2013 EMPLOYMENT TRIBUNAL REPRESENTATION SCHEME PROTOCOL

## INTRODUCTION

1. This protocol describes the scheme for representation of individual members by Thompsons at an Employment Tribunal. It is not for matters wider than this, e.g. collective issues, or different forums, e.g. the courts. The Scheme is designed to ensure that UNISON’s members receive the best employment law service offered by a trade union in the UK. It is not UNISON’s intention to resolve industrial issues merely by taking tribunal cases as the union considers that industrial solutions are best both for our members and for employers. However, where litigation is necessary and justified, UNISON will provide the highest quality legal representation possible, using solicitors. This extended scheme is entirely free to UNISON members and no retentions are made from any awards paid.
2. This scheme covers Employment Tribunal cases where Tribunal proceedings are commenced on or after 29th July 2013.
3. Separate arrangements exist for cases in the High Court, County Court and jurisdictions other than the Employment Tribunals, and for defending claims brought against the union.
4. Cases will only be pursued under this scheme if there is a reasonable prospect of success - see paragraph below. Where a case is listed, or likely to be listed, for a hearing of 10 days or more the matter must be referred by the manager to UNISON’s Legal Services Department and separate financial arrangements will be agreed between UNISON and Thompsons.
5. There is already Guidance on access to legal advice, on employment law matters and the maintenance of records, and the operation of the CASE management system. Organisers must ensure that all requests for advice go through the RMT, and that they do not commit the Region to pursuing any Employment Tribunal claims without the agreement of [*the* *appropriate member of the RMT or Case Unit*]. The start and outcome of all Employment Tribunal cases must be recorded on the CASE forms. The Region will continue to refer to the Legal Services Department at Head Office those issues which have been placed in a list of priority issues. They are known as **Reserved Areas** and are: Judicial Appeals, including Employment Appeal Tribunal, Court of Appeal and Supreme Court; Civil claims arising out of employment issues; Defamation; Equal Pay; European Law; Immigration; Industrial Action (advice should be sought from ballot section); Injunctions and Interdicts; Judicial Review; Matters affecting national terms and conditions, e.g. Single Status, Agenda for Change or other cases which clearly have national and strategic significance; Negligent misstatement; New law (as defined by UNISON guidance); Pensions; Public Sector Equality Duty; Public or private enquiries; Rules; Trade Union recognition; TUPE – collective issues; and Cases otherwise identified by the Union as particularly strategic in line with the Union’s policy and priorities from time to time
6. UNISON has finite resources and it is important that, in common with other services, the scheme is operated as a managed resource.

# FIRST STEPS

1. Before an Organiser is approached about taking an Employment Tribunal case the branch secretary shall ensure that every member seeking legal assistance completes a Case Form. Following discussion and agreement with an Organiser, and where a legal referral is sought via the Region, the branch secretary shall ensure that this occurs only where the issue cannot otherwise be resolved by branch. The branch secretary shall ensure that all parts of the Case Form are completed in full by the member and the branch secretary (including the fee advance agreement and the financial information for potential remission of fees), and shall not send any which are not.
2. Where an Organiser is approached about taking an Employment Tribunal case, they must ensure that the member concerned is advised of their legal rights and the relevant time limits. An initial assessment should be made by the Organiser, where necessary with the assistance of Thompsons under the fixed fee, to see whether the case should be referred to Thompsons for a full merits assessment. This will normally involve the Organiser meeting the member (at the Organiser’s discretion), and getting copies of relevant papers. A case will normally only be given legal assistance where it is considered by Thompsons to have a reasonable prospect of success. Organisers should **not** suggest that initial UNISON support means that Thompsons will deal with the case, and they should inform the member that there is still a requirement for a legal assessment to be made.
3. When a case which cannot otherwise be resolved industrially[*or via the ACAS Early Conciliation Scheme (see paragraph )*], and where appropriate in consultation with the branch, the Organiser should consider whether it should be referred to Thompsons for a full merits assessment. In doing so the Organiser should carry out the steps in paragraph . If they believe it appropriate to do so then the case should be referred to their [*appropriate Manager]*, who will confirm whether or not the Region will refer the case to Thompsons. The RMT must keep a record of all referrals using CASE.
4. It may be necessary for more complex cases to be referred to Thompsons for preliminary advice, before a decision is taken. As mentioned, the criteria for determining whether or not a case should be supported will be whether or not there is a **reasonable prospect** of the case succeeding. As stated at paragraph above, the union does not have unlimited financial resources and regard must therefore be paid in all categories of employment tribunal cases to the cost of pursuing cases when compared with the likely possible financial or other benefit that could accrue to the member as the result of bringing a case.
5. General advice on employment law issues, including in relation to disciplinary matters comes within the scope of the fixed fee arrangements between UNISON and Thompsons and should continue to be referred under that scheme using the existing arrangements referred to in paragraph above. There will always be an element of judgement involved but generally matters will form part of the Employment Tribunal scheme at the point that it is apparent that litigation is likely. A matter that has at the outset been dealt with as advice under the fixed fee arrangements can become a case under the Employment Tribunal scheme. **It would be expected that cases would normally follow this route and that Thompsons would generally be responsible for lodging the application** (subject to paragraph 22).

