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Writing with half-a-dozen readers looking over your shoulder: judgment writing at first instance

Philip Rostant

Retired Employment Judge

Correspondence email: cecilphilip.rostant@gmail.com.

INTRODUCTION

I ought first to confess to a lurking imposter syndrome in writing this piece. The other authors in this series are all distinguished academics. I am a retired, and undistinguished, first instance judge. That is not to say that I have not got my toes damp in academic writing. I'm the co-author of four articles published in pukka academic outlets.[1] But the key to that statement is the word co-author. My partner, in life and in print, Tammy Hervey, is the real force behind those and, although I brought something of value to those articles, I would not even have started them had I been alone with my thoughts. I have, therefore, very little to say about the process of writing for academic publication (what little I have to say can be found at the end of this piece, if you want to cut to the chase). Anyone looking for an authoritative 'how to' guide would be better advised to read Barbara Prainsack's or the late Conor Gearty's pieces in this series.

But I have done quite a lot of writing in my life. As a result of my time as one of the Directors of Training at the Judicial College of England and Wales, I could certainly write a very helpful monograph on the art of the passive aggressive email and an equally expert, if shorter, piece on responding to questions from Members of Parliament.

But the form with which I am most familiar is judgment writing. I was an Employment Judge for more than 30 years. In that

1 Harriet Cameron, Brian Coleman, Tamara Hervey, Sabrina Rahman, Philip Rostant, 'Equality law obligations in higher education: reasonable adjustments under the Equality Act 2010 in assessment of students with unseen disabilities' 39(2) Legal Studies (2019) 204–229; Tamara Hervey and Philip Rostant, '"All about that bass"? Is non-ideal-weight discrimination unlawful in the UK?' 79 Modern Law Review (2016) 248–282; Tamara Hervey and Philip Rostant, 'After *Francovich*: state liability and British employment law' 25 Industrial Law Journal (1996) 259–285; and Tamara Hervey and Philip Rostant, *New Oxford Companion to Law*, contributions on strict scrutiny; positive discrimination; positive action; *acquis communautaire*; European Community law; European Treaties (Oxford University Press 2008).

time, because of the procedural rules governing the Employment Tribunals, almost all of my decisions (or the decisions of the three-person Tribunal which I had chaired) had to be supported by a fully reasoned written judgment. Those might be no more than two or three pages. But they might, and often did, vastly exceed the normal word limit for articles in this journal. Indeed, at least one of my judgments came close to the word count of the average law PhD.[2]

The Employment Tribunal is a specialist civil court in the UK, resolving disputes (in the main) between workers and employers. It has a very wide jurisdiction, covering everything from individual claims, based in contract, for a few days' unpaid wages, to huge multi-claimant class actions for equal pay, via complex claims of discrimination in the workplace. Claimants are often unrepresented and cases can take from a few hours to several weeks and even months. Some cases are heard by a judge alone, others by a three-member Tribunal, made up of two lay members and a judicial chair.

LEARNING ON THE JOB

Starting out, nobody told me how to write a judgment. In 1995, training for new judges in England and Wales was pretty rudimentary. I recall that the induction course for Employment Judges (or Chairmen of Industrial Tribunals, as we were then) did include a segment on judgment writing. I recall, indeed, that I was required to hand-write a brief judgment (laptops, what laptops?) and then have it marked by a terrifying senior Employment Judge who didn't say a word about style or structure but took issue with my analysis of the law. To this day I maintain that she was wrong, but that sense of grievance was all I took away from the lesson.

Happily, my sensible Regional Judge started me off with smaller, simpler cases. The retiring room, from which I entered the tribunal on my first case, had a mirror in it. I used it to check the straightness of my tie and the pallor of my brow. Oddly, the nerves really only truly subsided when I delivered judgment. First of all, I had made a decision in which I was confident. (I will return to that quality later.) Secondly, I'd seen it done, hundreds of times, well and badly, when appearing as an advocate. (In the UK, unlike in many other European countries, you start as a lawyer, and become a judge later in your career.) As an advocate, I knew what I hated and I knew what I liked in judgments. I tried my best to give an oral *ex tempore* reasoned judgment – later to be typed up by an audio typist and which I then corrected – which made sense and which sounded like me. That last

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2 The first instance decision in *Nicholls v Coventry City Council*, reported at appeal stage as *Coventry City Council v Nicholls* [2009] IRLR 245 (EAT).

point is important because trying to be somebody else is exhausting and unsustainable. You have to find ways to be authentic but effective.

