How to win friends and influence judges

OR HOW I LEARNED TO STOP WORRYING AND LOVE THE PH

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CONTENTS

SPEAKER

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Michael is an employment specialist with over 20 years' experience at the Bar. He sits as a Fee-Paid Employment Judge in the South-West Region (Bristol, Southampton and Exeter) and is the only practicing barrister who sits in the Jersey Employment and Discrimination Tribunal; he is a Leading Junior in employment law in each edition of the Legal 500 from 2013 to date as well as the Chambers and Partners Guide from 2016 to date.

Along with multi-national companies, public authorities, public sector employers, and large infrastructure organisations Michael counts some of the largest service provision companies amongst his clients. He has a thriving practise representing Claimants and has recently been instructed in litigation involving whistleblowing claims emanating from banking practices involving Iranian money transfers.

Owing to the sensitive nature of some of his clients' undertakings Michael is national security vetted and undertakes cases where r94 and Schedule 2 of the 2013 Rules of Procedure operates.

He sits as one of the country's first Legally Qualified Chair of Police Disciplinary Tribunals and has been an Independent Assessor of disciplinary investigations for the Association of Chartered Certified Accountants. He has been a member of the Bar Standards' Board Professional Conduct Committee and is a member of its Independent Decision-Making Body which replaced the PCC.


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INTRODUCTION

1. Whereas the High Court has its Masters the ET has no particular cadre of judges who case manage matters: E.J.'s have to do it all, and this means they may get a number of Preliminary Hearings on one day, which may (if they are lucky) have landed on their desk the day before but could possibly have been given to them on the morning!

2. This is an opportunity for a well-prepared representative to build up a bank of good faith with an E.J. who today may be sitting on a list of Preliminary Hearings but tomorrow may be starting your 10-day discrimination claim and so who is pressed for time; it also enables representatives to increase the chances of client satisfaction as well as reducing the amount of work that the representative themselves has to do, or at the very least increase their productivity.

3. This seminar aims at raising awareness of issues that I have witnessed over the years as both a representative and, latterly, as an E.J.; it is not aimed at telling you the law, or telling you how to do things, rather its approach is to (hopefully) give food-for- thought.

THE FRAMEWORK

THE REGULATIONS

4. So far as is relevant the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 ('ETR') state:

2 OVERRIDING OBJECTIVE

The overriding objective of these rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as is practicable:

a) ensuring the parties are on an equal footing;

b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

c) avoiding unnecessary formality and seeking flexibility in the proceedings;

d) avoiding delay, so far as is compatible with proper consideration of the issues;

e) Saving expense. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

29 CASE MANAGEMENT ORDERS

The tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order, the particular powers identified in the following rules do not restrict the general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice.

Rules common to all kinds of hearing.

41 GENERAL

The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict the general power. The Tribunal shall seek to avoid undue formality.

CASE LAW

5. There are various statements of principal in the case law, but a good place to start is Mummery L.J. in *Martins v Marks & Spencer plc* [1998] IRLR 326; the stated the aim should be that tribunals seek to case manage:

'to allot a realistic slot in the list to ensure an uninterrupted hearing of the whole case, without damaging disruptions which had occurred in the present and other cases'.

THE RULES OF CASE MANAGEMENT

6. In 1942 Isaac Asimov wrote the short-story 'Runaround'. In this were contained the seminal rules for robotics. They are:

a) A robot must obey the orders given it by human beings except where such orders would conflict with the First Law.

b) A robot may not injure a human being or, through inaction, allow a human being to come to harm.

c) A robot must protect its own existence as long as such protection does not conflict with the First or Second Laws.

7. Adapting these slightly for this seminar, I proudly give you 'Salter's Rules for Case Management Preliminary Hearings':

a) A representative may not injure the tribunal process or, through inaction, allow the process to come to harm.

b) A representative must obey the orders given it by the process except where such orders would conflict with the First Law.

c) A representative must protect its own existence as long as such protection does not conflict with the First or Second Laws.

RULE 1 A REPRESENTATIVE MAY NOT INJURE THE TRIBUNAL PROCESS OR, THROUGH INACTION, ALLOW THE TRIBUNAL PROCESS TO COME TO HARM.

