Strangers in this strange land

TRAINING By **Emma Bell**

Imagine you've just arrived in a country that you haven't visited before. This is not a pleasure trip, but one that you've been forced to make. You'd rather be at home, but there is something you must achieve while on this trip. In fact, your mental health, wealth and happiness are entirely dependent upon you making a success of the trip; at least that's how you see it. You've no idea how to speak the language in this strange land and will not have enough time to learn it. What you have to achieve is partly dependent on making yourself understood, as well as familiarising yourself quickly with your surroundings and how things are done here. You strongly feel that the ultimate success of your endeavour, however, is entirely within the hands of the natives.

The country is the unfamiliar terrain of a courtroom; the language is the procedural rules and the applicable law. While the natives are comfortable with the terrain and fluent in the local dialect, you feel isolated, outnumbered and overwhelmed.

Studies show that parties involved in litigation base the fairness of the outcome of a case on the treatment they receive during the hearing (Lund and Tyler 1988). Both defendants and plaintiffs rated the opportunity to 'tell their side of the story' during the hearing as more important than winning their case or minimising costs. Lawyers and their clients gave greater weight to the quality of treatment they received from the judge than to the actual monetary outcome of the case. The two crucial elements cited in the studies are known as 'voice' and 'treatment'. 'Voice' refers to the opportunity the individual party has to present his or her views, concerns and evidence, while 'treatment' relates to being dealt with even-handedly by the judge and with respect and dignity.

As a judge or member, how you interact with the parties or their representatives has the greatest bearing on whether litigants and appellants feel that justice has been done. That is a heavy burden – and a significant opportunity.

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Captive audience

In 1999, I was an employment law specialist and about to be made a partner of the law firm I was working with. At that time I won a contract to train 2,000 line managers employed by a global plc in employment law. The employment law training was to be delivered to a captive audience of 12 delegates at a time – that's a lot of sessions. We deployed every employment lawyer within the team to do the work, and it was an experience that changed the direction of my career.

The training focused on compliance – 'follow that performance management process and apply this disciplinary procedure and you'll avoid a huge employment tribunal award' was essentially the message.

I found the whole process utterly depressing. Our training omitted one vital aspect – to help the manager understand how to motivate and engage members of his or her team. We were giving each manager a stick, but no carrot. That's when I became deeply interested in the subjects of organisational behaviour, the psychology of motivation and how effective communication can transform relationships. I read in excess of 200 books on those topics within a year, did a coaching qualification and within 18 months began a 16-year journey in designing and delivering leadership development programmes on the psychology of leadership and motivation.

For the past 16 years, I've been able to combine my legal and leadership development careers, initially as an employment law partner and latterly as an employment judge. Our wonderfully supportive President of Employment Tribunals in Scotland enabled me to enjoy the luxury of two hugely rewarding careers. But ultimately, the constraints of judicial office and the surge in my coaching, writing and speaking career meant that, in December 2016, I walked away from my judicial office with both a heavy heart (I was leaving a job I loved) and a spring in my step because of the exciting opportunities that lay ahead.

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One of the factors in making the decision was whether I would be able to continue my work with the Judicial College in training judges from multiple jurisdictions on gaining insight into their own styles of communication when sitting, and how to adapt it. The great news for me was that I could. I am passionate about working with judges and members to understand the impact of their behaviour on the dynamics in a court or tribunal setting, and how they can engage and communicate with parties to ensure that the voice and treatment aspects of 'procedural justice' are delivered consistently. We are, after all, there to serve the users of the system, as well as the ends of justice. I believe that both outcomes are complementary.

Initial foray

My initial foray into the judicial training arena as a trainer was to design and deliver a full-day session for our own employment judges in Scotland. After its successful completion, I went on tour around all the Employment Tribunal offices in Scotland to train our members. Both constituencies described the sessions variously as 'critical to our role' and 'some of the most useful training we have ever received'. 'Great', I thought; they could see what I had felt every day when sitting in an Employment Tribunal and using the skills that have become part of my repertoire after 16 years of training and coaching leaders.

