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GETTING FROM THE STORY OF A DISPUTE TO THE LAW

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Introduction

What is your approach to giving employment advice? Responses to this question from specialist and generalist advisers, as well as solicitors working with the Citizens Advice service, emphasised a particular *process*. While the advice interview must start with the client's story, this initial narrative account represents only the first step; it is in what comes *after* this that the critical work of advice is achieved. In this chapter I explore how advisers move from the story of a dispute to the law. The practice engaged in by advisers is far more than simply an exercise in legal diagnostics. As I will explain, this represents just one stage. Other critical elements include teasing out the full range of relevant factual detail relating to the employment dispute, communicating the law to clients, and framing the law in terms of possible courses of action.

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These latter aspects of the process take into account contextual issues beyond the immediate law, and involve consideration of the hurdles inherent in the Employment Tribunal process, the disposition of the client, and the level of support that the adviser can offer throughout the course of the dispute.

Gathering the story and identifying the law

The advisers in our study typically began the first advice session by giving clients space to talk freely about the problem they faced at work. As described in Samuel Kirwan's chapter, allowing them to tell their story often had the effect of putting the client at ease. But, crucially, it also commenced the first step of identifying the nature of the dispute.

It was important at this point to develop an understanding of the clients' account of events – to establish the chronological order of occurrences, the nature of the relationships between the parties involved, and details of who engaged in which actions (or inactions). Equally critical, though, was the need for advisers to broaden out the focus of the discussion. Advisers asked questions that aimed to guide clients' attention on matters relevant in law but not necessarily recognised by the client as being important. A commonplace example here are details of the actions (or inactions) on the part of the employer, which the adviser could then assess as constituting correct procedure or not. The questions asked by advisers could also unearth additional potential legal claims that the client may not have thought of or realised were possible (unpaid holiday pay is one typical example of something often overlooked by a client). Advisers spoke of this stage as 'digging around' or 'ferreting out' information – an attempt to capture all potentially relevant detail and unearth that which was not revealed by the client.

In most cases, in this initial advice meeting, advisers would also attempt to compile details of factual information relevant to the general operation of employment law. One adviser referred to this as developing the 'framework' in which the dispute took place. This 'framework', comprised of details such as where the client worked,

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the job they undertook, how long they had worked there, whether they were an employee or otherwise, and so on, allowed advisers to further identify appropriate categories of law that may apply to the clients' disputes.

What comes through in these accounts is the extent to which the relevant law, and possible basis for a claim, are not necessarily immediately apparent: it takes a careful process of investigation to determine these. Indeed, the full extent of the factual detail may only emerge over a course of interactions between adviser and client as the relevant evidence is accumulated and examined. One specialist employment adviser described how he spends the first few weeks of a dispute in what he calls 'fact finding mode'. Moreover, there may be intermediate steps that the client or the adviser on their behalf can pursue before the crystallisation of a potential claim. These actions can include writing a letter to an employer or raising a formal grievance with them. Such steps and their associated responses (or lack of them) on the part of the employer may take weeks or even months.

Gathering the story and identifying the law involved active roles on the part of both the client and the adviser. The client, after taking the initial step of approaching the CAB and relaying their narrative of the events experienced, was prompted to reiterate and elaborate upon various components of the narrative. Documentary evidence of the events was often procured. Advisers, for their part, while allowing clients space to communicate, are active in guiding the nature of information volunteered so that they can begin to align this with relevant law.

Communicating the law and framing possible courses of action

The second area of practice that is key in the process of moving from the story to the law is the task of outlining the relevant law to clients and framing possible courses of action for the client to take. Again, this is not as straightforward as merely describing the relevant legal framework and how this will apply to the client's situation.

ADVISING IN AUSTERITY

In terms of communicating the law itself, advisers are mindful that many of their clients will have very limited knowledge of employment law. This may also be combined with low educational attainment and low levels of confidence about utilising such a formal institution. Thus advisers are aware of the risks of overwhelming clients with the complexity of employment law, of confusing them, or even of intimidating them. As a result of this, advisers typically sought to avoid any negative effects of communicating legal information by focusing on the specific aspect of the law or procedure that was immediately relevant to the client at that particular stage of the dispute, or by outlining the law in general terms instead of detailed specifics, or by focusing particularly on the practical steps that the adviser and client needed to engage in as opposed to the technical detail.