8. So, how can you help, or at least, not harm, the process? Well it is seemingly simple: prepare for case management.

9. It is implicit in every PH or hearing, this may sound obvious but too many times I have seen senior counsel arguing some esoteric points of some rarer still statutory instrument yet, after hearing them on this, the E.J. asks them what the issues are for the final hearing to be told, with a slightly panicked look on their face, 'Oh, I am not instructed on that'. Further, I suspect we have all had an opponent stare blankly at the E.J. when asked to identify the issues and paragraphs in the ET1/3 they rely upon.

10. What does preparation entail: at the very least it is a case management agenda, ideally agreed between the parties, but if not then one for each party the Agenda highlights issues that can be overlooked, such as:

- Dates to avoid
- Mediation
- ENE.

1. PROFESSIONAL PRESSURE

11. A lack of preparation harms the process: to appreciate why, look at the world the ET representative works in: clients, tribunal obligations and their own (legitimate) interests all exert an influence on representatives, and which of these pressures impacts the most is a matter of some debate and, I suspect, some individuals are more influenced by one than

the other; but most representatives all start from one common point with obligations imposed by their codes of conduct to assist the tribunal, and, in any event, all parties are expected to do co-operate with the tribunal under the Overriding Objective (ETR r2).

12. When considering this obligation to co-operate one must consider that the employment tribunal process is under stress even pre-COVID-19: budgets are tight, resources are thin and human error/complacency has a disproportionate effect on those using the system. For example, if you are spending an hour at the outset of a one-day hearing identifying the issues you have used up 20% of the time allocated to that case. The effect of this is that the prospect the matter going part-heard or a judgment being reserved just increased dramatically and in order to avoid this the E.J. may impose a guillotine enforced timetable in accordance with r45, or may adjourn the matter entirely to give it a longer-listing.

13. Remember the E.J. probably has two or more Case Management PH's in their list for the day. Often they are listed at 10, 12 and 2pm. If you are listed at the 12.00 noon hearing, don't send your list of issues (see below) in at 10am and hope the E.J. will have seen it when your hearing starts. I aim to get the Note and Agenda to the other side at least a week before the hearing. if they agree them then they can be sent to the tribunal days in advance and, when the REJ is allocating the case to a particular E.J. an agreed list of issues and timetable can go a long way to getting your in-person PH converted into a telephone hearing.

14. Budgetary constraints mean that Final Hearing listings are, seemingly, getting longer. This may appear counter intuitive (less money means longer cases) but Salaried E.J.'s are working at full or near full capacity, and there are limited resources for Fee-Paid sittings, so the system does not want a large number of reserved judgments or part- heard matters clogging it up, resulting in long delays until other matters are heard, judgments are given or sent to the parties and until cases are 'off the books' of the HMCTS.

15. The effect is that listings may be getting longer in order to maximise the prospects of the case being fully dealt with (liability, judgment, remedy and any other applications) in the time allocated for it (more on time estimates is below).

16. Maximising the prospects of achieving resolution within time estimates means, in some cases, control needs to be exercised by the tribunal E.J.'s at early stages. The E.J. wants to feel they are in control of the process they lose this by having parties go away and undo the work they have done at tribunal; thus requests made at a hearing for '7 days to provide the particulars sought' are less likely to be granted if the request for F&BP's was made some time ago or is not overly complicated, so expect reluctance to let parties leave the tribunal when matters can be thrashed out before the E.J.

17. Tribunals expect for the most preliminary matters to be dealt with before them… just look at Boxes 2.3 and 4.2 of the Case Management Agenda:

> **2.3** Has the necessary additional information been requested? If not, set out a limited focused request and explain why the information is necessary.
>
> *If requested, can the relevant information be provided for the PH? If so, please do, (my italics).*

> **4.2** Are there any preliminary issues which should be decided before the final hearing?
>
> If yes, what preliminary issues?
>
> *Can they be added to this preliminary hearing? If not, why not, (my italics).*

18. With this expectation of dealing with matters such as F&BP's at the PH, request them a reasonable time before the PH, or highlight any application you want to make in good time…if appropriate why not set them out in the ET3 or at the same time as the ET3, or if acting for the Claimant, as soon as you receive the ET3.

