



# Andrew MacPhail

**Year of Call:** 2007

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## Overview

Andrew is an employment law specialist of many years experience. He is recognised for his talents in both Legal 500 and Chambers & Partners.

Please scroll down to "Recommendations" or click on "Employment and Discrimination" below for further information.

## Recommendations

Andrew MacPhail has long been recommended as an Employment & Discrimination specialist by the Legal 500 UK Bar Directory, praising him as:

"Very good with clients." - **Legal 500, 2020 / Employment - South Eastern Circuit - Tier 1 barrister**

"Very good with clients." - **Legal 500, 2020 / Employment - Western Circuit - Tier 1 barrister**

"Andrew is a very user-friendly barrister" - **Legal 500, 2018/19 / Employment - Tier 1 barrister**

"Practical and professional; clients love him" - **Legal 500, 2017 / Employment - Tier 1 barrister**

"A pure employment expert" - **Legal 500, 2016 / Employment - Tier 1 barrister**

He has also been rated Band 4 for Employment Western (Bar) in **Chambers & Partners 2020 UK Bar Directory**.

The scope of his employment practice often focuses on complex multi-day discrimination and whistle-blowing hearings. He also has experience of TUPE and breach of contract work.

Strengths: "He is extremely detailed, and really analyses a case down to the finest details."

**In Chambers & Partners 2017 UK Bar Directory.** Andrew is rated 'Up and Coming barrister' and described as: "Andrew is esteemed for his experience in a diverse array of employment law disputes, ranging from whistle-blowing, discrimination and harassment, to equal pay, unfair dismissal and TUPE ". His strengths were detailed as : "His experience at tribunal covers a wide range of employment law areas. He is often instructed for complex multi-day discrimination and whistle-blowing hearings."

In **Chambers & Partners UK Bar Directory 2016**, Andrew was again rated as an Up and Coming barrister for Employment and described as counsel who "has represented both claimants and respondents in matters concerning issues as diverse as whistle-blowing, unfair dismissal, TUPE, equal pay, unlawful deductions and breach of contract. His strengths were described by clients as "He's m and reassuring, and has a confident approach. He always delivers and always gets good results." "He's sensible, gives the client confidence, and can boil down the information to its essential points."

In **Chambers & Partners K Bar Directory 2015**, Andrew was again rated as a top employment barrister and was described by clients as : "He is a thorough and systematic barrister. You always know when Andrew is instructed that he will devote his full care and attention to the case." "He's quite technical but very effective as an advocate, and always invested in his work."

## Academic qualifications

- MA Hons, Classics, University of Edinburgh
- Graduate Diploma in Law, College of Law
- Bar Vocational Course, College of Law

## Professional qualifications & appointments

- Graduate Diploma in Law, College of Law
- Bar Vocational Course, College of Law

## Professional bodies

- Employment Law Bar Association
- Employment Law Association

## Employment and discrimination

### Overview

Andrew is regularly instructed to appear at Employment Tribunal hearings. His experience at ET covers a wide range of employment law areas including whistle-blowing, discrimination (including sex, race, disability, pregnancy and age), failures to make reasonable adjustments, harassment, victimisation, equal pay, unfair dismissal, TUPE, unlawful deductions and breach of contract.

He is often instructed for complex multi-day discrimination and whistle-blowing hearings.

Andrew has also made many appearances at the Employment Appeal Tribunal. Issues dealt with on appeal include: NMW ("sleep-in" shifts), employee status and continuity of service, equal pay, effective date of termination, ACAS EC, limitation, duty to mitigate, et al.

As set out below Andrew has also achieved success at the Court of Appeal in *BMC Software Limited v Ms A Shaikh* [2019] EWCA Civ 267.

### Appellate work (Court of Appeal and Employment Appeal Tribunal)

Appearances at the Court of Appeal and the EAT include:

#### Equal Pay – Court of Appeal

Andrew successfully appeared in the Court of Appeal on behalf of Ms Shaikh, a senior female sales person (*BMC Software Limited v Ms A Shaikh* [2019] EWCA Civ 267).

The Court of Appeal upheld Ms Shaikh's cross-appeal against the judgment of the EAT, thereby reinstating the decision of the ET upholding her claim for equal claim (and the claims contingent on that, including unfair dismissal and wrongful dismissal). The Court of Appeal agreed that the EAT had been wrong to reach the view that the ET had failed to give adequate reasons for the decision in favour of Ms Shaikh on her equal pay claim.