# *ACAS EARLY CONCILIATION SCHEME[[1]](#footnote-1)*

1. [Where the member’s case is suitable for entry into the ACAS Early Conciliation Scheme an Organiser will make the assessment identified in paragraph .
2. *Where Thompsons are asked to assist this should be by telephone only. No physical referral should be made at this stage. The Organiser is expected to have already acquired a sufficient understanding of the member’s case to enable this to take place.*
3. *At this stage Thompsons are only expected to provide the Organiser with assistance in assessing sufficient detail about merits and value to enable them to negotiate during the Early Conciliation process. It is not expected that a full merits assessment would be done at this stage.*
4. *Thompsons will confirm their advice within 2 working days in the simplest of terms and without detailed reasons.*
5. *If no resolution can be achieved then paragraph 9 applies.*

# REFERRING CASES

1. Once the decision to refer to Thompsons for a full merits assessment has been made as per paragraph the nominated manager will make the referral. Using the standard letter the member must be informed that the case has been referred but is still subject to a legal assessment of the merits by Thompsons and that until they are notified that Legal Assistance has been granted they are responsible for their own claim. The union’s standard letter should be used in all cases.
2. It is important in order to save time and costs that where a case is referred to Thompsons they are sent copies of all the relevant papers, properly ordered and indexed. No referral should take place unless the referral paperwork is complete and this **must include:**
3. A note from the Organiser explaining what the case is about, the Organiser’s view of the case, and all the steps that have been taken so far, highlighting any deadlines and time limits. There must also be enclosed a copy of the CASE printout up to that point;
4. the fully, and properly, completed CASE Form which incorporates
5. the fully, and properly, completed and signed fee advance agreement;
6. the fully, and properly, completed and signed remission application.
7. An indexed bundle of all the relevant documents, such as the contract of employment, any relevant collective agreements, and copies of the correspondence;
8. Copies of all the pleadings if there are any at this point, that is to say any ET1 and any ET3, together with any correspondence with the Tribunal;
9. Preliminary and/or any other statements from the member and any witnesses where appropriate;
10. [*Any certificate from ACAS confirming that the case may be issued.*]
11. Cases must be referred to Thompsons at the earliest opportunity. This scheme is **not** intended to pick up cases at the last moment. If the scheme is to be successful and cost effective, the Organiser needs to have made a proper assessment and have all relevant papers to ensure that local cases are opened onto the CASE management system and should seek referral from the nominated manager as soon as it has been assessed that a full merits assessment is needed. In particular do not wait until the outcome of any internal appeal before referring the case.
12. Thompsons will assess the case and provide a brief written advice as to whether a case has merits in accordance with UNISON’s criteria. Thompsons will assess the most appropriate way to provide this advice and it may include contacting the member directly or through the Organiser.
13. Thompsons will also provide a pro forma ‘Offer of Legal Assistance’ which the Organiser can then use to notify the member what claims would be supported. If the member wishes to accept the offer then they should sign and return it. Only when this is received is the union or Thompsons responsible for issuing the claim. In all cases the Organiser should also check with the member whether they qualify for a fee remission and complete any necessary form at this stage.
14. Thompsons are formally instructed to act only when they have received (1) the acceptance form (2) a copy of the CASE form containing the completed fees advance agreement and (3) the completed fees remission application. Where this is no later than 4pm 28 days before limitation expires Thompsons will be responsible for issuing any ET1. Regions retain responsibility for referrals made later than this.
15. Usually the relevant solicitor would be expected to have a face to face meeting with the member at an early stage and would involve the Organiser responsible where appropriate. Any further meetings felt to be necessary by the solicitor will not normally involve the Organiser unless either the Organiser or Thompsons believe that would be useful. Similarly, only key correspondence with the member will be copied to the appropriate Organiser.
16. If Thompsons form the view that there are insufficient merits to justify issuing the case in the Employment Tribunal this will be a matter discussed with the appropriate Organiser and/or (depending on the level of previous involvement in the case) with the nominated manager. It will be the Organiser’s duty to pass this information onto the member as soon as possible.

