



ELA Podcast – Nicholas Robertson interviews Mr. Justice Choudhury the President of the Employment Appeal Tribunal, 17 May 2019

Hello and welcome to a podcast for the Employment Lawyers Association. My name is Nicholas Robertson, I am the head of employment at Mayer Brown and the presenter of the very long-running podcast The View From Mayer Brown, and that is all the advertising I'm allowed to do today because I am delighted to be joined by Mr. Justice Choudhury the President of the Employment Appeal Tribunal. Welcome!

Good afternoon, Nick.

Now, we thought we would have a chat about the Employment Appeal Tribunal, obviously and some changes that may be coming and what the future might look like, but if I take you back as it were to the start and say what's been the career path has really led you to the point where you're now the President of the Employment Appeal Tribunal?

Well, I suppose the career path could be described as fairly traditional in some senses, starting out with a law degree, moving on to the bar, long career as a barrister then a role as a part-time judge as a recorder and then taking silk, Deputy High Court judge and then moving on to the full-time position so that's a fairly common trajectory among High Court judges.

I suppose there's also a non-traditional element to all of that if you drill down which is that I grew up in Scotland and have ended up in the English judiciary.

All the best people did – your presenter did.

I'm not alone in that respect. I think there are about two or three of us now in the High Court and after that I did a physics degree first, so I didn't do law straightaway. I moved into law later on and I did a law degree which is somewhat unusual in that I went to the School of Oriental and African Studies in the University of London. So those are probably the non-traditional elements which have led me to where I am today.

Fascinating. I didn't know that. I often think that where members of my team have done science degrees before doing law, there's a difference in the way they approach things and do you think your science background that you have perhaps means that sometimes you're looking at things a little differently from people who've done law degree only, you know, arts, law degree, practice as a lawyer?

Yes, I think it's influenced the way I practiced law and the way I approach judgments. There's a much more analytical approach and an attempt to break things down into their constituent parts before putting them back together. It's a very scientific approach to legal thinking and I think it's helped me in the course of my career.

Interesting. And you became President of the EAT at the start of the year?

Yes just on the 1st of January this year, yes.

And in a nutshell how would you sum up the role of the EAT President as opposed to being a judge in the EAT?

Well, you're still a judge first and foremost and as well as a usual diet of sifting through cases and doing rule 3.10 hearings and full hearings you also get to hear cases of particular significance in terms of the development of the law or procedure and that's a great benefit as President.

There are also other aspects of the role - that probably takes up a good two thirds, but then there's the other aspects. I'm the lead judge for the EAT so I make sure that we have sufficient judicial capacity to deal with all the cases that are coming through. That involves an element of pastoral care for the other judges that come through, both full time and part time, and I have responsibility for setting the practice of the Employment Tribunal. I can issue practice directions and practice statements which is good fun. I work closely with the Registrar and the other staff to make sure that the service has been provided efficiently.

But apart from all that - that's all internal stuff - there's also a very large external role where I'm the face of the Employment Appeal Tribunal. I sit on various external bodies and panels to voice the interests of the EAT. For example I'm on the panel dealing with reform in the court system, I'm also on the panel dealing with the introduction of new technology into the courts.

Yes, both of which we're going to talk about

All those things are part of my role as well which I enjoy very much and then there's the more nitty-gritty I suppose. I'm not a line manager of any particular staff members but I do have a leadership role and I think it's important for me to engage in keeping the morale high amongst the troops as it were, and I do enjoy that aspect as well.

Speeches, things like this podcast, that's also part of my role and quite a big chunk actually, probably giving a speech every couple of weeks or doing some sort of external activity is a big part of the role.

And there's also the less pleasant aspect which is dealing with complaints. Complaints against judges are about judicial practice in any particular case. Obviously, not to do with the substance of the matter because that's a matter for the Appeal Courts but if there's any concern about behaviour or conduct then I have to deal with that in the first instance.

That's quite challenging - irrespective of the merits it's going to be a challenging question to deal with.

It is. Thankfully doesn't happen very often.

Sure, but still, yes. Has anything surprised you in in the time that you've been President? I always vision that you know, if I was the President of the United States, the Secret Service would take me to one site and say, "Nick, about area 51, there's some stuff you need to know." Is there anything that you've been surprised in your time as President of the EAT to see or to learn or something you hadn't appreciated just being in the EAT but not President?

