**Example skeleton argument for an employment tribunal hearing**
A skeleton argument is the Claimant's opportunity to show how the law interacts with the evidence that the tribunal panel has heard.

It is important to research the law and in particular to look for relevant precedents (ie case law). Bear in mind that tribunals will normally only consider cases to which they have been expressly referred. While the judge can be expected to know the main authorities, it can be worth setting out concepts established by, or pertinent quotes from, key decisions. Given time constraints, it usually pays to focus on a small number of decisions which are of particular relevance to the key areas of your case.

The following skeleton argument is designed to assist readers of the LRD booklet Employment Tribunal Companion. Please refer to section [x] of that booklet for further information.

**IN THE LEEDS EMPLOYMENT TRIBUNAL** **7654321/2009**

**BETWEEN: -**

**Anne Michael**

**Claimant**

**- and -**

**Tea Stop Partners**

**Respondent**

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**SKELETON ARGUMENT ON BEHALF OF THE CLAIMANT**

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ABSENCE OF COMPLETE WRITTEN STATEMENT
A. In contravention of s.38 of the Employment Act 2002, the Respondent failed to give the Claimant a complete written statement. Specifically, the contract given to Ms Michael did not set out to how much holiday she was entitled: **tab 2, page 23**.

**[REFER TO THE PRECISE PLACE IN THE BUNDLE WHERE THE EVIDENCE CAN BE FOUND – THIS WILL SAVE THE TRIBUNAL'S TIME AND REINFORCE THEIR RECOLLECTION OF EVIDENCE IN SUPPORT OF YOUR CASE]**

UNFAIR DISMISSAL
B. Ms Michael was automatically unfairly dismissed under s.98A(1) Employment Rights Act because the Respondent failed to comply with the Statutory Dismissal Procedures. In particular, Tea Stop Partners did not state the real reason for disciplinary action against Ms Michael (the theft of money) and instead suggested that the grounds for action were mere non-compliance with some of the banking procedures (in so far as any were established or communicated to Ms Michael) on a small number of occasions. Therefore, Tea Stop Partners cannot, it is submitted, have complied with Step 1(1):

> "The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee."

**[QUOTE THE RELEVANT PART OF THE LEGISLATION THAT HAS BEEN BREACHED]**

C. Ms Michael's employment was unfairly terminated by the Respondent in breach of Part X Employment Rights Act 1996. Specifically:

1. GC's investigation, at around three months, took too long ("unjustifiable delay in taking disciplinary action" rendering dismissal unfair: *RSPCA v. Cruden* [1986] IRLR 83) and was too limited (e.g. she only interviewed Ms Michael and then only briefly).

**[AS WELL AS NAMING THE CASE THAT ESTABLISHES THE POINT, INCLUDE ITS LAW REPORT REFERENCE. A COPY OF THE JUDGMENTS (PREFERABLY UNMARKED) WHICH YOU WISH TO RELY ON SHOULD BE PROVIDED TO THE TRIBUNAL – WITH A COPY FOR THE OTHER SIDE]**

2. Contrary to the stated reason for disciplinary action, Tea Stop Partners didn't have strong objections to non-daily banking, which in fact was by necessity, commonplace. Rather Tea Stop Partners pursued action against Ms Michael because sums of money had been lost and because Ms Michael was suspected of stealing:

**-**GC, who carried out the investigation was from the Fraud Dept (mentioned for first time in GC's evidence), rather than investigatory/ HR Department and was examining what "happened to 9 days of banking" (**tab 3, page 96)**

**-**GC only interviewed Ms Michael: i.e. no other staff at all (GC's evidence and **tab 3, page 96**)

**-**GC's questioning of Ms Michael: "Did you take that money?" 12th of 15 questions (**tab 3, page 95)**

-reason for suspension: "risk to business" (**tab 3, page 108**)

-Mr Dyke's statement that:

> "…maybe you were not a suspect AT THAT TIME [note-taker's emphasis]. We can't prove before investigation." (**tab 3, page 115, line 21 of text**)
> and
> "Information shows on dates on paperwork CCTV shows you at bank. Goes back to you or cashier." (**tab 3, page 116, line 15 of text**)

-considerable time spent in evidence (as well as weight sought to be placed) on bank slips filled out/ purportedly filled out by Ms Michael (**tab 3, pages 91-92**)

**[IT WILL ASSIST THE TRIBUNAL IF YOU LIST EACH PIECE OF EVIDENCE THAT SUPPORTS YOUR ASSERTION TOGETHER WITH QUOTES AND PLACES WHERE THE INFORMATION CAN BE FOUND]**

3. Whatever the reason (perhaps the Respondent chose for the disciplinary action against Ms Michael, a different ground to fraud/ theft as it couldn't be proved that Ms Michael was involved in taking any money) it is submitted, that in reality it was the loss of the money that made Tea Stop Partners want to terminate Ms Michael's contract. By instead telling Ms Michael that the investigation was into breach of banking procedures, Ms Michael was confused and unable to appropriately defend herself at her disciplinary and appeal hearings – *Hotson v. Wisbech Conservative Club* [1984] IRLR 422:

> "Suspected dishonesty is a grave and serious ground for dismissal which should be stated at the outset by the employer…where the original reason for dismissal is lack of capability, the substitution or addition of suspected dishonesty as a reason, even though precisely the same facts may be relied upon by the employer, goes beyond a mere

change of label. It is too serious and too significant to be given such innocuous character…such an allegation has to be put with sufficient formality and at an early enough stage so that the employee has the fullest opportunity to meet it, to consider its implications and to answer it…the appellant was denied the opportunity of dealing with the allegation fully and of being sufficiently prepared to state her answer at the hearing."

and - *Alexander v. Bridgen Enterprises Ltd* [2006] IRLR 423:

"…the information provided must be at least sufficient to enable the employee to give a considered and informed response to the proposed decision to dismiss…this will involve identifying the nature of the misconduct in issue…"

also a breach of the ACAS Code of Practice of Disciplinary and Grievance Procedures (para 60):

"Employees to be informed of the complaints against them..."

**[AS THE COPIES OF THE JUDGMENTS THAT YOU PASS TO THE TRIBUNAL SHOULD BE UNMARKED, IT IS HELPFUL TO SET OUT IN THE SKELETON ARGUMENT THE RELEVANT PASSAGES ON WHICH YOU RELY]**

4. Even though GC had formed the view that disciplinary action against Ms Michael would follow, she continued with the investigation process (including interviewing Ms Michael) – ACAS Code of Practice of Disciplinary and Grievance Procedures (para 99):

"If it becomes clear during the course of such a[n investigatory] meeting that disciplinary action is called for, the meeting should be ended and a formal hearing arranged at which the worker will have the right to be accompanied."

Even though GC's investigation meeting was disciplinary in nature, Ms Michael was denied a companion (**tab 3, page 109, end of bullet point 5**) amounting to a breach of s.10 Employment Rights Act 1999.

5. It was not necessary to suspend Ms Michael for breach of the banking procedures (according to the advice given to Mr Young, Ms Michael's line manager). Ms Michael was suspended by GC of the Fraud Dept because Ms Michael was suspected of involvement in the theft of the lost sums (GC's evidence and **tab 3, page 108)** but, again, this reason for her suspension was not explained to Ms Michael, nor was it put to her by CE or DG at her formal disciplinary and appeal.

6. Ms Michael was not involved in discussions about whether the suspension was avoidable and she was not told about the parameters of her suspension (e.g. how long it might last/ when the need for it would be reviewed): GC's evidence.

7. Even more fundamentally, the significance of suspension was not explained to Ms Michael - ACAS Code of Practice of Disciplinary and Grievance Procedures – para 35:

"It should be made clear to the employee that the suspension is not a disciplinary action and does not involve any prejudgement."

