'tell the story' from that witness's point of view. If the witness statement makes a reference to a document, it should include a reference to the appropriate page number in the bundle. The witness statement is not to exhibit additional documents without the permission of the Certification Officer (see paragraph 11).

17. If a party submits a written witness statement but the witness does not attend the hearing to be cross-examined, the Certification Officer will normally give less weight to the witness statement than otherwise.
18. The directions issued by the Certification Officer may specify the date by which the witness statements are to be provided to the other party and the Certification Office (see paragraph 5 c).
19. The Certification Officer has no powers to order the attendance of a witness.

Skeleton Arguments/ Legal Authorities

20. The directions issued by the Certification Officer may specify that each party is to produce an outline summary of its argument (a 'skeleton argument') and that a copy is to be provided to the other side and the Certification Officer by a specified date. The purpose of a skeleton argument is to summarise the party's submissions of both fact and law. In cases where the facts are in dispute, it will explain why that party's factual evidence should be preferred. It will also make any relevant legal arguments.
21. Any legal authorities to be relied on by the parties should normally be copied to the other side and to the Certification Office at the same time as the skeleton argument is provided to those parties.
22. The directions issued by the Certification Officer may specify the date by which the skeleton arguments and authorities are to be provided to the other party and the Certification Office (see paragraph 5(d)).

Chronology /Agreed Statement of Facts

23. The parties may prepare and submit to the Certification Office prior to the hearing a chronology of relevant events or an agreed statement of facts. The parties should attempt to agree any chronology before submission to the Certification Office. The chronology or agreed statement of facts should include references to the page(s) in the bundle/ witness statement which deals with each relevant event.

Procedure at the Hearing

24. The procedure at the hearing will normally be as follows:-

24.1 The Issues

The issues to be determined by the Certification Officer will be confirmed with the parties at the beginning of the hearing by the Certification Officer.

24.2 The Outline Facts.

In the absence of an agreed statement of facts, the Certification Officer will endeavour to agree the outline facts with the parties in order to identify which facts are agreed and which are in dispute.

24.3 The Witness Evidence.

(a) The witness evidence for both sides will usually be called before any legal arguments/submissions are made. Normally the witness statements will have been read in advance by the Certification Officer and the witnesses will not be required to read them out. Each witness will be asked to confirm that his or her witness statement is true and accurate. Supplementary questions may only be asked of a party's own witnesses with the permission of the Certification Officer. The witness may then be asked questions by the other side (i.e. cross-examined). Finally, the witness may be re-examined by the party who called him or her. The Certification Officer may ask the witness questions at any time.

(b) The witnesses for the claimant will be heard first (including the claimant if he/she wishes to give evidence), followed immediately by the witnesses for the union.

(c) Where either party is represented, it is not permitted to cross-examine the representative. Cross-examination is restricted to those who have given oral evidence.

24.4 The Claimant's Submissions

After the conclusion of the evidence, the claimant or his/her representative will be invited to present their submissions, that is their arguments as to why the Certification Officer should uphold the complaint(s). These should be based on the facts as they appear in the documents and the evidence given by the witnesses. The submissions should address the issues that have been identified at the hearing. It is not an opportunity for general criticism of the union. It is the claimant's opportunity to explain why he/she should win the case on the evidence that has been presented.

24.5 The Union's Submissions

The representative of the trade union will be invited to respond to the claimant. Its submissions should also be based on the documents in the bundle and the evidence that has been given by the witnesses. It is not an opportunity for general criticism of the claimant. This is the union's opportunity to advance arguments, based on the evidence, to counter the case made by the claimant.

24.6 The Claimant's Reply

The claimant will usually be permitted to have the last word by way of a reply, unless the Certification Officer directs otherwise. This is an opportunity for the claimant to reply to the arguments made on behalf of the union and to explain why the claimant considers that the arguments advanced by the union should not be upheld. It is not an opportunity to repeat the submissions which have already been made.

24.7 Declarations and Enforcement Orders

If the Certification Officer considers that there has been a breach of the statutory provisions or the rules of the union, he may make a declaration to that effect. Should the Certification Officer make a declaration he will also consider whether it is appropriate to make an enforcement order. As the Certification Officer normally reserves his decision, he will usually, at the end of the hearing:-

(a) invite the claimant to state whether, if successful, he/she wishes an enforcement order to be made. If the claimant seeks an enforcement order, he/she will be invited to state the terms of the order which is sought. The order must be within the powers of the Certification Officer as set out for example in sections 55(5A) and/or 108B(3) of the 1992 Act and

(b) invite the union to comment on the enforcement order sought by the claimant.

24.8 The Decision

The Certification Officer will not normally give his decision at the hearing. The Certification Officer will issue a written decision, with reasons, as soon as possible after the hearing. At the end of the hearing he will, in most cases, give an indication of when he expects his decision to be given.

25. At any stage in the proceedings questions may be asked by the Certification Officer.
26. The Certification Officer can strike out the whole or part of an application or response at any stage of the proceedings or order that the application or response be amended. The grounds on which such an order can be made are that the application or response, or any part of it, is scandalous (ie irrelevant and abusive of the other side); vexatious (ie a complaint made with no reasonable expectation of success to harass the other party or a complaint made out of some improper motive); has no reasonable prospect of success or is otherwise misconceived. An application or response may be struck out or amended on the Certification Officer's own initiative or on the application of the claimant or the union concerned.

Costs etc.

27. Under the 1992 Act the Certification Officer has no power to award costs or to order the attendance of witnesses or the production of documents.

Expenses

28. Expenses for reasonable travel costs and for certain other costs incurred by the claimant and his/her necessary witnesses in attending a hearing may be reimbursed by the Certification Officer. The Certification Officer has a discretion to allow or refuse all claims. The rates of reimbursement are set by the Secretary of State for Business Innovation and Skills and may only be varied by his order. The current rates can be obtained upon request to the Certification Office. It is recommended that the rates for re-imbusement are obtained before committing any expenses

Special Needs

29. If you or anyone attending the hearing with you requires any special adjustments to be made, you should contact the case manager as soon as possible before the hearing to discuss the matter so that appropriate arrangements can be made.

Right of Appeal

30. There is a right of appeal to the Employment Appeal Tribunal (EAT) from a decision of the Certification Officer on a point of law. Any such appeal must be made to the EAT within 42 days from the date the written record of the decision was issued. The EAT's address is: 2nd Floor, Fleetbank House, 2-6 Salisbury Square, London, EC4Y 8TX (020 7273 1041/1044). Further information about the EAT can be found on its website, www.gov.uk/appeal-employment-appeal-tribunal/overveiw

Further Questions

31. Any questions relating to these procedures should be raised in the first instance with the person who sent this guidance to you.

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