Well, I was hoping that when I became President I would be handed some sort of dossier which told me what the range of reasonable responses actually was and things like that. But no, nothing - no secrets were revealed.

What has amazed me is how the whole system works behind the scenes. There's a whole lot of work done by the staff who are incredibly committed and dedicated in getting cases up and ready to be

heard by the judges and I've been impressed and surprised by how much work is involved and how they do it without any external interruptions or giving away how much work they do.

It's one of the things I've noticed that when you're dealing with cases in the EAT the ability to phone up and ask people questions and get sensible and helpful answers because they want you to do the right thing is notable in comparison with the Employment Tribunal's overworked people doing their best but it's much, much more hit-and-miss if you can ever get a hold of someone and the EAT staff I've long thought are a core part of what makes the whole thing work viewed from the outside so I'm really interested to hear what you're saying from the insider's perspective.

I'm glad you see it that way because I really do think that the EAT provides one of the most efficient services in the court service and I've sat in various divisions now and I've seen the way things work in other divisions but the EAT really does seem to stand head and shoulders above many other divisions and I think part of the reason for that is the excellence of the staff. We have a really dedicated bunch of people, some of whom have been there for decades and they really know the procedures and the rules inside out - far better than some of the judges I have to say and they can answer questions and we rely upon them probably just as much as external litigants do.

I can understand that. Before we talk about potential changes or developments in the EAT do you have any words of wisdom, based partly on your own career as an advocate, but also from having sat as a judge in the EAT, any words of wisdom for advocates appearing in the EAT?

Yes, I think it would be the same advice I give to advocates anywhere. First and foremost be prepared. That may sound very simple but it is fundamentally important to know your case inside out; know the authorities that you're going to be relying upon inside out. Sometimes advocates appearing in the EAT don't appreciate the extent to which we as judges look to them to point us in the right direction in terms of law and authority and when we ask questions it's because we really do want some guidance not because we're trying to make a point.

And so be prepared for questions is the other thing I'd say. So think about the issues that arise not just from the perspective of your client but from the other side's perspective as well and also from the third angle which is what the judge might make of it all and try and anticipate the kind of questions you might be asked.

And again, when we ask questions it's not because we're trying to be difficult or show that we're clever (that old chestnut), it really is because we want some assistance.

Do ever find that people sometimes, if they've come from an Employment Tribunal, which is relatively informal and whilst the EAT's hardly the most formal of courts, it is a development, there is a significant step up in terms of formality of process and approach I've seen, do you find some people may be caught a little on the hop if they know Employment Tribunals or they've done an Employment Tribunal for whatever reason, venturing into the EAT, that sometimes takes them by surprise? I've certainly had clients that commented on the difference and, as I say, the EAT is hardly the most formal of the courts that we deal with.

No, it's not the most formal of courts but I think there is a step difference between the Tribunal and the Employment Appeal Tribunal. That's not deliberate I think, it's just a historical quirk that's developed since the EAT began, perhaps due to the seniority of the judges that have manned the EAT.

One of the more obvious things is that you have stand up to make your submissions although we're very flexible about that if people prefer to sit down then of course that's up to them but there is a

degree of formality which isn't present in the Employment Tribunal and I have noticed as you said, some advocates who are there for the first time are taken somewhat by surprise by that.

How about solicitors in terms of solicitors who aren't appearing as advocates but are, you know, responsible for preparing cases or assist in the preparation of cases? Is there any words of wisdom or to put it another way is there something you're thinking "if I had a magic wand that I could ensure that the following never happens again, I would be gladly waiving the wand that way"?

Extraneous correspondence is the obvious answer there. I think just be conscious that the Employment Appeal Tribunal doesn't need to see every item of correspondence. We do come across firms who feel the need to copy the Tribunal into everything and that can be a bit cumbersome both for staff and the judges who have to read it.

I think the other thing I'd say is, bear in mind that although you as a solicitor have the full professional resources and backing to represent your client's interests, more often than not you'll be against a litigant in person. And although you've been against the litigant in person in the Employment Tribunal and the relationship may have soured, try to put that to one side and be as professional as possible. I think the worst thing you can do, whether as an advocate or as a solicitor in the EAT is to be disdainful or disrespectful of the litigant in person.

Of course we appreciate that sometimes relationships have become toxic or that some litigants in person behave unreasonably but that's no reason to put aside your own professionalism and I think it's very important to bear that in mind.

