**Address to Employment Lawyers:**

‘**The Art of Persuasion’**

**A. INTRODUCTION**

David Napley,  The Technique of Persuasion:-wrote in the preface *“this book is not presented as an elixir of advocacy which, taken in suitable doses, will turn the halting phrases of the inexperienced advocate to pure gold.”*  The same applies to this talk.

The importance of preparation and procedures.

One virtue of the tribunal process is that the requirement to draft a statement of issues forces you to rigorously analyse the relevant legal principles.  This applies with force in disability claims, whistle blowing, and indeed, discrimination generally.

Every case has two sides.

**B. PERSUASION IN NEGOTIATION: POINTS**

In practice, the main business of persuasion takes place in negotiations.  Most cases settle.

Negotiation typically involves a shakedown of the merits, with each side setting out their strong points.  You need to develop the ability to stand back from the case;  identify strengths and weaknesses;  and weigh them in the balance.

In negotiations,the key objective is getting to yes.

1. Be aware of personal weaknesses. In negotiation, you have to be willing to review and re-evaluate your position throughout.
2. Summarise negotiating positions as the process goes forward.  This serves to ensure that counsel understands the other side's position.  If you don't do this, the risk is created of misunderstanding, mistrust, or difficulties later in implementing an agreement.
3. Never underestimate your opposition-or tribunals for that matter.
4. Try to avoid irritating your opponent

5. Devote preparation time to quantum.

The *Vento* scales have recently been revised in GB, see Presidential Guidance, coming into force from 4th September 2017 (£8400/£25,200/£42,000).  See also a recent decision of Judge Buchanan, awarding £11.5k for injury to feelings (depression) in a case where multiple heads of discrimination complaint  were dismissed, leaving only one.  *McLaughlin v Hurst 83/15*

**C. PERSUASION IN TRIBUNALS: POINTS**

1. Keep in mind that their agenda probably does not coincide with your agenda. Your task is to present your client's case in its best light.   Theirs is to write a decision. You will not persuade if you miss salient points.  Moreover, if a tribunal perceives that you are assisting it with a difficult point, you will be more persuasive.
2. If you repeatedly appear before tribunals, the efficacy of your advocacy will be influenced by the reputation you have established by your conduct of advocacy in the past.
3. Employment judges handle many more cases than you do-they have read more submissions than you have-they have dealt with more obscure points of law than you have,  They have a superior knowledge which should be respected.

Remember the duty to assist the Court.  It can assist you to persuade.

1. Counsel knows more about the case than the tribunal.  The hope is that tribunals will allow some leeway to counsel when cross examination starts down a route which is not immediately obvious.  The corollary is that counsel should not waste time in pointless cross examination.  Wherever a tribunal indicates it has got the point, or is not assisted by the point, move on immediately.
2. There is a tendency for tribunals to lean in favour of a middle way-if there are two points, dismiss one, uphold the other:  such an outcome does not surprise.

**D. OTHER MISCELLANEOUS POINTS**

If a point is against your client, it calls for a degree of judgment on your part to convince him or her without undermining his or her confidence in you.

Timetable: have one agreed in advance, ready to present at the start of the hearing.  It will get you off to a good start.

Cross examination of witnesses - secure admissions:  they are a powerful tool for persuasion.

In dealing with witnesses, don't flog a dead horse.

If you are bombarded with questions from the panel-it doesn't bode well.

In dealing with the panel, speak quietly.

Keep calm.

Be patient.  Sometimes, you need to stick to your point.

Listen.

The red face test.

One strategy for persuasion-asking questions.  The advantage of the question technique is that it can offer an alternative to disagreement.  And if you deploy the technique at hearing, it has the virtue that it gives you thinking time.

**E.** ***Shamoon* An example to illustrate the importance of preparation.**

It is necessary to understand what tribunals are looking for in terms of evidence.  Overlook that, and you are unlikely to persuade, however eloquent you might be.  *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 offers an instructive illustration.

Evidence to support an inference of less favourable treatment:  statutory v evidential comparators.  (See speeches of Lord Scott and Lord Rodger-L Scott 109-10, 116: L Rodger 143.)

The tribunal can refer to actual evidence of treatment of a person whose case is dissimilar, but not wholly so.  Despite the differences, the tribunal may be able to use that evidence as a sound basis for inferring how the employer would have treated a male employee in the same circumstances as a female claimant.  But there is a drawback in selecting evidential comparators.  Lord Scott observed-

*109. The usefulness of the tool will, in any particular case, depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the victim. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference.”*

Other suitable evidential material- Lord Scott-

*116. [    ] in the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inference of discrimination. Discriminatory comments made by the alleged discriminator about the victim might, in some cases, suffice. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some cases suffice.”*

An awareness of these evidential considerations will serve to enhance the preparation of proofs, thereby improving your chances of persuasion.  You may wish to see witness statements while they are still in draft form.  A statutory questionnaire may also serve to enlarge the scope for drawing adverse inferences.

The integrity of counsel is an important feature promoting the chances of settlement.   It must never be compromised.

**Kevin Denvir BL.**

**11/10/17**