SERJEANTS' INN

Winning Advocacy in the Employment Tribunal

Written by Angus Moon QC
Published: 27 June 2017
Featured in Lawyer 2B magazine

LAWYER 2B

The David Hare screenplay for the recent film *Denial* contains the following advice to the client: '*stay seated, button your lip, and win*.' This article seeks to plot a path for advocates to winning in large scale discrimination claims in the employment tribunal, based on the writer's long experience of the ET and, more recently, briefs to act for the respondents in two high stakes cases, *AB -v- A Chief Constable**[i]*** and *Aubrey -v- The Chief Constable of Northumbria Police**[ii]***. The suggested lessons apply to all types of large-scale claim in the ET.

The facts of these cases were as follows. In *AB* the claimant was a gay Chief Superintendent of Police. He alleged sexual orientation discrimination, victimisation and contended that he was a whistleblower. The respondent Chief Constable contended that the Claimant had inappropriately sought to influence the recruitment of a gay friend as a Special Constable. The main witness for the claimant was the claimant himself, and lengthy cross examination was required. The claimant lost.

In *Aubrey* the claimant was the Director of Legal Services of the Northumbria police. She brought claims for sex discrimination, disability discrimination, unfair dismissal and she too claimed that she was a whistleblower. The respondent Chief Constable contended that Ms Aubrey was dismissed for gross misconduct as a result of, amongst other things, having inappropriately disclosed confidential information. The facts underlying Ms Aubrey's claims were complex and the decision of the ET runs to over 400 paragraphs. One complication of the case was that the *former* Chief Constable of

Northumbria Police, Mrs Sue Sim, gave evidence on behalf of Ms Aubrey and needed to be cross-examined. Ms Aubrey lost, although she is appealing to the EAT. On one point Mrs Sim's evidence was described as 'not credible' by the ET.

What if any lessons can be learned from the successful defence of these two cases? The first is that the development of a clear strategy for winning at an early stage is critical. What is meant by "strategy" here? The client may perceive that the litigation is an opportunity for advancing strategic aims which are not necessarily obvious at the outset to the advocate. It is important to discuss the strategic aims with the client in detail so that the advocate knows what outcome the client wishes to achieve, and whether those aims are achievable. Once the client has decided to fight the case, and not to settle, the strategy will of course be fact sensitive, so that what works in one case will not necessarily work in another.

Having understood the client's hopes and expectations, it can be necessary to give realistic advice about whether those expectations are achievable, and if so how. It may be necessary to warn the client about the risks of adverse publicity so that, if appropriate, experts in public relations are available to address the media.

Once a coherent strategy for winning has been agreed, the next step is to identify the team required in order to pursue that strategy. In both *AB v A Chief Constable* and *Aubrey v Northumbria Police* the respondents were represented by highly competent and very experienced solicitors and junior counsel.

In the past the lead advocate in such cases, usually a QC, would be relatively secretive about some aspects of trial advocacy. Many silks now share their draft cross-examination plans with other members of the team and invite comment. Just as a speaker may fail to connect with the audience, sometimes questions or submissions do not hit the mark with the tribunal when delivered orally. Particular questions may also not work in light of some factor known better by other members of the team than the lead advocate. Hence it may be worth inviting comment to gauge whether the plans will translate well into the arena of the tribunal.

Once the hearing has begun, one of the first important tasks of the advocate is to establish a rapport with the tribunal. How is this done? First, particularly at the start of the hearing, do not take bad points (unless you absolutely have to). Help as much as you can by, for example, providing a written Chronology and *Dramatis Personae*. Answer the tribunal's questions clearly and fairly right from the outset so that the tribunal learns that you can be trusted to help. Once you have got this credit in the bank it will help in dealing with any trickier exchanges as the hearing proceeds.

In the ET there is little if any examination in chief. So often the oral evidence goes straight to cross-examination. Some advocates say that few cases are won on cross-examination. The writer parts company with that notion. There are a few simple rules which apply as much in the ET as in other tribunals:

- First and foremost, preparation is key. The rule is that each party's case must be "put" in cross-examination. Whilst it is not always necessary to put every detail, the salient differences in the accounts must be explored in cross-examination. But in order to put the case, the advocate must know what it is. The documents and witness statements must have been read assiduously and analysed for differences of account.

- It is generally best to cross-examine in chronological order, so that the tribunal can follow the sequence of the case being put from start to finish.

- Aggression towards a witness is generally a bad idea because it tends to leak sympathy away from the questioner towards the witness. Hard differences must be put, but if possible without aggression.

- One of the most difficult skills of cross-examination is to listen to the answers to questions. The necessary preparation may cause an advocate not to wish to deviate from the pre-planned path, but inflexibility is dangerous for at least two reasons. First, the tribunal cares little for your plan and wants the important issues dealt with as they arise. Secondly, failing to listen to the answers inevitably means missed opportunities for exploring and exposing the evidence and logic of the witness.

Lastly, the opposing advocate. Some consider that advocacy involves a degree of modification of approach to take account of the personality of the advocate on the other side. Whilst this may be appropriate in some cases, it is generally better to see your "opponent" as the tribunal itself. The advocate should not care about persuading the opposing advocate – but should focus on persuading the tribunal. In many ways it is better to ignore the opposing advocate, not to the extent of being discourteous, but by remembering that the primary function of the advocate is to persuade the tribunal, whilst observing the professional rules which govern advocates' conduct.

Not every case can be won. But the best way to maximise the chance of winning is to analyse how others have done it in the past, and try to learn from that analysis. The process of learning does not stop however long you have been an advocate.

[i] *AB -v- A Chief Constable*, Case Nos 1201272/2012 and 1200038/2013.

[ii] *Aubrey -v- The Chief Constable of Northumbria Police*, Case No 2500192/2014.