A person I worked for when I first joined as a junior lawyer brought home to me very early on, it's not your case, you're just representing someone else, so you don't put someone down because they've put you down. It's not in the interests of your clients – you represent your client, that's all you do.

Indeed, and when you're trying to persuade a judge of the merits of your case the last thing you want to do is to get their hackles up by being rude to the litigant in person.

Yes, OK, good. So, the EAT's been around for many years now and has got a good reputation. It's a long-established court. What do you see as the issues facing the EAT in 2019 that may bring around changes and what do you think those changes are going to be? It's a bit of a portmanteau question so we can take that in stages. What do you see as the pressures for change with the EAT in 2019? let's start there.

I suppose one big change has already happened in 2019, which is that we've moved premises and that might sound like a fairly mundane matter, routine matter but it has particular implications because of the nature of the change. The EAT has moved a couple of times before from, it used to be St James's Square, to Audit House then from Audit House to Fleetbank House and now from Fleetbank House to the Rolls Building. In the previous two moves we were going from one unique court building for the EAT to another.

Now in the Rolls we are one court within a building accommodating many other divisions: Chancery, Commercial, Technology and Construction, Upper Tribunal Administrative Appeals Chamber, Upper Tribunal Lands, Upper Tribunal Tax, so there are many divisions fighting for space within a relatively compact building and that creates its own set of pressures but also introduces a culture change I think for the EAT. We've had dedicated courtrooms, our own building and now we're having to share court rooms and I think there's a change of practice there which staff and judges will have to get used to.

No, I can see how that could be quite a character change. OK. And that move, remind me, when did that move take place?

That took place just two weeks ago.

Ah, excellent. Have you found the kettle and everything?

That's probably a good example, we haven't found the kettle yet.

So if anyone's seen the EAT kettle, please let ELA know and we'll earn some brownie points.

So what else? That's a change that has happened. What do you see as the other pressures for change that are likely to result in differences for the EAT?

I think the big one that's on the horizon is technology and the introduction of electronic filing, electronic case management, that's already being rolled out in some of the other divisions. I think Queen's Bench has already started the introduction of electronic case management and filing, and the idea is that people can upload files to an electronic filing system and that all parties who need to have access to that file can have access to it from any computer anywhere in the world.

Obviously that has a lot of advantages but it probably throws up its own sets of challenges and problems as well and I think we're in the pipeline to accommodate that change sometime in 2020, and there's a lot of work being done at the moment to prepare for that, which will involve a complete rethink of how papers are prepared, what they look like and how things get to and from clients how things get to from the court and to and from judges, so there's a lot of work to be done there but I think it'll be a change that will benefit all in the long term but in the short term no doubt it will cause quite a few headaches.

Absolutely and again it's very easy to forget if you're a lawyer this all seems like the most obvious thing to us that we write in - the example I always give to try to explain to lawyers how odd we look to clients sometimes is bundles. We have bundles of papers and we transport multiple copies of bundles of papers for hearings. And the clients are going "what are you doing?" And actually I think it has advantages. I prefer paper over electronic screen most days but the world has moved on and I can see why the desire to ensure that administration of justice keeps up is essential.

I suppose the idea is that eventually you can just take everything on your laptop or through any computer screen without having to carry back-breaking quantities of papers around.

Which is important. What happens though with, say, litigants in person who maybe - we assume that lawyers are technologically literate enough and I'm not sure we should make that assumption but let's assume that generally that that's not a problem. What about litigants in person? How would they be accommodated if - are we talking about something where they would still be, do you think, and this may still be to be decided - options for people to still do old-style filing or whatever and interaction with the courts if you're a litigant in person who may not have access or ready access to computers? Clearly this shouldn't be a bar to justice.

No, not at all. The idea is to make justice more accessible. There will be instances where as a result of lack of technological access we're just going to have to do things in the old-fashioned way for particular litigants. We would hope that that wouldn't happen very often. The rate at which technology has been taken up by society as a whole is so great that the likelihood is that most people would be comfortable with some screen-based access to their file rather than the old paper-based system that we have now and even currently the vast majority of communications with litigants is by email.

Yes, of course.

So, that means they have a computer. That means they have access to a screen and the idea is if everything works it's just a couple of extra steps to be able to access the electronic file containing your claim.

And so, and again this may still all be being sorted out, you mentioned 2020 for the introduction, is it likely, have you seen it being trialled or introduced in other courts? Are we likely as solicitors to get six months' notice and some sort of process explained to us so that we know what we should be trying to do to try and help the process along? What's the introduction or is that is that a level of detail that is yet to be...

