



# NICHOLAS SMITH

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Nicholas Smith is a specialist **Employment & Discrimination** barrister, and has been Band 1 ranked in both Chambers & Partners and the Legal 500 directories since the late 1990's.

In 2018 he stood down as Employment & Discrimination team leader having overseen considerable success and growth of his team at Guildhall Chambers (following a team move in 2012).

He has a genuine passion for employment law, since undertaking his first Employment Tribunal in the spring of 1991. Though his practice is predominantly respondent focussed, Nick enjoys acting for the individual particularly where there is a significant imbalance of power and resource.

Given his vast experience he is genuinely a 'go-to' advocate for complex or high value cases. Nick can also undertake Direct Access work across the spectrum of cases from a high level and critical review of proposed settlement agreements to conducting complex cases. In most cases Nick will be able to sign off legal adviser certificates within the traditional fee boundaries provided by the employer for such work.

Nick acts for a wide range of clients across the complete spectrum of employment. This is reflected in the body of his work spanning three decades.

He also undertakes High Court litigation in respect of breach of employee's express and implied obligations, and appellate work in both the Employment Appeal Tribunal and the higher courts.

Nick has been awarded a place in the *Best Lawyers in the United Kingdom* (2021). *Best Lawyers* is the oldest and most respected peer review publication in the legal profession. This is a recognition that he is widely regarded by both clients and legal professionals. The list is compiled by conducting exhaustive peer review surveys in which tens of thousands of leading lawyers confidentially evaluate their professional peers.

## Expertise

### Employment & Discrimination

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Nick acts for a wide range of clients from multi-nationals, banks, health boards/trusts and SME's to representing the individual. He advises and represents his client across the spectrum of employment law including:

- Unfair and wrongful dismissal
- Whistleblowing
- Discrimination in all its forms
- Redundancy and reorganization
- TUPE and employers insolvency
- Contractual disputes
- Covenants, breach of confidence, breach of fiduciary duty, database abuse
- Collective bargaining and consultation
- Industrial disputes
- Territorial jurisdiction

### **WHISTLEBLOWING**

He is currently instructed in a number of very high worth / high profile whistleblowing cases in the public sector. Nick's has developed a reputation as the 'go to' advocate for defending claims in the NHS, where contested hearings are often lengthy, complex and of major significance /value. Nick has had significant recent success in a high publicity detriment and dismissal action against the police.

### **INSOLVENCY RELATED TUPE**

Nick has a particular specialisation in TUPE related insolvency matters including automatic unfair dismissal arising from administrations including pre packs, and liabilities arising from collective failure to consult.

### **CONSTRUCTIVE DISMISSAL**

He has evolved a particular interest in constructive unfair dismissal and has a number of notable appellate authorities to his name.

### **CIVIL ACTIONS FOR BREACH OF EXPRESS COVENANT / IMPLIED CONDITIONS AND DATABASE ABUSE**

Increasingly employers are prepared to fight to protect their intellectual property and prevent the abuse confidence in the misuse of crucially important data. Nick is heavily involved in representing and advising individuals and more commonly employers with regards to contested injunctive / trial proceedings involving breaches of express covenants; breaches of the duty of confidence; database 'theft' and breaches of fiduciary duty in both the County Court and the High Court.

### **APPEALS**

Nick has seen a significant growth in Appellate work both in the EAT and the Court of Appeal from a range of clients across a spectrum of issues who recognise that they need not use London counsel for this work. He has evolved a reputation as the "go to" lawyer for fighting and winning, high profile complex or 'must win' cases at first instance or on appeal.

### **LECTURING**

He is very active in the Employment Lawyers Association and is currently engaged in delivering a programme of evening seminars across England and Wales. He has given high level training for ELA delegates for many years. As with all members of the team, Nick is happy to discuss providing bespoke in house training for clients and local law societies and has been interviewed in the media with regard to employment law issues. Nick was guest speaker at the R3 Regional training event in 2012 regarding the

employment law implications of administration and failure to consult and he was guest speaker for the ICAEW in October 2013.

## **WRITING**

Nick has had articles published in the ELA Bulletin and in the Jordan Employment Law Portal on a range of topics from Pre action non party disclosure to the 'shares for employment rights' debate.

## Featured Employment & Discrimination cases

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### **Succession Group Ltd v Mr M Beckwith: UKEAT/0238/17/JOJ March 2018**

This appeal to the EAT was a key part of extensive tribunal litigation involving the co- owners of a financial services business that was acquired by the Succession group (for whom Nick acted). The claimants sought a declaration that they had been unfairly dismissed because this would they contended reverse their 'bad leaver', thereby entitling them to full value of their shareholding. Due to a significant delay in dealing with an interlocutory application to seek redactions from witness evidence, the REJ hurriedly dealt with the application on the last working day before the start of the trial. Significantly an adjournment of the trial was granted on day 1 of the hearing to permit the Respondent to appeal the case management decision. The EAT (Mrs Justice Slade) found for the appellant, concluding that the ET's conduct of the application to rule out certain elements of the evidence on the grounds that they were inadmissible was procedurally and substantively unfair. Instructed by Foot Anstey (Exeter).

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### **Rand v Atomic Weapons Establishment EAT**

Nick successfully defended a Rule 3(10) hearing in which the Appellant sought to challenge a decision made by Reading ET to dismiss his claims following a submission of no case to answer made due to the non-attendance of the claimant. Instructed by the Engineering and Electrical Federation (EEF).

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### **Conteh v First Security Guard (Ltd) UKEAT0178/17/LA**

Successfully resisted very complex appeal in respect of the correct approach to applications to amend claims. Instructed by BPE.