8. Instead YP's letter of 19 April 2008 (**tab 3, page 98**) suspending Ms Michael is unnecessarily strongly worded ("you are legally obliged to comply with the Company's reasonable instructions"). This, coupled with the Respondent's instruction in the same letter not to contact her colleagues, led to Ms Michael having no companion (again, amounting to a breach of s.10 Employment Rights Act 1999). Although Ms Michael was clearly very upset (CE and DG's evidence), the disciplinary wasn't adjourned by either of them to enable her to obtain a companion. This prejudiced her ability to defend herself.

9. The Respondent when deciding to terminate the Claimant's employment failed to take into account that:

a. Ms Michael hadn't been provided with any/ adequate training.

b. Ms Michael hadn't been provided with any/ adequate written guidance on banking responsibilities or procedures.

c. Ms Michael hadn't had her training needs reviewed at any point during her two year employment.

d. Tea Stop Partners hadn't reviewed the success of the banking system at Halifax Readalot branch at any point during Ms Michael's two year employment.

e. Tea Stop Partners didn't provide any/ adequate ongoing support/ manager to run the store/ mentor Ms Michael.

f. Tea Stop Partners didn't provide adequately trained staff members to assist Ms Michael.

g. In relation to banking procedures, Ms Michael had only been imitating the behaviour of the manager(s) who had responsibility for her induction - para 13 of *Ladbroke Racing Ltd v. Arnott* [1983] IRLR 154:

> …several factors which seem to me to have called for consideration as mitigation of the respective offences to an extent which could have affected the justification for dismissal…The second factor was whether the respondents believed or had reason to believe that what they did had been sanctioned by a superior in the organisation."

h. Banksafe's part in the any of the banking irregularities (**tab 3, page 114**). *Francis v. Ford Motor Co* [1975] IRLR 25: employee's explanation of apparent misconduct rejected without prior inquiry.

i. Ms Michael was only an assistant store manager and did not hold the more senior post of manager: this failure to distinguish between the two positions is evidenced throughout the Respondent's documents (e.g. para 14c of DG's witness statement). The responsibility for the activities of the Tea Stop Partners concession in Readalot's lay with CS. It is submitted that it was unfair to hold Ms Michael culpable for a responsibility that she did not have.

10. The outcome of the disciplinary action against Ms Michael was pre-determined. For example:

-decision to suspend given that suspension was previously expressed to be unnecessary – **tab 3, page 108, sentence 2**

-letter from YP suspending Ms Michael stating that there would be a next stage in the procedure (i.e. before the decision as to whether there would be disciplinary action was purported to have been taken) – **tab 3, page 98, para 2**;

-CE had not arranged to have the correct paperwork at the disciplinary hearing (Ms Michael's name was recorded as Ms Murchall) and relied on the findings of GC's report rather than assessing Ms Michael's knowledge for himself– **tab 3, page 100** and para 7 of CE's witness statement;

> "…looking at the investigation report this showed that she understood the procedures…"

-the condemning terms of GC's email of 21 May to senior management (including to YP – i.e. Ms Michael's manager's manager/ according to the Respondent, Ms Michael's manager) – **tab 3, page 109**.

-private discussion about case between DG and YP: DG's evidence, but not reflected in his witness statement - **para 4 of DG's witness statement** as compared with para 3 of CE's.

-DG announced his decision at the outset of Ms Michael's appeal hearing – **tab 3, page 111, line 25 of text**: "As person in charge you are [liable]."