The decision on adequacy of reasons rendered academic BMC's appeal as regards the previous manner of disposal adopted by the EAT. The Court of Appeal nevertheless took the opportunity to point out that an invitation to an ET to give further reasons is not an option available to the EAT at point of disposal; rather it is a tool which can be deployed only whilst the relevant appeal is ongoing.

The litigation is also notable in respect of the earlier decision of the EAT on the question of whether a breach of an equality clause can, in itself, give rise to a discriminatory constructive dismissal ([2017] IRLR 1074).

Andrew appeared on behalf of Ms Shaikh throughout the litigation, from the ET to the Court of Appeal.

### **National Minimum Wage ("sleep-in shifts")**

Litigation addressing whether "sleep-in" shifts are "work" for the purposes of the National Minimum Wage has been ongoing for a considerable period, with the matter currently due to be considered by the Supreme Court in 2020, the Court of Appeal's most recent decision on the matter in favour of the employers concerned (including Mencap) having been appealed by Unison.

Earlier in this litigation Andrew appeared in the EAT in an appeal conjoined with the Mencap matter. Andrew represented Mr Roberts, resisting the appeal of Focus Care against a judgment of the ET in favour of Mr Roberts (UKEAT/0143/16/DM). The appeal was successfully resisted, albeit due to the principle claim in Mr Robert's case being based on breach of contract rather than the National Minimum Wage.

Andrew appeared on another "sleep-in" NMW matter at the EAT on behalf of Ms Edwards, in the appeal of Abbeyfield Wessex Society against an ET judgment in Ms Edwards' favour in respect of the NMW (UKEAT/0445/16/BA). The matter was remitted to the ET, but stayed pending the wider ongoing litigation in the Court of Appeal on "sleep-in" shifts (now due to be heard by the Supreme Court).

### **Effective date of termination**

Andrew represented an employer at the EAT resisting an appeal by an employee against the decision of the ET that a letter purportedly giving notice of dismissal was effective. The result at the ET had been to render most of the employee's claims out of time.

The employee argued, amongst other things, that the alleged "conditional" nature of the letter rendered the letter rendered it ineffective as a notice of dismissal. Andrew was successful at the ET and the EAT; the EAT upheld the decision of the ET that the letter was effective, despite the employee's arguments as to its "conditional" nature, and dismissed the appeal.

### **Employee status and continuity of service**

In April 2017 Andrew appeared in the EAT, resisting an appeal against the decision of the ET in favour of C. At ET C had argued that his period of engagement with R was covered by an umbrella employment contract; in the alternative he contended that each and every assignment (of which there were 100s) was a contract of employment, and that he could rely on the continuity of service provisions of the ERA to demonstrate qualifying period.

The ET had upheld the latter argument and as such concluded that C was an employee with qualifying service. At the EAT the ex-employer was represented by an eminent employment QC. The EAT upheld the appeal. The matter was remitted to the same ET.

### **ACAS Early Conciliation**

Andrew has appeared at the EAT twice in respect of litigation concerning ACAS Early Conciliation:

*Science Warehouse Ltd v Mills* [2016] 1 ICR 252 was heard at the EAT in October 2015, with Andrew acting for Ms Mills.

Andrew successfully resisted the appeal. The resulting EAT decision represents one of the first EAT authorities in this area.

Andrew also appeared at the EAT in *De Mota v ADR Network & The Co-operative Group* UKEAT/0305/16/DA in which the EAT concluded in essence that it is not necessary for a claimant, who wishes to pursue two different employers, to complete two different ACAS EC Forms.

## **Employment tribunal appearances:**

Summaries of some of Andrew's appearances at ET are set out below:

### **Acting for Respondents:**

#### **Dismissal due to immigration status: successful defence of claim for unfair dismissal**

C was dismissed in circumstances where R believed that the company would be in breach of immigration law to continue to employ him (albeit that belief turned out to be incorrect). No appeal was offered. C claimed for unfair dismissal. Andrew represented R at ET. The ET dismissed the claim.

#### **Local government: successful defence against claims for EqA victimisation and ERA whistle-blowing**

Whilst employed C pursued a number of grievances about various matters, including alleged discrimination. In due course C resigned and subsequently pursued multiple claims for victimisation and whistle-blowing detriment, as well as unfair (constructive) dismissal. Andrew represented R at a multi-day hearing on liability. The ET dismissed the claims.