Observers from the Judicial College attended one of the sessions that I delivered to my employment law colleagues. As a consequence, I designed and delivered a 45-minute slot at the 'Judge as Communicator' pilot in May 2016. It seems that the feedback from that session supported much more focus on this topic. With the support of the Judicial College directors and some of the judicial training leads, we produced content for the January 2017 session covering unconscious bias, key influencing skills, relationship dynamics, conflict resolution and impactful communication skills – with role-play to boot – though, obviously, we didn't call it that!

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In our courts and tribunals, the focus for each judge and member is that of dispensing justice. We know from the studies referred to above that justice is a subjective concept for our users; for them to feel that justice has been done, they need to feel that they have had the opportunity to tell their story, that the judge has listened and that they have been treated with dignity and respect. Whereas litigants and appellants focus on procedural justice, the judicial role is, arguably, focused on delivering substantive justice. Of course, it's necessary to do both.

The tricky thing about having human judges and members is that you are subject to the cognitive biases that plague all human beings. As Lord Neuberger put it:

'The big problem, as it is everywhere, is with unconscious bias. I dare say that we all suffer from a degree

of unconscious bias, and it can occur in all sorts of manifestations. It is almost by definition an unknown unknown, and therefore extraordinarily difficult to get rid of, or even allow for.'

Given the importance of procedural justice, judges and members do require to allow for cognitive biases. My view is that we cannot 'get rid' of them, but that awareness of them is hugely helpful in encouraging the use of strategies that militate against their potentially negative impact on judicial behaviour and approach.

My own session on the 'Judge as Communicator' course begins with a discussion of the most relevant cognitive biases, and, perhaps more importantly, delegates have the opportunity to identify the risks and mitigation strategies with colleagues from various jurisdictions.

The session then moves on to look at the dynamics that operate within a court or tribunal environment. It's illuminating to break down what happens in an interaction, and how misunderstanding and even conflict, can occur. What's more important, however, is to discuss the practical things that judges and members can do to prevent or diffuse conflict or challenging dynamics when they arise. The layout of our courts and tribunals reinforces the role of the judge or member as ultimate decision-maker and holder of order, and that can unconsciously drive particular behaviour in litigants and the individual judge or member that undermines the aims of delivering procedural justice.

During the session, we work on the key communication techniques that enable us to deliver on the 'voice' and 'treatment' aspects of procedural justice, but that also allow the judge or member to keep matters moving and maintain focus on what is relevant to the issue being adjudicated. Some of the techniques that we talk about are well used by delegates, but others are entirely new. By discussing all of the approaches available in communication, delegates are able to broaden their 'conscious' repertoire and to reach for what might have most impact in that moment of difficulty rather than reacting instinctively (and usually unhelpfully, as we discuss during this session).

These 'resilience factors' are intended to operate as techniques that can be deployed readily when the going gets a little tough. Each delegate is encouraged to choose one factor to ritualise so that it becomes habitual.

Role-play

Finally, I admit, we do 'role-play'. But, before you recoil in horror, the feedback from delegates has been that it is hugely helpful to practise the influencing and communication skills in a 'safe' environment to find what works best and feels most comfortable. When the gifted actors create realistic scenarios during day two, it's possible for each delegate to 'diagnose' the dynamics that play out in a courtroom, and identify the approach of the judge that would best diffuse the mounting conflict and shift the interaction to a more constructive dynamic.

The final session of day one focuses on six practical things that judges and members can do to maintain resilience in the face of challenging behaviour and work pressure. These 'resilience factors' are intended to operate as techniques that can be deployed readily when the going gets a little tough. Each delegate is encouraged to choose one factor to ritualise so that it becomes habitual.

For my part, I'm grateful for the opportunity to maintain my links with the judiciary, and I thoroughly enjoy the high levels of engagement and interaction during these sessions. My aim is to support judges and members to enable the users of the system to feel more empowered in advocating their case, and gain a greater sense that procedural justice has been done. I'm sure that's an aim we all share. After all, if we can assist visitors to our strange land to navigate the territory and understand the language, they will be more likely to leave us feeling that justice has been done, whatever the substantive outcome.

Emma Bell is a personal development coach and former employment judge Back to contents