-DG, in **para 5a of his witness statement**, did not appreciate/ address the full breadth of the points that Ms Michael was making in connection with her appeal against dismissal – **tab 3, page 105**

**[CONTEMPORANEOUS DOCUMENTS WILL ALMOST ALWAYS BE GIVEN MORE WEIGHT THAN AN INDIVIDUAL'S RECOLLECTION OF EVENTS. THIS IS UNSURPRISING GIVEN THAT BY THE TIME OF HEARING, THE EVENTS UNDER DISCUSSION MAY HAVE OCCURRED MANY MONTHS PREVIOUSLY: DOCUMENTS WIN CASES]**

11. GC's investigation report was determinative of action against Ms Michael and heavily relied upon by both CE and DG. However, it was (not involving an interview of any other staff at all) an inadequate basis upon which to terminate Ms Michael's employment - *British Home Stores v. Burchell* [1980] ICR 1980 340 at paras D-E:

> "…[had the employer] carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

and *Devis and Sons Ltd v. Atkins* [1977] IRLR 314:

> "…if the reasons shown [for dismissal] appear to have been a sufficient reason, it cannot be said that the employer acted reasonably in treating it as such if he only did so in consequence of ignoring matters which he ought reasonably to have known and which would have shown that the reason was insufficient."

12. Tea Stop Partners's investigation findings were wrong and went uncorrected (key finding at **tab 3, page 97, first bullet point**): contrary to GC's (the investigator) assertion in her email of 21 May 2008, CE (the individual conducting the original disciplinary) was not aware of the serious flaws in GC's report (**tab 3, page 100, last 3 lines**) and Mr CE's evidence.

13. Contrary to its undertaking to Ms Michael, Tea Stop Partners didn't provide a copy of the investigation report to Ms Michael at her disciplinary hearing.

14. SC, Ms Michael's manager, who was responsible for failing to support and train Ms Michael was present at Ms Michael's disciplinary. Her presence was inappropriate as it inhibited Ms Michael from raising the important issues, in relation to SC's failings (which would have helped greatly in explaining the challenges that Ms Michael faced).

15. The treatment of Ms Michael was inconsistent/ considerably less favourable than that of colleagues in identical situations (the Respondent's witnesses, with all their experience as set out at the head of each of their witness statements, not being able to point to a single other employee who had been disciplined, let alone terminated, for failure to observe banking procedures) - *Post Office v. Fennell* [1981] IRLR 221:

> "…employees who behave in much the same way should have meted out to them much the same punishment. An Industrial Tribunal is entitled to say that where that is not done and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal."

16. Ms Michael was completely unaware of the contents (such as the result of the investigation was inconclusive) and existence of GC's email of 21 May to and YP's letter (as well as his conversation prior to 21 May) with DG. Accordingly she could not respond to the points made. Therefore Tea Stop Partners concealed important information which influenced the decision-maker and which would have enabled Ms Michael to conduct a more appropriate defence of herself. Ms Michael needed information - *Alexander v. Bridgen Enterprises* [2006] IRLR 422:

> "…at least sufficient to enable the employee to give a considered and informed response to the proposed decision to dismiss."

Also, it is submitted that this amounts to a breach of the ACAS Code para 60:

> "Employees to be informed of the complaints against them and supporting evidence before a meeting."

17. DG, failed to conduct a re-hearing as promised in his letter of 21 May (**tab 3, page 110)** and as required by the contractual disciplinary procedure (**page 201, middle of right hand box**) governing Ms Michael's employment: please see **tab 3, page 111** and DG's evidence.

18. Neither CE nor DG gave serious consideration to retraining/ a lesser disciplinary penalty or alternative position for Ms Michael - *P v. Nottinghamshire County Council* [1992] IRLR 366 at end of para 20:

> "…in an appropriate case and where the size and administrative resources of the employer's undertaking permit, it may be unfair to dismiss an employee without the employer first considering whether the employee can be offered some other job…"

In particular, DG's evidence was that an appropriate sanction for a first failure to observe banking procedures would be retraining. It is submitted that this much milder penalty (not even invoking the disciplinary procedure) would have been the appropriate and proportionate response consistent with the treatment of all other Tea Stop Partners staff who (twelve stores per week in the Greater Leeds area according to GC) fail to observe the exact details of the banking procedures.

**James Botham**
**Leeds Solidarity Union Branch Chair**