A political hearing in the Employment Tribunal

I recently represented a trade unionist in a Tribunal claim. Mid-way through the hearing, I received by text solidarity greetings which had been voted through at a union meeting the night before. This was certainly something I have never been sent as a lawyer before. Groups of workers attended the hearing: never less than two or three at a time, on one occasion as many as a dozen people filling the room. Through the hearing I was constantly reminded of the different ways a case will be understood by lawyers and by a political trade unionist. I have often heard lawyers denigrate trade unionists, including at one training day run by a well-known provider of pro bono representation, where it was said that the widespread use of Tribunals had come about because unions had not taken issues of discrimination seriously. I doubt the speaker had heard of Grunwick or the Ford equal pay strike. When lawyers run down unions we reveal ourselves as fools.

In truth, a skilled trade unionist can often do more good for a worker than even the very most brilliant lawyer. Long before a claim is issued a good union representative may know the company’s procedures by heart and be able to spot even relatively minor breaches by the employer. The workplace representative may have lengthy experience of working with a particular manager and have developed the skills to persuade that manager to change his or her mind before a final decision is made. Best of all, she will have access to sources of strength that are wholly closed to the lawyer. For example, there may be a group of colleagues who can rally behind the claimant, who could come forward as witnesses to a hearing, or who may even threaten strike action if the company does not back down. The best lawyers win their clients compensation; the best trade unionists save workers’ jobs.

A recurring theme of the evidence in our case was the contrast between the sorts of hearings which used to be common at the Tribunal and the sorts of hearings we often have these days. One witness was a union full-time officer, who described becoming a Tribunal rep for his union in the early 1990s, shortly after taking on a full-time post. He was quizzed on the support he had had when he began the job. Union officials now regularly make calls to a designated solicitor’s firm. The officers of the union continue to deal with casework on behalf of their employed members but all their Tribunal representation is farmed out to lawyers. Twelve years ago, the official explained, the situation was different, union officials were solely responsible for hearings and had minimal backup.

The prevalence of professional representation is described in the literature as an ‘arms race’. Employers spend more on representation and claimants retaliate by demanding solicitors rather than union officials, barristers rather than solicitors. This model serves claimants poorly. The large majority of claimants obtain representation by finding a lawyer willing to act pro bono, or through a union, or via no-win-no-fee agreements, all of which avoid having to pay legal fees up front. Employers have deeper pockets. Their representatives exploit this by over-litigating demanding Pre-Hearing Reviews with the hope of striking out the claim. As the higher courts dislike strike out at preliminary hearings in many cases this increases the total cost of litigation. Employers are notoriously weak at controlling their own lawyers’ costs. They blame workers for the total costs of defending each claim.

Returning to the recent case; parts of the hearing were reported in the press. At times, the political nature of the hearing seemed to win us a certain freedom in court. The Tribunal made no attempt to close down lines of questioning, even when they drifted away from the strict issues in the case. It was a scrupulously fair hearing, which at the end we lost. After the hearing, the client celebrated his defeat with a three-day party. It was wonderful.

Sometimes, in a political case, as my client showed me, winning isn’t everything.

David Renton

On the picket line

Russell Fraser