No, I think you raise a good point there about making sure that external users know what's going on. It would be a shame if suddenly the courts were to turn around and say "right, from tomorrow it's all going to be electronic" and nobody outside knows what's going on.

I think the likelihood is that there will be a process of introduction over a period of time. It has already been rolled out, as I said, in Queen's Bench in some of the regions but it's a good point to make sure that there's training available for people who are using the system for the first time externally.

If it's anything like the Digital Case Management System in the criminal courts then once you access the site, the relevant website, there will be a training program available which takes you through the basics and I'd imagine that there would be something like that for the Electronic Filing System in the EAT.

And then potentially some sort of feedback or whatever. So, to the extent that the users are finding in the context of the Employment Tribunal system let's say or the EAT, any points that have become apparent can be fed into the system so that there's a process that the feedback can be then used to assist in the improvement of the system. Because I imagine that inevitably there will be some things that only become apparent when the system goes live.

Yes, I think that's inevitable. I was going to say almost inevitable. And part of the reason for that is that the technological experts who are designing the system and will be responsible for implementing it will, by and large, not be lawyers who may not know the real details involved in getting a case up ready for court so they have to work closely with people who advise them as to what the needs of the system are but it's only once the system is up and running that you really find out whether it's fit for purpose and I think the feedback process will be very important to ensure that it develops along the right lines, improvements are made where necessary and so on.

Understood. And one of the other changes I noticed in connection with the Employment Tribunal was delegating some of the judicial powers down to case officers so that tribunal judges weren't taking some of the quasi administrative decisions if I could put it that way. Is there any similar push in the EAT that some of the decisions would be effectively the equivalent of case officer? Again, is that something that's seen as an Employment Tribunal issue rather than something that would be a priority for the EAT?

Well we're quite lucky in that we already have a Registrar whose responsibilities do include taking certain decisions such as in relation to whether or not an appeal has been lodged in time and that is a big part of a Registrar's role. So, we don't have to decide those kind of matters in the first instance. Sizes of bundle or an extension of time to lodge certain documents - all those kinds of decisions are taken by the Registrar in the first instance.

If a litigant isn't happy with the decision then of course they have a right of appeal to a judge.

Whether or not we'd want to increase the scope of that sort of administrative decision making to the Registrar or to another caseworker is not something we've given any great thought to, probably because it's working quite well at the moment.

If it's working, don't fix it.

but it's something that certainly we'll keep under review.

What about other changes or other pressures for change? Is there anything else on the horizon and for these purposes let's say in the next couple of years?

Yes, well something that should be on the horizon perhaps is exiting Europe because...

You think that's going to happen in the next two years?

I make no comment about that but with a jurisdiction like employment where a very large proportion of the relevant law is derived from EU law, leaving Europe is likely to make a difference if not in the immediate short term but in the long term in working through how older Directives and case law relating to those Directives is to be applied in cases once we've left Europe and that will no doubt lead to a slew of cases in the Employment Tribunals that work their way up to the Employment Appeals Tribunal. I think that'd be quite an interesting area of law in due course.

I went into employment law in the early 80s when the Thatcher strike reforms were at the heart of political discourse, so it sort of felt like your subject was at the very heart of issues convulsing Britain. So employment law at the moment feels like it could be there again. Brexit and workers' rights and so on it's hardly the only issue but it is a core issue.

It is and one of the things that I enjoy so much about employment law is that it is so often at the heart of important social issues. In the last couple of years we've had the gig economy cases which have been very important and I think the EAT and Employment Tribunals have a very important role to play in shaping the kind of rights that workers and employers have in this new work environment that we're operating in. So, those are the kinds of changes that I foresee in the next couple of years

Fantastic. That's really interesting. Let's speculate, let's push the horizon out to say 2030 – a date chosen largely at random.

Now you're testing me.

But if you were speculating what do you think the EAT of the future might look like and let's choose a date far enough down the road that no one's going to ring us up at that date and say "but you said, we're going to have hovercraft." No. What do you think the EAT of the future might look like? What would be different about it or where would you see the direction of travel being, do you think? Or where would you like to see it?

Well I suppose my main hope is that it doesn't look very different from the way it does today.