2. CLIENT PRESSURE

19. Pressure to uphold the process is also applied to representatives by clients: active case management by representatives assists the clients: firstly, clients (always) want more return for less legal spend; with robust case management they can get this: for instance, they get a better indication early who will be required as witnesses, if the matter is timetabled they may also be able to see on what day and at what time particular witnesses are needed thus reducing the indirect hidden (and often vastly disproportionate cost to any employer: lost management time). Claimant's and their witnesses also benefit from this as they do not need to take lengthy period off work to sit at the back of the tribunal. With social distancing applied in tribunals the physical space of the communal areas is in more demand and tribunals are timetabling attendance with even more vigour than before.

20. Whilst accurate predication of time estimates is also of importance to clients (very few people on their death bed (I suspect) say they wish they had spent more time as litigants in the Employment Tribunal), your own personal credibility before the tribunal (see the Third Rule) is enhanced by sensible estimates – for instance a 9 witness claim involving employment status, multiple whistleblowing detriments (so requires a full panel), a s103 ERA and 98 dismissal, with jurisdictional points on time, will take a smidging longer than two days for liability, determination and remedy that was suggested to me; the Agenda requires:

> **8.1** *Time estimate for final hearing, with intended timetable.*
>
> Is a separate hearing necessary for remedy?
>
> If yes, why?
>
> *Note the presumption of remedies being part of the final hearing.*

21. So, show they ET you have thought about the timetable, and why the hearing will take this long; remember the ET has an express power to timetable any hearing (r45) so at the very least they will have expected you to think about who will be called and how long the hearing will take.

22. Another benefit of the client is that the later stages of the litigation process are easier for the client: with defined lists of issues it is easier to understand what is relevant and what is not, and easier to define and locate relevant material and people.

3. PERSONAL PRESSURE

23. Active case management assists the representatives: it provides a strong foundation for the preparation of the Final hearing: lists of issues give you the framework of what you need to focus on, it can limit the (seemingly) endless volume of correspondence passing between parties, it defines the extent of disclosure obligations, which feeds into the benefit to the clients.

RULE 2 A REPRESENTATIVE MUST OBEY THE ORDERS GIVEN IT BY THE PROCESS EXCEPT WHERE SUCH ORDERS WOULD CONFLICT WITH THE FIRST LAW.

24. There is a lot of assistance out there for representatives that can reduce the amount of preparation required for an effective PH.

1 HOUSE STYLE

25. Firstly, look at previous directions given by the ET you are going to – is there a 'house-style' and if so, adopt it in the model directions you are proposing.

2 ATTEMPTS TO LIMIT THE CLAIM

26. A failure to appreciate these can impact Rule 3.

27. The Appeal Tribunal is very concerned about practises whereby strict limits are imposed on claimants over the number of their claims: *Mckinson v Hackney Community College & Others* [2011] UKEAT/0237/11 and *Fairbank v Care Management Group* [2012] UKEAT/0139/12.

28. Strike out limits: be sensible in any applications you make. Successful strike outs on the basis of the claim having no reasonable prospect of success are rare at the best of times and case law limits this further. Balls v Downham Market High School & College [2011] IRLR 217:

'the tribunal must first consider whether on a careful consideration of all the available material it can properly conclude that the claim has no reasonable prospect of success. I stress the word 'no' because it shows that the test is not, whether the Claimant's claim is likely to fail nor is the matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects.'