In my early days as a judge, I also grasped what I think is the single most important rule about a judgment, written or otherwise. It has to make sense to the parties. Particularly when a judgment is given orally, before later appearing in print, the parties are its first and most important audience. I tried to write judgments which reflected the evidence and the submissions I'd heard and explained what part they had had to play in my final decision, and why. In other words, the judgment looked like I had been in the same room, seeing and hearing the same things, as the parties and witnesses. And if you say 'Well, of course,' allow me to say that there is no 'of course' about it. For a start, the appeal courts hate reading a full setting-out of all the evidence and, in any case, it is unbearably, and pointlessly, tedious to do. You have to be sensibly selective. I have been on the receiving end, as an advocate, of judgments which made me wonder whether the judge had actually been paying any attention at all. Part of the problem, of course, was that my view, as an advocate, of what was of central importance to a case might not necessarily have been shared by anyone else (apart, presumably, from my client).

THE NON-LAWYERS AT MY SHOULDER

It is trite now to describe a written judgment as a letter to the loser. I never believed that the losing party was the main target audience for a reasoned judgment. I had, metaphorically, both parties looking over my shoulder as I wrote, both asking, at every point, 'Why?' and, 'What do you mean by that?' Of course, the loser is keen to understand why their evidence or submissions (or both) have not resulted in victory. After all, they might want to appeal. But at the very least they want to feel that they have been listened to and are not the victim of mere caprice or arbitrariness. The studies on the importance of procedural justice bear that out.[3]

However, the winning party too has an interest in understanding the decision. Successful employers want to understand which parts of their processes have been regarded as robust, and why. They also want to know if there are any weaker areas that they can improve on. Indeed, it is part of the express remit of the Tribunal to improve employment relations, and judgments are a useful educative tool. Successful employees want to know not just that they have been vindicated but why. They want something they can show to everyone and say 'See?'. Witnesses,

3 For a very full discussion, see Camillia Kong, Jessica Jacobson and Penny Cooper, 'The humanising imperative for effective participation: human virtues and the limits of procedural justice' 21(3) International Journal of Law in Context (2025) 453–472.

who on the face of it have no particular stake in the outcome, want to know whether they have been believed and whether the appalling anxiety they have had to endure in the hearing has had some purpose. I was writing for all of them. That's three of the half dozen readers on my metaphorical shoulder accounted for.

When I started out, I assumed that my judgments needed to sound thoroughly lawyerly. I employed a register of language which I thought the parties would expect. I certainly assumed that departing from the vocabulary and syntax which was the common currency (and still is) of the judgments of the higher courts would mean that my judgments lacked credibility. And so I imagined the parties at my shoulder, but also any lawyers who would read it (I'm coming to them next), tutting at sentences ending with a preposition or at the absence of a regular use of litotes, not to mention pining for a plausible sprinkling of Latin.[4]

As I came to realise, this was just wrong. The average reading age of an adult in the UK is 11. As my confidence as a judge grew, I allowed (forced is nearer the mark) myself to write in a register that was accessible to the parties and witnesses in a case. That said, trying to explain some of the very difficult legal concepts involved in UK employment law in 'plain English' was an extremely challenging task. Anyone reading this who has had to wrestle with the concepts of indirect discrimination or the shifting burden of proof will, I hope, give a small sigh of sympathy at this point. Nevertheless, I felt it important to make the effort. Partly this was because many litigants in the Tribunal are not represented and have nobody else to do the explaining. But mainly this was because, represented or not, the parties were the people most invested and most entitled to a judgment that they could read without some form of Google translate for legalese. I found that examples were a key tool, as were similes which engaged with the lived experiences of the parties. (A sympathetic Employment Judge once tried to help a client of mine, struggling to explain her physical location relative to others at the time of a key incident, by starting, 'Imagine you are fielding at square leg …'. Well-meaning of course, but for my female client of Polish extraction, not likely to move matters along.)

I also came to realise that a tribunal hearing exacts an enormous emotional toll on parties and witnesses. Cases that turn on their facts, as most do at first instance, require a careful examination of the evidence. Very

4 The Civil Procedure (Amendment) Rules 1999 adopted a plain English approach to the procedural rules for civil proceedings, dropping many Latin terms, and the then Lord Chief Justice urged the judiciary and the legal professions to follow suit. In 2004, the *Law Society Gazette* was able to report on how pleased the Campaign for Plain English was with the progress made.

often that evidence will come from the oral testimony of the claimant and other witnesses, subjected to cross-examination. Their credibility is at stake and, indeed, may well be the subject of comment in the judgment. I tried very hard to acknowledge that in judgments. I avoided using language which was personal, belittling or went further than was needed to explain why evidence had been rejected. If, on the other hand, which happened rarely, I was forced into concluding that I had heard evidence which was *knowingly* untrue, I was direct. Phrases like 'incapable of belief' or 'obviously disingenuous' are just fancy ways of calling someone a liar and they smack of a judge lacking the courage of their convictions. The words 'untrue', 'dishonest' or 'lied' are better.