#### **Tourism company: claims for disability discrimination and unfair dismissal**

C was dismissed for redundancy and proceeded to pursue multiple claims for disability discrimination and unfair dismissal. R was represented by Andrew at ET. The ET found disability unproven and in any event dismissed the claims for reasonable adjustments and disability discrimination. The unfair dismissal was upheld on procedural grounds, albeit the award was limited to two week's pay under the "polkey" principle.

#### **Town council: successful defence against lengthy claim for constructive dismissal**

C worked for a local town council. C resigned relying on (as alleged breach of contract) numerous matters going back years. The ET hearing of the evidence ran over seven days, in two sittings. Andrew successfully defended the claim. It was dismissed in its entirety.

#### **National organisation: EqA harassment and constructive unfair dismissal**

C was a senior manager in a division of a large organisation. She resigned following what she alleged was unreasonable/discriminatory treatment going back some years. She alleged that there had been a campaign to force her out of the business. Andrew represented the Respondent in this matter. The ET upheld some claims for harassment. However Andrew successfully persuaded the ET to reject the claims for unfair constructive dismissal and failures to make reasonable adjustments; the ET also rejected C's core contention of a campaign to force her out.

### **Acting for Claimants:**

#### **NHS: successful discrimination claim against NHS Trust**

Whilst employed C pursued a number of grievances about various matters. R dismissed C purportedly on the basis of a breakdown of trust and confidence. In the circumstances, R chose not to comply with its usual disciplinary procedures. C brought claims for race discrimination and unfair dismissal. Andrew represented C at a multi-day hearing on liability. The ET upheld the claim for unfair dismissal, as well as the race discrimination claim relating to the manner of dismissal.

#### **NHS: successful unfair dismissal claim against NHS Trust**

C was dismissed by a NHS Trust: it was alleged that she had been working for another employer without adherence to the

additional employment policy, allegedly whilst in receipt of sick pay; it was alleged that she had, initially, failed to declare those earnings to the HMRC at the correct time.

C was represented by Andrew at the ET. The ET upheld her claims for wrongful dismissal and unfair dismissal. In respect of the latter, a 25% contributory fault reduction was made; no "polkey" reduction was made.

#### **Local government: successful unfair dismissal claim for social worker**

C was dismissed in circumstances where she had, R alleged, been responsible for acts of seriously negligent mis-judgment. C claimed that her dismissal was unfair. She also alleged that her dismissal (and other alleged acts) had been because of whistle-blowing. Andrew represented C at ET. The ET upheld the claim for unfair dismissal.

#### **Re-engagement order obtained: housing association**

C was dismissed, purportedly for redundancy. C claimed unfair dismissal. Shortly before the ET hearing, R conceded unfair dismissal. Andrew represented C at the ET hearing. Andrew pursued, and obtained, a re-engagement order.

#### **Employee status: founder solicitor**

C was founder of a firm of solicitors; she was subsequently bought out by a LLP and continued in a senior position. Post termination she brought a number of claims. A preliminary issue for the ET was employee status, in respect of which Andrew represented C. The ET found in favour of C, i.e. that she was an employee.

## **Conferences and seminars**

Andrew enjoys delivering training seminars. He is happy to explore potential options upon enquiry. Seminar topics delivered recently include:

- Equal pay
- National minimum wage
- General caselaw updates

## **Other experience**

Prior to joining 3PB Andrew gained invaluable experience working in the employment department of a major corporate firm. He has also undertaken a period of secondment in the legal department of a local authority.

Before retraining as a barrister Andrew spent nine years in the corporate world. This experience enables Andrew to appreciate employment disputes, and their context, on a very practical level.

## **Publications**

A cautionary tale for claimants with a "distorted perception" of events - Andrew MacPhail analyses Mr Brooks v Nottingham University Hospitals NHS Trust UKEAT/0246/18

[View Publication](#)

Equal pay – Constructive dismissal: Andrew MacPhail analyses BMC Software Limited v Ms A Shaikh [2019] EWCA Civ 267

[View Publication](#)

"National Minimum Wage: A better night's sleep": an analysis by Andrew MacPhail, who achieved a successful outcome for the claimant in Focus Care Agency v Mr B Roberts, EAT.

[View Publication](#)

