

## Tom Kirk

CALL: 2007

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### Overview

Tom's practice is divided between chambers' Employment & Discrimination, HR Professional Support, Investigations and Commercial teams. He is predominantly an employment law specialist with particular expertise in disability discrimination, frequently instructed by both Claimants and Respondents in difficult long-term sickness absence and reasonable adjustments claims, and disputes over worker status. He is ranked as a leading individual for employment law in the Legal 500, which describes him as *"an academically terrific opponent, whose advocacy is both measured and incisive"* (2020 edition), *"a gifted and rounded, intelligent advocate"* (2021), *"very bright, personable, committed to his clients"* (2022) and *"a methodical and skilled cross-examiner"* (2023).

Tom has extensive experience in dealing with politically sensitive employment disputes for his clients in the public, healthcare, educational and charitable sectors. Through his appointment to the Attorney General's A Panel, he is regularly instructed by government departments often in high profile cases or cases heard under the national security rules. Tom is frequently involved in NHS litigation across a wide range of claims, acting for and advising both British Medical Association (BMA) members and various NHS Trusts. He also regularly advises a range of large trade unions and union members on matters such as worker status, contractual disputes and equal pay.

#### Memberships

2020: Attorney General's Junior Counsel to the Crown, A Panel  
2016: Attorney General's Junior Counsel to the Crown, B Panel;  
2012: Attorney General's Junior Counsel to the Crown, Regional Panel.  
Volunteer advisor, Employment Law Appeal Advice Scheme ("ELAAS")  
Employment Law Bar Association  
Employment Lawyer's Association  
Discrimination Law Association

#### Regulatory information

Vat number: 939863953 [Bar Standards Board](#)

### Employment & Discrimination

Tom is frequently instructed to appear in multi-day trials and preliminary hearings. He has an extensive paperwork practice and has been acknowledged by clients for providing thorough yet concise advice and robust pleadings. He also advises employer clients on various non-contentious matters, including TUPE transfers and the review of disciplinary / grievance policies and contractual terms. Tom also appears in appeals before the Employment Appeals Tribunal and Court of Appeal and acts in restraint of trade cases in the High Court and in applications for interim relief before the Tribunal.

In addition to his work in the public-sector, Tom is equally at home representing commercial clients and has been praised for his ability to quickly find a solution to a dispute that embraces an employer's specific practical and business needs. His Respondent/Defendant clients have included major corporations such as GlaxoSmithKline, Sainsbury's, Homebase, Serco, Royal Mail, LHR Airports, DHL, Barclays, New Look & Selfridges.

Tom has an unstuffy and approachable manner with clients. Solicitors often

### Expertise

- Commercial Law
- Employment & Discrimination
- HR Professional Support
- Inquests & Public Inquiries
- Investigations

### Recommendations

"He is very experienced, knowing when to concede and when to push. He knows how to handle his opponent appropriately, which helps get the best for the client." Chambers & Partners 2024

"Tom is detailed and forensic. He has an excellent eye for detail and will fight to the last moment for his client." The Legal 500 2024

"An astute assessor of the strengths and weaknesses in his clients' cases. Also a pleasant opponent, who is a methodical and skilled cross-examiner." The Legal 500 2023

### Key contacts

#### Lee Jennings

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**Deputy Senior Clerk**

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mention how his conferencing skills make both Claimant and Respondent clients feel quickly at ease when faced with the potentially daunting prospect of litigation.

He has achieved several high value awards and settlements but is also quick to grasp the non-monetary aims pursued by Claimants such as negotiating re-engagement packages, releasing employees from restrictive covenants and agreeing full and fair references. Tom regularly acts for trade union members and has represented Unite, Unison, Equity and BMA members in Tribunal claims including those involving trade union related dismissals, non-payment of the National Minimum Wage, holiday pay, equal pay, and in disputes around worker status and contractual interpretation. He has a firm grounding in litigation involving NHS employment and regularly represents both NHS Trusts and members of the BMA.