THE LAWYERS BREATHING DOWN MY NECK

As an advocate, win or lose, I would study decisions carefully so that I might learn. Thus, when I became a judge, I always imagined not just the lay parties and their witnesses reading over my shoulder, but also any lawyers involved (the fourth metaphorical shoulder-sitters). The lawyer for a losing party will often be asked: 'Can I appeal?' They have a duty to give the best advice they can. The lawyer for the winner will be asked whether an appeal is likely. The clearer the judgment, the easier their jobs are. The interests of justice are generally served by anything that makes the lives of embattled advocates easier! In any set of written reasons, as a sweeping generalisation, once you've got past the judgment, the win and lose, the findings of fact are what interests the parties and the analysis is what gets the attention of the lawyers. Lawyers know that the appellate courts are very unlikely to interfere with first instance fact-finding. But the setting-out of the relevant law, the resolution of disputes as to its meaning, and its application to the facts, is where any point of appeal may be found. The sort of language that helps to explain a judgment to a lay person may be inadequate, even inappropriate, to explain your reasoning to a lawyer.

And that, of course, also means to another judge. A higher judge. An appellate judge. Towards the end of my career, I had the privilege of teaching judges. When it came to judgment writing for Employment Judges, we would ship in a well-disposed judge from the Upper Tribunal and they would explain what was useful to them. They always started by complaining that our first instance judgments were too long. In truth, they may have been, but much of that was ascribable to pressure of time. It takes more time to write less and still say what you want to say. And nobody ever got appealed for writing a judgment that was too long. Nevertheless, when I could, I did try to pare down judgments. This was for two reasons. Excessive verbiage risks retaining material

that does not add to your reasoning and may even detract from it. Secondly, excessive length is a turn-off, in and of itself. Annoying the human beings that inhabit the appellate courts is poor tactics.

In the training, the kindly appellate judges would then always offer the reassuring advice: 'Don't worry about being appealed!' I never worried about being *appealed* but I did worry about being *overturned*. I think most first instance judges do, if for no more noble reason than personal pride. So, when I wrote I also had an appellate judge jostling with the others for space behind me. Unlike all the other folk I've so far mentioned, the appellate judge wasn't present at the hearing. That fact made me focus not just on getting the individual components of the judgment right but on ensuring that there was a logical flow, a structure that allowed an appellate court to understand what I thought the case was about, what law I thought applied and why, what relevant (key word) evidence I had heard and seen, why I had accepted some parts of it and not others, what my findings of fact were, how the law applied to the facts and, therefore, inexorably, what I had concluded and why. The first reaction I wanted from someone marking my homework in an upper court (shoulder-sitter five) was 'Oh yes, I see what you have done there.' Lord Justice Warby's mnemonic for a good structure is 'Parties Issues Facts Law Analysis Conclusion' – PIFLAC. When I came across this, I struggled to rid myself of the feeling that PIFLAC was really a proprietary brand of indigestion tablet, but I was also gratified that, instinctively, I had arrived at broadly the same approach as one of our keenest judicial minds. The successful appeals that don't make the reports are mainly those where the essence of the appellate court's decision is 'We can't follow the reasoning.' That's the sort of judgment from above that I really dreaded.

THE BROADER PUBLIC

Who else? By now you are beginning to suspect that my judgment writing was a task undertaken in a state of constant anxiety and self-doubt. Well, a bit of self-doubt is a good thing. Anyone who is convinced they are always right is an oxymoron of a personality. But, a judgment cannot look like it is riddled with indecision. Civil judges, at least at first instance, are paid to decide a dispute which the parties cannot resolve themselves. The process of arriving at a decision ought to be one full of questions. The final judgment, however, should look as if you have answered all those questions to your own satisfaction. Once I had written my conclusion, I always went back to ensure that there was nothing in the earlier parts of the judgment that did not support or, worse, contradicted that conclusion. If I did, I thought carefully about whether my

conclusion was still justified. If I was satisfied that it was, normally because I had thought about the matter at an earlier stage but had, in writing the judgment, failed to explain why it didn't sway the outcome, or was not relevant at all, I rewrote the offending passage or, if I could, simply removed it altogether. This is not evidence of arrogance or retrofitting. It is a very rare case where there is nothing at all to be said for one side or the other. We certainly taught judges that the search for 'truth' was fruitless. All that anyone can do is to say that their conclusion is the best available in the light of the case as presented in the hearing. This is not a nuance much recognised by the general public, or the press for that matter, but it is an important one to bear in mind.