29. If the ET is going to be expected to pour over documents and engage in extensive study of documents then it is likely that, again, the application will fail QDOS *Consulting v Swanson* 0495/11/1204 where Serota QC stated:

'I would observe, bearing in mind the high cost to employers of conducting a hearing in the Employment Tribunal not only in terms of its legal costs but the expense of its employees attending lengthy proceedings (for example, I note that the Claimant's claim against Sandwell Borough Council took some 17 days), there is a temptation to take advantage of a procedural shortcut to avoid these expenses. As Bingham L.J. put it: 'a technical knockout in the first round is much more advantageous than a win on points after 15'. However, applications to strike out on the basis that there is no reasonable prospect of success should only be made in the most obvious and plain cases in which there is no factual dispute and which the Applicant can clearly cross the high threshold of showing that there are no reasonable prospects of success. Applications that involve prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of the witnesses should not be brought under r 18(7)(b) but must be determined at a full hearing. Applications under r 18(7)(b) that involve issues of discrimination must be approached with particular caution. In cases where there are real factual disputes the parties should prepare for a full hearing rather than dissipate their energy and resources, and those, I would add, of Employment Tribunals, on deceptively attractive shortcuts. Such applications should rarely, if ever, involve oral evidence and should be measured in hours rather than days.'

30. Also, remember strike outs are subject to a 'reasonable opportunity to make representations' requirement (r37(2)). Yet, deposit order applications are not subject to a similar requirement (r39).

3 LIST OF ISSUES

3.1 Generally

31. When drawing up your list of issues remember what the E.J. will have in front of them: at most it will be the ET file which, at this stage is likely to be thin and consist of the ET1, ET3 and some internal case management paperwork (maybe even the ACAS Certificate!), and where administration for a region is centralised away from your hearing centre it may not even be even that, and likely to be only the ET1 and 3. They certainly will not have the voluminous documents you have obtained from your client via DSAR or from advising historically.

32. As the list of issues will be based on the pleadings cross-refer in the list of issues to the pleadings only: besides anything outside of the pleadings may require an amendment – which will require an application!

33. It is not enough for the list of issues to merely say: 'Was the claimant unfairly dismissed', break it down so – think: jurisdiction (time limits, ACAS etc), qualification (was the Claimant an employee, did they have two years' service etc), liability (s98, *BHS v Burchell* [1978] IRLR 379, *Williams v Compair Maxam Ltd* [1982] ICR 156), remedy (s122, 123) other matters (s12A Employment Tribunals Act 1996).

3.2 Jurisdiction

34. Do not be afraid of concessions: they show insight and that the point has been considered. A wrong concession on jurisdiction is not fatal, however does have consequences as, if you are wrong, and a jurisdictional point or bar does exist, the ET are bound to take it of their own motion. There will be eyebrows raised at you, however, there may be cost consequences and Rule 3 will be affected.

3.3 Case-law Guidance

35. The more technical areas of employment law have been litigated up hill and down dale and some of it is useful. For instance, ALM Medical Services Ltd v Bladon [2002] ICR 1444 suggested that a hearing is needed in protected disclosure cases

'in order to identify the issues and ascertain what evidence the parties intend to call on those issues'.

36. When considering what the issues are in a PIDA claim look no further than *Blackbay Ventures v Gahir* [2014] IRLR 416 where HHJ Serota QC gave some useful advice as to what an ET judgment on PIDA should contain at p.98:

37.

a) Each disclosure should be identified by reference to date and content.

b) The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.

c) The basis upon which the disclosure is said to be protected and qualifying should be addressed.

d) Each failure or likely failure should be separately identified.

e) Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation.

f) The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s.43B(1) and under the 'old law' whether each disclosure was made in good faith; and under the 'new' law whether it was made in the public interest.

g) Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon.

38. In *Hendricks v Metropolitan Police Commissioner* [2003] IRLR 96, para 54, Mummery LJ gave the following guidance for dealing with discrimination cases which involve numerous incidents:

'Before the applications proceed to a substantive hearing, the parties should attempt to agree a list of issues and to formulate proposals about ways and means of reducing the area of dispute, the number of witnesses and the volume of documents. Attempts must be made by all concerned to keep the discrimination proceedings within reasonable bounds by concentrating on the most serious and the more recent allegations. The parties' representatives should consult one another about their proposals before requesting another directions hearing before the chairman. It will be for him to decide how the matter should proceed, if it is impossible to reach a sensible agreement.'