Tom also has experience of advising and acting for clients in non-employment discrimination litigation in the civil courts, mainly in the provision of services. He is also Direct Access qualified and has a firm commitment to undertaking Pro-Bono Work, including by assisting in appeals before the EAT under the Employment Law Appeal Advice Scheme (ELAAS).

## Reported / Noteworthy Cases

### *Court of Appeal:*

- *Robinson v Department for Work and Pensions* [2020] IRLR 884 (Bean LJ) (on the test for causation in claims for discrimination arising from disability);
- *Dunn v Secretary of State for Justice* [2019] IRLR 298 (Underhill LJ); one of the recent leading cases on s.15 discrimination, confirming the test for causation is the same as under s.13. Also deals with when cases should be remitted to the ET rather than substituted.

### *Employment Appeal Tribunal:*

- *Leslie v DVSA* [2023]: upcoming appeal on whether injury to mental health attributable to the stress of litigation can be deemed an injury flowing from a disciplinary dismissal.
- *Hewston v Ofsted* [2023] EAT 109 (HHJ Auerbach): on the importance of setting out disciplinary guidance on what touch may be deemed gross misconduct in workplace (reported in the Telegraph and Times).
- *Seccombe v Reed in Partnership* [2021] UKEAT/0217/20: on the interrelationship between the tests for disability and knowledge under the Equality Act 2010;
- *Department for Work and Pensions v Robinson* [2019] UKEAT/0021/19 (EAT – Kerr J): on the application of the test for causation under section 15 of the Equality Act 2010 being more than simply but for and the burden of proof;
- *Aston v Martlet Group Ltd* [2019] ICR 1417 (HHJ Auerbach): on disability discrimination, victimisation and whether doctrine of judicial proceedings immunity compatible with EU law;
- *Davis-Bol v Brook Street and the Secretary of State for Justice* UKEAT/0681/18 (HHJ Auerbach): time limits for appeals and extensions of time (racial harassment claim);
- *Akhigbe v Berkeley Homes (Urban Renaissance) Limited* [2019] UKEAT/0005/18 (Kerr J): on whistleblowing, striking out and the meaning of detriment;
- *Blakely v Onsite Recruitment* [2018] UKEAT/0134/17/DA (Choudhury J): test case on worker status in the construction sector and intention to create legal relations;
- *Farrer v SOSJ* [2018] UKEAT/0286/17 (HHJ Richardson): test case on contractual status of civil service medical inefficiency payments and contractual interpretation
- *Pugh v RT Electrics Ltd* [2017] ICR D3 (Lady Wise): the application of res judicata / issue estoppel to determinations on time limits (disability discrimination claim)
- *Secretary of State for Justice v Dunn* [2017] UKEAT/0234 (Simler J): discrimination arising from disability, causation and the application of the burden of proof
- *Taylor v Governing Body of Potters Gate CE Primary School* [2015] UKEAT/0227/14 (HHJ Eady QC): on apparent bias and school governors (disability discrimination);
- *Bleasdale v Healthcare Locums Plc* [2014] UKEAT/0324/13 (HHJ Peter Clark): on whistleblowing, misconduct and the reason for dismissal (causation).

### *Employment Tribunal:*

*Howarth v Ministry of Defence* [2023]: novel test case determining whether the defence of illegality available where employee appointed in breach of the civil service nationality rules.

- *Djalo v Secretary of State for Justice* [2022]: acting for Respondent in this test case concerning allegedly indirectly discriminatory pay practices in the way government cleaning services are contracted out. Being appealed to EAT.
- *Nagle v East Kent Hospitals University NHS Foundation Trust* [2022]: acted for NHS trust Respondent in novel new claim for constructive dismissal alleging instruction to work from the office breached the COVID regulations then in force

and whether that instruction amounted to conduct which automatically terminated the contract of employment in the *Hogg v Dover College* [1990] ICR 39.

