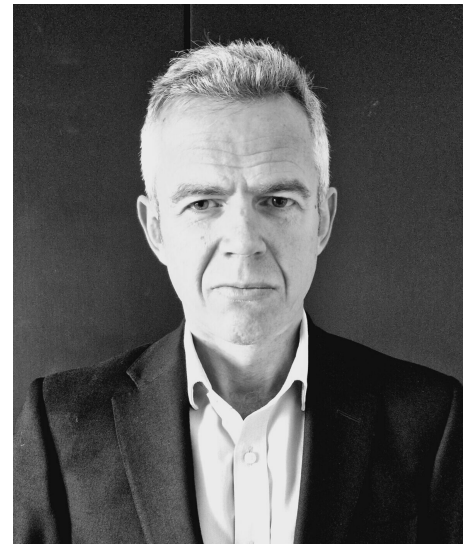


# Andrew MacPhail

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## Employment and discrimination

Andrew MacPhail 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 spanned a considerable period, with some parties pursuing the litigation to the Supreme Court.

Earlier in the litigation, Andrew appeared in the EAT representing 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)*.

### **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 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: Acting for Respondents:**

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

### **Whistleblowing detriment, dismissal and costs**

Andrew represented R in defending a claim pursued by C for whistleblowing detriment and unfair dismissal. All of the claims were dismissed following a 12-day final hearing in late 2021.

Andrew also represented R in its subsequent application for costs, for a significant sum. The costs litigation ran for several months, with C contesting the application vigorously.

At a costs hearing in September 2022, the ET gave judgment in R’s favour, concluding that C had acted unreasonably. The ET ordered that C pay 50% of R1’s costs, with a detailed costs assessment to be carried out by the County Court.

### **Direct race discrimination**

Andrew represented R in defending a claim presented by C for numerous alleged acts of direct race discrimination. The claims were principally directed at the failure to appoint him to various posts for which he had applied. The matter was heard at a 10-day final hearing in May 2022. The ET heard from 11 witnesses. The claims were dismissed in full.

#### **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.

#### **Employment tribunal appearances: 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.

## **Articles**

Andrew MacPhail considers the case of *Worcestershire Health and Care and NHS Trust v Ms Allen* [2024] EAT 40, which serves as a helpful reminder that the issue of causation in Equality Act harassment involves ascertaining the cause of the conduct in question rather than that of the wider context; and which also provides a useful analysis of what is required to satisfy the concept of “conduct extending over a period” for the purposes of limitation.

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Andrew MacPhail reviews the case of *Lovingangels Care Home Ltd v Mhindurwa* [2023] EAT 65, which highlights the need for employers to explore all options before proceeding to a decision to dismiss by reason of redundancy.

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3PB employment law specialist [Andrew MacPhail](#) considers the case *Cook v Gentoo Group Limited* [2023] EAT 12 where the EAT had to consider whether the ET had erred in dismissing a direct age discrimination claim.

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[Andrew MacPhail](#) looks at the case of *Ellis v Bacon and Advanced Fire Solutions Ltd* [2022], in which an appeal was allowed by the EAT against the original Employment Tribunal’s ruling that an employee was discriminated against due to her marital status.

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Andrew MacPhail analyses *Mr Parr v MSR Partners LLP* [2022] EWCA Civ 24, a case in which the Court of Appeal provides useful guidance for any practitioner seeking to advise on the issue of limitation within the context of a rule/policy -based decision.

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Andrew MacPhail analyses *Hovis Limited v Mr W Louton* EA-2020-000973-LA, and highlights the importance for parties in a case to always carefully consider if they are in a position to call witnesses who can give direct evidence on any disputed factual findings.

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Andrew MacPhail analyses the CoA’s decision in *Gwynedd Council v S Barratt & I Hughes* [2021] EWCA Civ 1322, which provides a reminder to employers to take particular care before declining to follow best practice on key matters such as consultation on redundancy and the provision of an appeal process, even if it considers that such steps would be futile.

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In this article, Andrew MacPhail analyses *Cox V Adecco & Others* UKEAT/0339/19 and the steps respondents should take to

limit the possible risks presented to them by unclear and confusing pleadings from litigants in person.

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*Mrs I Chalmers v Airpoint Ltd & Others UKEATS/0031/19/SS*

Andrew MacPhail analyses the case of Mrs I Chalmers v Airpoint Ltd & Others UKEATS/0031/19/SS.

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*University College London v Mr T Brown UKEAT/0084/19/VP*

Employment law specialist [Andrew MacPhail](#) reviews the case of University College London v Mr T Brown UKEAT/0084/19/VP.

The case is a reminder that, where the activities of trade union officers are concerned, employers should take particular care before interceding.

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How representatives should best prepare for an application to amend

Andrew MacPhail reviews Mrs G Vaughan Modality Partnership UKEAT/0147/20/BA and its implications on how representatives should prepare for an application to amend.

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Does the failure to place a redundant employee on an existing "bank" workers list render a dismissal unfair?

Andrew MacPhail analyses Aramark (UK) Limited v Mr Fernandes UKEATS/0028/19/SS (13th March 2020).

[View Article](#)

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 Article](#)

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

[View Article](#)

"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 Article](#)

## Recommendations

Andrew MacPhail has long been recommended as an Employment & Discrimination specialist by both Chambers UK and Legal 500 in their UK Bar Directories, praising him as:

Andrew MacPhail acts for private companies, public bodies and individuals in Employment Tribunal claims. "He is adept at handling a range of employment matters including unfair dismissal, discrimination and whistle-blowing detriment claims." Strengths: "His ability to think of technical arguments to cover off all eventualities and scenarios is particularly impressive, and his assistance with strategy is invaluable too."