Which brings me to the sixth and final metaphorical shoulder-sitter. The British judicial approach to the fourth estate is long established. Judges are discouraged from engaging directly with journalists and certainly from attempting to explain their decisions. We have a press office for that at a micro level and, at an institutional level, a Lady or Lord Chief Justice. We are supposed to speak through our judgments alone. The increased willingness of the national press to criticise the judgments of the higher courts has not tempted judges to counter-attack, although I could certainly sympathise with the private seething of a colleague whom I observed looking at a newspaper report of one of his decisions whilst muttering 'That's *not* what that means, I shall write to the editor!' (He didn't, of course.) However, the risk of being misreported is a real one. Since most people have no idea what is going on in their local courts and tribunals, generally, if they learn about a case at all, it is through the press. I worked in Sheffield. My decisions often involved big local employers and attracted local media interest. Avoiding expressing myself in terms which could be lifted, out of context, to form a sensational headline in quote marks was always on my mind. Thus, when the key process of editing began, I was alert to colourful language, emotive terms and any other evidence of an inappropriate descent from lofty detachment. The net result is that, quite contrary to my natural inclinations, my judgments, available in full on line after 2017, were often a slightly prosaic read and, I hoped, less easily cherry-picked for a juicy headline. Well, so be it. I wasn't there to add to the gaiety of the nations.

One final audience – of which I was unaware at the time and so did not take into account in my judgment in *Farrel v South Yorkshire Police Authority*[5] – is the lively online community of conspiracy theorists. I blame myself. I ought to have known that the case of a dismissed police

5 ET/2803805/10.

analyst who believed that the 9/11 and 7/7 terrorist attacks were false flag attacks might be keenly followed by others of the same persuasion. I certainly attracted the ire of a large number of adherents when I concluded that the belief that the Twin Towers and London mass killings were the work of the respective national governments was not one capable of being protected in law. Indeed, I called it absurd. Which was perhaps a mistake. I mean, it is absurd, but I might not have needed to go that far. The only lesson I learned from that is that you cannot write judgments hoping to avoid all offence to any possible reader.

WHAT *YOU* MIGHT THINK ABOUT

What has all of this got to do with me, the readers of this piece ask?

I think that probably some of the disciplines I imposed upon myself in writing judgments might help academic writers.

How do you get started? Don't write until you have read. Read lots of articles in your field. Pay attention to what you admire and what is a turn-off. Try to work out why it has that effect. Steal mercilessly from what lands with you, eschew what doesn't resonate. Once you have written a paragraph, read what you have written (out loud if you can). Ask yourself: does it sound like me? If not, try again.

Ask yourself: for whom am I writing? It seems obvious, but if you only expect your article to be read by subscribers to *The Journal of Manx Public Highways Law*, you need not be troubled by your use of what might otherwise be opaque technical references which are bread and butter to your three readers. If, however, you are hoping for a somewhat wider impact, you really must decide how wide your readership might be and bear that in mind. As soon as you are expecting to be read by others not as expert in your field as you are, you are going to have to exercise the precious gift of empathy. Try to put yourself in the shoes of your likely readers. Even better, get one of them to look at your article at an early draft stage. If you are writing for practitioners, try hard to ensure that you point to the practical effects of any analysis you are supplying. For a lawyer, 'What does it mean?' is really 'How can I use this to help my clients?'

Ask: is my chosen register really necessary? Academia appears to me one of the few remaining professional disciplines where the Campaign for Plain English has failed to establish many missionaries. There are audiences for academic writing who actually need to remind themselves of the meaning of 'epistemological' and 'positionality'. Try to remember that we exist.

Consider: do I have confidence in my conclusions? I know that there is a place for articles which pose more questions than provide answers, but I suspect that the most compelling articles lay out a research question, examine the

arguments and reach a conclusion. The articles to which I referred at the start all do that. Others may disagree with you, but it looks a bit odd if you are not sure you even agree with yourself. In that regard, think about whether your choice of language is so contingent that it doesn't really say anything at all: 'may', 'might' and 'seems to' are all suspect in this regard.

On the subject of disagreement, if you are critiquing the work of others, try to avoid being personal. Using the sort of code that academics use when they mean 'the man is an idiot' won't help if, although he is an idiot, he happens to know the code. Academic spats in print are undignified.

Is my statement about the law accurate? Any argument you might make based on a flawed or inadequate setting out of the legal principles at stake is unlikely to convince. It will almost certainly result in a discerning reader losing confidence in what follows.

Does my article have a logical narrative flow? Have I found a way of structuring the article that carries a reader along, each section seamlessly linking to the next and the whole article pointing to and supporting the conclusions?

Is my article guilty of repetition, excessive verbiage, pointless adverbs and adjectives? Although your writing style need not be colourless, it ought not to distract from the story you are telling. A tip. Control F for the words 'very' and 'clearly'. They almost always add nothing. On the other hand, do not be afraid to use illuminating metaphors (see what I did there?) and examples that help understanding.

Will this article be better if I can make it shorter?

Probably, yes.

Can I stop the press from misreporting my conclusions?

No.