39. The EAT has given tribunals guidance as to the path it must tread prior to making a finding that there has been a failure to make reasonable adjustments. Although decided under the DDA, Environmental Agency v Rowan [2008] IRLR 20 is likely to

remain good guidance. Indeed, its approach was more recently applied in RBS v Ashton [2011] ICR 632 (albeit still a DDA case):

'A close focus upon the wording of [the DDA] shows that an Employment Tribunal – in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus discrimination – must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled'.

40. If this is what the EAT are telling ET's their judgments should contain, then a list of issues that hits these points is exceedingly welcome.

3.4 Overloading

41. Beware of over-burdening pleadings: recently, the EAT deprecated the practice of pleadings being long discursive documents that do not identify the relevant parts of the cause of action, but rather should include enough factual matter to establish the legal claims: *C v D* UKEAT/0132/19/RN.

42. What is the impact of ENE?

43. Equally, do not go with boiler plate pleadings without considering if they are appropriate; all too often the Grounds of Resistance raises justification without saying what the legitimate aim even is – when the representative is questioned on this in tribunal, they either do not know or ask for seven days.

4 APPEALING THE ORDER

44. It is important to get it right. If harm is done, be afraid! It is notoriously difficult to overturn case management decisions whilst the rules seem quite permissive the case law is not.

45. An order made or refused by one judge cannot simply be revisited by another. On any subsequent application, tribunals should follow the same principles applicable under the CPR and only set aside or vary such an order where there has been a change in the

circumstances since it was made (see CPR 29PD, para 6.4). In *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251 held on appeal that, in the absence of any change of circumstances, this was both:

'a wrong exercise of discretion and wrong in principle'

46. See also, and more recently the 2016 case of *Serco Ltd v Wells* [2016] ICR 768 where the EAT, effectively, states that it is rare that a tribunal should vary a case management order.

RULE 3 A REPRESENTATIVE MUST PROTECT ITS OWN EXISTENCE AS LONG AS SUCH PROTECTION DOES NOT CONFLICT WITH THE FIRST OR SECOND LAWS.

47. Repeated examples of proactive and sustained high quality case management by a representative pays huge dividends: you get known by E.J.'s – they talk over cups of coffee and you hear names of representatives be mentioned over and over again, for good and bad reasons. This, if you are one of the ones being spoken about positively, is a bonus: you build a bank of trust with the E.J.(s) who think highly of you; they are useful referees for any applications you may make; they are more likely agree with things you have been saying to LiP's, yet as its coming from an E.J. the LiP will listen.

48. Helpful case management does not end at the end of the PH – if the E.J. has adopted your list of issues and directions, offer to email it to the tribunal's general email address (cc'ing in the other side) and making to the attention of the E.J. this helps reduce the administrative burden of getting the Order drawn up by the E.J./ET staff.

49. We all know representatives who haunt tribunals and who, when you hear you are against them ruin your day, your shoulders sag, you check the wine/beer/chocolate supplies at home as you know the pain you will be enduring before you get home, and you make sure kickable animals are nowhere to be found – judges feel the same, a poorly represented party is harder to deal with than many LiP's. Make sure you are not that person, make sure in fact the E.J. can turn to you as a rock in their direst hour of need!

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THE EMPLOYMENT GROUP

The Employment Group at 42 Bedford Row is thirty-five members strong. Members regularly appear for both employers and employees before the ET, EAT, High Court and Appellate Courts. Members have appeared not only in England and Wales but also in Employment Tribunals in Jersey, Scotland and Northern Ireland.

The Group is well represented across all levels of experience and includes members of the Attorney General's Panel of approved counsel, a Fee-Paid Employment Judge, a Deputy Chair of the Jersey Employment and Discrimination Tribunal as well as barristers recognised by the Chambers and Partners Guide to the Legal Profession and the Legal 500 as leaders in their field.

Members are also instructed for High Court Injunctions and undertake representation before regulatory and disciplinary hearings. The group also has members who have experience of sitting on and being instructed at professional disciplinary panels.

The Employment Group provides expertise in:

- All forms of discrimination (including equal pay), harassment and victimisation claims
- Unfair and constructive dismissals including redundancy claims
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- Collective labour law
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