- *Hewston v OFSTED* [2021]: acted for Unison member in unfair dismissal claim concerning the application of a controversial alleged “no touch” national policy for those working in schools.
- *X v SOSJ* [2020]: acted for Respondent in whistleblowing claim involving a high-profile interview given to BBC by TU official about prison officer assaults and understaffing;
- *Kumrai v SOSJ and ors* [2019]: acted for Respondent in claims of race discrimination brought by serving Tribunal Judge involving senior members of judiciary (reported in the Times);
- *Slater and ors v Matthew Clark Bibendum* [2019]: acted for the Respondent in these claims brought by multiple senior directors for breach of contract, unfair dismissal & under TUPE, following the break-up of Conviviality plc, the UK’s largest drinks distribution business;
- *Gregory v DFT* [2019]: acted for Respondent in claims involving whether the new Sat Nav driving test, rolled out nationwide, is indirectly discriminatory on grounds of disability;
  
- *Dhami v Tesco Stores Ltd* [2017]: acted for Claimant in one of first cases since the landmark Unison Supreme Court judgment to consider unlawful tribunal fees as a reason for extending time in a disability discrimination case.

## HR Professional Support

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Tom frequently advises both public and private sector Human Resources clients on non-contentious employment issues, e.g. the reviewing and drafting of disciplinary, grievance and pay policies, advising on whether policies are indirectly discriminatory and TUPE.

He also has experience of acting as the independent legal adviser in internal disciplinary and appeal hearings and advising clients on how to conduct disciplinary and grievance investigations. Tom writes and delivers in-house training for HR clients, providing an updating service on a whole host of employment law topics and putting on mock tribunals.

## Investigations

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Tom has a firm understanding of what constitutes a full and fair investigation through his experience of dealing with employment cases which have examined investigatory processes. Tom has experience of conducting cases in the Employment Tribunal which have examined the sufficiency and scope of investigations into whistleblowing allegations and concerned grievances and disciplinary matters. He has acted as a legal adviser to county councillors sitting as personnel appeals committees and has provided advice to clients on how to improve the way in which their investigations are completed, on the interplay between disciplinary and grievance investigations and on the re-opening of investigations at an appeal stage. Tom has provided numerous seminar and in-house training sessions to solicitors and HR professionals, which have explained how to carry out disciplinary and grievance investigations properly and how to minimise litigation risk in doing so.

## Commercial

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Tom’s commercial practice intersects with his employment work and he often advises companies on their obligations under TUPE, how to draft employment contracts and on restraint of trade issues. He has acted for companies in a number of commercial disputes involving contracts for the sale of goods and has advised on the incorporation and construction of indemnity and warranty clauses within commercial contracts. Tom has been instructed in some high value Construction Adjudications. He was instructed as a junior in a Technology and Construction Court claim worth almost £1.5 million, involving complex legal arguments over the jurisdiction of adjudicators.

Recent cases include:

- *Hart & PK Maintenance v Ideal Response Group Ltd* [2018] EWHC 314 (TCC): claim for almost £1.5 million in unpaid construction adjudication awards arising out of contracts to convert the Olympic Village into residential accommodation;
- *Loopdynamic Ltd v Louis Young and Open Select Recruitment Ltd* (QBD) (Picken J): application for interim injunction by recruitment company to enforce restrictive covenants in recruitment consultant’s contract, involving ambit and reasonableness of non-solicitation clauses;
- *Z v G*: advising and drafting pleadings in commercial contract dispute over the supply of digital marketing services;

- X v Y: advising over the enforceability of various restrictive covenants for consultants working as international foreign exchange brokers.

## Professional Recommendations

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"I know that I am in safe hands when Tom is instructed on a matter."

### Chambers & Partners 2024

"Great counsel. He's very detailed in his advice and cares about his clients."

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"Very bright, personable, committed to his clients and level headed. An excellent barrister and safe pair of hands in any litigation."

### The Legal 500 2022

"A gifted and rounded, intelligent advocate - he invariably impresses for the quality of his written and oral advocacy, and he has a great courtroom presence."

### The Legal 500 2021

"an academically terrific opponent, whose advocacy is both measured and incisive"

### The Legal 500 2020