### Chambers UK 2024/Employment/South Eastern Bar

Strengths: "Andrew provided excellent representation throughout." "He brought a hearing listed for many days to an abrupt and early end by demolishing the claimant with his cross-examination." "Andrew is fastidious in attention to detail. He is very

thorough and well prepared."

#### **Chambers UK 2024/Employment/Western Bar**

Andrew MacPhail's employment practice often focuses on complex multi-day discrimination and whistle-blowing hearings. He also has experience of TUPE and breach of contract work.

#### **Legal 500 2024/Employment/Leading Juniors/South Eastern Circuit – Tier 1**

'Andrew is a very strong and commanding advocate, able to put forward his arguments in a clear and concise manner even when addressing matters which have litigants in person. His knowledge of the law and how to get the best out of any situation is second to none.'

#### **Legal 500 2024/Employment/Leading Juniors/Western Circuit**

'An accomplished advocate with an incisive approach.'

#### **Legal 500 2024/Employment/Leading Juniors/London Bar**

Andrew MacPhail acts for private companies, public bodies and individuals in Employment Tribunal claims. He is adept at handling a range of employment matters including unfair dismissal, discrimination and whistle-blowing detriment claims. Strengths: "He gives incredible confidence to clients in his demeanour, and persistently pushes clients' agendas in hearings. He is fastidious, comprehensive and highly attentive to detail."

"We appreciate Andrew's ability to think of technical arguments to cover all eventualities and scenarios, giving clients a 360-degree view of the situation."

#### **Chambers UK 2023/Employment/Western Bar**

"Andrew MacPhail is an outstanding employment lawyer and a safe pair of hands on any matter."

Strengths: "His ability to review papers and to understand not only the legal issues in the case but also the commercial aspects and implications, in a very short time, has been astounding. Andrew has an eye for detail and nothing is lost on him. He has made himself available to assist us with ongoing work on the case as needed. His calm and confident manner has been of great reassurance to the client."

Recent work: Successfully defended Swalecliffe Pharmacy in a claim for age-related harassment concerning the alleged use of the phrase 'stropky child'.

#### **Chambers UK 2023/Employment/South Eastern Bar**

'He is fastidious, comprehensive and highly attentive to detail.'

#### **Legal 500 2023/Employment/Leading Juniors/Western Circuit**

'Andrew is extremely thorough, knowledgeable, and approaches cases with a holistic approach that benefits all clients. He is excellent with clients providing both honest and pragmatic advice. Andrew MacPhail handles all complex discrimination and whistle-blowing matters with 'a holistic approach that benefits all clients'.

#### **Legal 500 2023/Employment/Leading Juniors/South Eastern Circuit – Tier 1**

'Andrew is meticulous in his approach – no corner is left unturned. He is good at probing questions for the client to consider, so the case strategy is clear; and he is effective in his cross-examination of witnesses, drawing out concessions along the way.'

#### **Legal 500 2023/Employment/Leading Juniors/London Bar**

'Very calm and measured. Never gets flustered. He gets to the heart of a case very quickly.'

#### **Chambers UK 2022/Employment/Western Bar**

Strengths: "Andrew is very technical and really good on equal pay claims."

Recent work: Represented the respondent in *Miss J Shrubsole v Swalecliffe Pharmacy*, in which age-related harassment was alleged by the claimant.

#### **Chambers UK 2022/Employment/South Eastern Bar**

Strengths: "He is very calm but diligent. He goes the extra mile for clients and is a fearless advocate."

Recent work: Acted for the claimant in bringing various claims, including an equal pay claim, against BMC Software.

'Andrew is extremely thorough and knowledgeable, with a forensic eye for detail.'

#### **Legal 500 2022/Employment/Leading Junior/South Eastern Circuit**

'Calm, methodical and extremely approachable for lay clients in conference, and provides clear and practical advice to enable easier decision making for clients.'

#### **Legal 500 2022/Employment/Leading Junior/London Bar**

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

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

#### **Chambers UK 2021/Employment/Western Bar**

"He is practical and thorough, and the clients love him."

#### **Legal 500 2021/Employment/South Eastern Circuit**

"Very good with clients." "Andrew MacPhail represented the claimant in Court of Appeal case *BMC Software v Shaikh*, an equal pay claim"

#### **Legal 500 2021/Employment/Western Circuit**

'Andrew is a very strong and commanding advocate. He is able to put forward his arguments clearly and concisely, even when addressing matters. His knowledge of the law and how to get the best out of any situation is second to none.'

#### **Chambers UK 2020/Employment/Western Bar**

"Very good with clients."

#### **Legal 500 2020/Employment/South Eastern Circuit**

"Very good with clients."

#### **Legal 500 2020/Employment/Western Circuit**

""Andrew is a very user-friendly barrister"

#### **Legal 500 2018/19/Employment**

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."

#### **Chambers UK 2017/Employment**

"Practical and professional; clients love him"

#### **Legal 500 2017/Employment**

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."

#### **Chambers UK 2016/Employment**

"A pure employment expert"

#### **Legal 500 2016/Employment**

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."

#### **Chambers UK 2015/Employment**

## **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