Yes

The Employment Appeal Tribunal has, as you've mentioned, quite a long history, it's quite a prestigious Court Division. Its decisions have capacity to shape the direction of the law in a way that other divisions perhaps don't always do and I think it is important that it retains its separate identity

and status. It would be a real shame if there were moves to make the Employment Appeal Tribunal for example just another chamber of the Upper Tribunal, for example.

There are, I think, real differences between the kind of litigation which the Employment Appeal Tribunal deals with and those of the other chambers in the Upper Tribunal that would make such a merger unattractive and perhaps even in some senses unworkable, so I do very much hope that it would retain its identity looking that far into the future and retains its ability to provide helpful and well thought-out decisions on matters of real importance in the employment sphere.

Yes. Well in a sense it's part of a wider thing in terms of how employment tribunals and the EAT continue to function and if you think part of that function – I always think part of the function of the tribunal system the Employment Tribunal and I include the EAT, is to do with workers, workers' rights and whether you're an employer or an employee doesn't matter - it's a major part of any democratic society that workers' rights are adjudicated in a way that both sides of that particular equation accept is a just way of dealing with it.

Yes

and if you just treat them as any other commercial disputes you'd end up with the small claims court hearing discrimination claims in certain cases. And if you consider the emotional importance to people of being accused of being discriminatory the cash offer is a tiny fraction of what's really at issue there. I think it raises a whole host of different issues so I certainly completely agree with you that it has a separate character and very much hope that it retains that separate character.

Yes, and I think there's also recognition that it is quite a complex sometimes complex, difficult area of law in which to adjudicate and it is all the more necessary I think for there to be a specialist division dealing with those kinds of cases with judges with the appropriate expertise in employment law. Not necessarily exclusively - I think there are always benefits from having other strings to your judicial bow as it were but to have some expertise in employment law to deal with the very difficult issues that arise can only be helpful.

Yes, yes, quite, particularly given the preponderance of litigants in person who are coming through whether a) there are skill sets in dealing with them but also if they're feeling they're dealing with people who are less experienced than ideal whether that has a corrosive effect potentially.

Interesting

Indeed, you don't want a situation where it's the blind leading the blind. If there's a core level of expertise then as you say, litigants in person can have confidence that even though they're not represented by professional experts the judge might at least to some extent know what he or she is talking about.

Yes, fascinating. Well, I was going to ask one more question if I may. And I like when I'm doing interviews whether for the ELA podcast or for our own one just to ask for a recommendation perhaps or a favourite book or piece of music or a favourite film. Do you want to plump for a category? We can have all three if you like but if you prefer to give us a category, which category would you go for?

I'll probably go for film. I have to say this is quite a hard question. There's so many...

Finally my "Paxman" appears

so many different favourites in different genres but I think yes, I'll plump for film.

So a recommendation or a favourite thing and obviously why, so what are you going to select?

I'm going to be fairly uncontroversial and go for an old classic which is It's A Wonderful Life. Lots of reasons I like this film. I think if you go by the number of times viewed then that certainly is up there in my top five but I also think it's a wonderfully acted film. Sometimes people miss that aspect of it. James Stewart is one of my favourite actors; classic everyman role that he played in many of his films has probably not been repeated by any actor since his heyday in the 40s 50s so that's a really great aspect of the film - his performance and the other actors as well.

It's obviously, it's a bit schmaltzy the film in some respects it's a bit sentimental but there's nothing wrong with a bit of sentiment.

If you come out thinking that the world is a better place then I think that's a nice thing. Films that make you come out thinking "oh, it's all terribly depressing, then we die" - I struggle to make myself go to see those at the cinema or to watch those.

If you're looking for a happy ending that's probably got to be up there with one of the best and it's also a film which reminds me of a great childhood that I had

I was going to ask, where did you see it first? Do you remember seeing it for the first time?

I remember seeing it for the first time on television in Scotland during I think it was a regular Christmas showing along with Wizard of Oz and those kinds of films.

And that one didn't stick?

Well, The Wizard of Oz is probably up there as well.

Oh fine, fascinating insight, how interesting.

I can understand, it is a great film although I possibly prefer him in Philadelphia.

Another good one.

Lovely, well listen, Mr Justice Choudhury thank you very much indeed. That's been really, really interesting and it's lovely just to think about partly what the EAT means now and also what may be coming down the pike in the next couple of years but also maybe speculate about what it might look like in years to come so once again, thank you very much for your time.

Thank you very much for having me.

[Music]