CONDUCT OF THE CASE

1. When formally instructed, and subject to paragraph 22, Thompsons will lodge the application at the Employment Tribunal if this has not already been done and take over the conduct of the case, including all interlocutory matters and advocacy at the hearing proper.
2. Thompsons shall take all reasonable steps to ensure that any fees paid are recovered from the respondent either as part of a settlement or a judgement. An application for the recovery of any fees will be made at all liability hearings. Where a respondent refuses to make a full reimbursement of fees part of a settlement package Thompsons shall notify the Organiser and the nominated manager to see whether a resolution can be achieved industrially.
3. Where a costs application is assessed as having reasonable prospects of success it is expected that an application will be made by Thompsons.
4. Once an issued case is listed for hearing, but before any hearing fee is paid, Thompsons will provide to the nominated manager and the Head of Legal Services a full written assessment of the merits of the case and a recommendation as to whether legal assistance should continue. An assessment of whether any fees are likely to be recovered will also be made at this time. This will be a matter discussed with the appropriate Organiser and/or depending on the level of previous involvement in the case with the nominated manager.
5. If Thompsons form the view that there are insufficient merits to justify continuing the case, and the union accepts Thompsons’ assessment, then assistance will be withdrawn and the member notified by both UNISON and Thompsons as quickly as possible and in any event within ten working days of that decision if possible. The Organisermust approve the letter to the member before it is despatched. It will include an invitation to meet with the solicitor responsible if the member wishes to do so in the company of the Organiser if necessary, unless the member has already been advised that there are weak prospects of success in the case and that the papers were referred for the purposes of a formal assessment.
6. If Thompsons form the view that there are sufficient merits to justify continuing the case, and the union accepts Thompsons’ assessment, then the member’s authority to incur the hearing fee will be sought. No hearing fee shall be incurred without the member’s express authority or (where they cannot be contacted) authority from the Head of Legal Services.
7. Where they consider it appropriate to do so, Thompsons will copy key correspondence to the Organiser and to the Legal Services Department. In most circumstances, it is anticipated that Organisers will be involved in any settlement issues unless for example they arise at the last moment and the Organiser cannot be contacted. In those circumstances Thompsons will be expected to seek instructions from the nominated manager.
8. Where a Respondent makes a costs warning Thompsons shall immediately notify the nominated manager and the Head of Legal Services, and provide an assessment of the potency of that threat and the extent of the union’s possible exposure. Any costs order shall be similarly notified.
9. Where a deposit order is made Thompsons shall immediately notify the nominated manager and the Head of Legal Services and provide a summary of merits and a recommendation as to continued support.

REPORTING LINES/MONITORING

1. Thompsons will meet with the appointed RMT member/s at intervals agreed locally between the parties. Thompsons will provide detailed reports on the progress of cases to the Region on a quarterly basis. The reports will also be copied to the Head of the Legal Services Department who will be invited to an annual assessment of the progress of the scheme. The Organiser will be responsible for reporting progress to the member’s branch, but it is recognised as with PI cases that contact with the member will be the responsibility of Thompsons, with only key developments copied to the Organiser.

QUALIFYING FOR AND CONTINUITY OF ASSISTANCE

1. The UNISON rulebook provides for the withdrawal of assistance by the NEC if a member is in arrears of subscriptions or fails to follow the advice of appointed lawyers, or if it would be unreasonable to continue support. Accordingly, Thompsons must immediately notify the Region and the Legal Services Department if it comes to their attention that a member has failed to reply to letters or attend appointments, or refuses to accept advice or gives misleading evidence about their case. The Organiser must ensure that in accordance with Rule K.2 the member has been a member of UNISON for at least 4 weeks prior to them knowing that they need legal assistance and that they maintain their membership, without any arrears of subscription, during the course of the case. The Organiser should advise members that they need to keep their membership up to date.
2. At the conclusion of the case, Thompsons will report on the result of the case, drawing to the Region and Legal Services Department’s attention any significant aspects of the case.

PUBLICITY

1. Since one of the aims of the Employment Tribunal Scheme is to assist in the recruitment and retention of members, the Organiser should get the member’s consent to publicity in writing using the standard CASE letter. The member should be sent two copies of the letter and asked to sign and return one of the copies. It needs to be recognised that there will be circumstances where members will wish to avoid publicity but in general the union should encourage them to agree for the benefit of all members.

1. The ACAS Early Conciliation scheme is due for implementation in early 2014. [↑](#footnote-ref-1)