If these techniques display an awareness of legal knowledge as a potential *inhibitor* of action, advisers also described a contrasting view of knowledge as *empowering* clients. One specialist employment adviser, for example, viewed communicating the relevant law to clients as necessary to making the law accessible; removing the mystery from the legal process would render it less intimidating for clients. Thus the adviser considered that this could have the effect of encouraging a client to pursue their case. Likewise, a generalist adviser spoke of the importance of directing clients to the considerable array of information available on the Advice Guide and ACAS websites. His view was that most clients were very interested in being able to explore this in greater detail to better inform themselves of their situation (as discussed in Morag McDermont's chapter, this view of the role of the Citizens Advice website is one that the service itself is moving away from).

Implicit in outlining the relevant law is the need to make an assessment of the merits of a client's claim. This requires objectivity on the part of the adviser, something which they acknowledged can be difficult at times. Both the client and adviser may feel that a real injustice has occurred. But this does not necessarily translate into a strong basis for a claim against an employer. While an adviser may empathise with the client, it was noted that giving them a sense of hope

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is ultimately fruitless. One solicitor described how this had happened to her and that she had learnt from it:

‘If it’s weak, it’s better for you to just say so and let them move on, than you drag this out when you really knew it was weak – but you feel sorry for them or you let them talk you into it, and then they have a year or two years of this hanging over them.’

When it came to translating relevant law into possible courses of action advisers were acutely aware of the practical realities of actually pursuing claims in the Employment Tribunal, difficulties discussed in Nicole Busby’s and Eleanor Kirk’s contributions to this book. For some advisers, this made this stage of the client–adviser interaction difficult. One specialist employment adviser noted that “A lot of my conversations to do with employment law are negative and you have to be realistic – it’s not my job to mislead people, so you have to tell them what the hurdles are going to be.”

Alongside advisers’ explanations of the hurdles involved in the Employment Tribunal process was a sensitivity to the associated *stress* of pursuing a claim in this way. A solicitor stated: “I know that [the Employment Tribunal] try, and they do try, to make it as stress free as possible but they can’t make it stress free, it’s just impossible to make it stress free.” Advisers sought to explain to clients that, in practice, taking a claim to the Employment Tribunal requires a degree of determination, grit and psychological strength. This underpinned, to a degree, the way in which advisers framed possible courses of action to clients. One solicitor noted:

‘there are some clients who are in tears the whole time you’re speaking to them when they’re going over the situation, and I am reluctant to go ahead with clients in that situation just because if they find difficulty dealing with the stress of speaking to me, the stress of appearing in a tribunal is going to be very, very high.’

The solicitor would not refuse to help them if they did want to proceed. However, he would ask them to take some time to consider again their planned course of action.

Clients' ability to deal with stress of the dispute also came to the fore in circumstances in which the CAB providing advice could only offer limited support to their client – situations which frequently occurred due to resource constraints. When deciding upon whether to allocate further adviser time to these cases, advisers would take account not only of the capability of the client to undertake aspects of the case themselves, but would also assess the actual legal merit of the case and the possibility of achieving a positive outcome.

The stage at which advisers communicate the law and frame possible courses of action is critical in terms of the potential to empower clients. Of course all advisers aim to empower clients. However, the nature of employment law – its complexity, what is deemed to be inappropriate in the employment relationship and what falls outside of this, and its procedural elements – can make this difficult. Relaying knowledge of the law to clients, for example, while often assumed to be positive for clients, is done so carefully and thoughtfully by advisers. Likewise, the framing of possible next steps takes into account the contextual reality such as the personal support and stability of clients and the degree of professional support an adviser can offer. The aspect of the process, then, is nuanced, with the client very much placed at the centre.

Conclusion

At first glance, providing employment advice, at least for those skilled in the matter, may appear a fairly straightforward matter. It would involve identifying the legally relevant facts and applying the law. However, when we frame the idea of 'getting to the law' in terms of eliciting the full picture, communicating the law to clients and framing possible courses of action, certain complexities come into play. CAB advisers are typically dealing with clients who are stressed from their employment problems and who may also be experiencing associated financial difficulties. Moreover, many of their clients lack experience

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of employment law and may have levels low of education. Advisers skilfully take account of these factors, as well as the challenges of going through the Employment Tribunal process, and provide sensitive and realistic advice for their clients.