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### **JV Strong v Hamill [2001] LTL 20/01/01 EAT**

Clear guidance regarding bullying at work and how the tribunal should consider the on-going effects. In this case a vulnerable employee was bullied at one location. He was relocated to a new site but his old foreman informed the employee's new colleagues of his past. Successfully resisted appeal.

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### **Tolson v Governors of Mixenden School [2003] IRLR 843**

This significant appeal helped to define the correct test to be applied in constructive dismissal cases. The EAT held that the conduct of employee was wholly irrelevant when considering whether the employer's conduct amounted to a cumulative breach. Appeal successful.

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#### **M&L Sheet Metals Ltd v S Willis [2010] LTL 06/04/10 EAT**

Bullying on grounds of sexual orientation. Successfully resisted appeal.

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#### **Whitehouse v North Bristol NHS Trust [2006] UKEAT/0133/06**

Secured a landmark victory in the EAT on behalf of a Senior House Officer. Nick was instructed by the Junior Doctors Committee of the BMA. The issue revolved around the construction of complex pay formulae governing pay protection for junior doctors depending on whether their assigned duties were Working Time Directive compliant. The EAT accepted the Appellant's case as to the correct interpretation of doctors' pay under the pay protection escalator scheme. This successful appeal has continuing nationwide implications for a significant proportion of NHS trusts. Nick is now recognised as a leading expert on doctors' pay disputes.

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#### **Welsh National Opera Co Ltd v Johnston [2012] EWCA 1046**

Represented the former Principal Oboe player at the WNO on appeal both before the EAT and the Court of Appeal. This high profile case was widely reported in the national press. The matter hinged on the correct interpretation of a collective agreement between the WNO and the Musicians Union. Nick succeeded on appeal in persuading the EAT that the decision below as to the correct construction of a collective agreement was fundamentally flawed. The employer's appeal was dismissed by the Court of Appeal. The matter was remitted to the ET for a remedies hearing and Nick then secured the Claimant a maximum award.

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#### **Sharma v Cleveland Cables Limited EAT 17/05/19 (Lavender J)**

Nick successfully resisted an important appeal brought a former Nepali employee contending that the ET in Ashford erred in striking out his claim for unfair dismissal whistleblowing detriment, victimisation on the grounds of race at a preliminary hearing. The case entailed a detailed review of the case law. This case represents a very rare example where it was possible to lawfully strike out a claim at an interlocutory stage even where race and whistleblowing were core elements of the claim.

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#### **Hill and others v Celsa UK - Cardiff ET 2014**

Nick acted for international steel conglomerate in an action brought by a group of employees who were dismissed as the employer was unable to single out precisely which members of the group had been guilty

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of an alleged £ multi-million conspiracy to defraud the company in its significant scrap steel operation. Highly unusual SOSR case. Instructed by EEF.

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### **Jefferies v Governors of St Marys Catholic School - Cardi ET 2014/2015**

A multi-week case in which Nick acted for the Claimant in an unfair dismissal claim shrouded in tragedy. Head teacher Mr Jefferies was dismissed after failing to recognise a potential safeguarding issue relating to a Muslim pupil and alert social services. The child was subsequently murdered by his own mother and she was sentenced to life imprisonment. A subsequent multi-agency 360 degree review concluded that there had been several matters that had come to the attention of Mr Jefferies that should have alerted him to the need to contact the authorities and he was summarily dismissed. Instructed by MLM Cartwright.

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### **Arriva Trains Wales v Conant [2011] UKEAT/0043/11/LA**

This case was listed for 3 days in November 2011 as one of three conjoined appeals dealing with the perennially difficult issue of determining whether an ET has substituted its view of the fairness of an employer's decision to dismiss. The President of the EAT clearly wanted to review the historic case law on the issue of substitution and listed the matters together. The EAT upheld the decision of the (lay) majority of the tribunal that the dismissal was outside the range of reasonable responses. Appeal successfully resisted.

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### **Powys Local Health Board v Agar and Hughes [2013] UKEAT**

Successful rule 3(10) hearing before HHJ Richardson on behalf of LHB, in which it was argued that the ET had substituted its view of the matter for that of the employer.

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### **Buzoli v Food Group [2013] UKEAT/0317/12/KN**

Successfully resisted an appeal on behalf of an employer in which it was alleged that failures to follow the disciplinary procedure / statutory code of conduct vitiated the fairness of the dismissal.

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### **Ferguson v ABMU Local Health Board [2013] UKEAT/0044/13**

Secured a stay of a 10 day hearing of a trial in which it was alleged that a LHB had subjected a GP who had 'blown the whistle' over allegedly homicidal activity of one her colleagues to a detriment. Appeal against a refusal by the ET to strike out the case where there was a contention that the LHB was under a duty to intervene in a partnership dispute involving the GP's colleagues. Key guidance from the President of the EAT in relation to strike out applications and the nature of omissions under S 47B ERA 1996.

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### **Mr M Baillon v Gwent Police: UKEAT/0354/14/BA**

This appeal was the penultimate act in a very long running and very high profile case involving a landmark victory for a former policeman (for whom Nick acted) constructively dismissed by Gwent Constabulary for Whistleblowing. This appeal before HHJ Shanks was to deal with the ET's findings on compensation and costs together with a cross appeal. The respondent cross appeal as to the pensions loss figure (£500k plus) was misconceived as elements had been agreed at trial. Instructed by Ashfords (Bristol).

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### **Gordon v Rockwell Automation Ltd - Bristol ET 2016**

Nick acted for the respondent in a 2-week long case involving significant whistleblowing allegations relating to North Sea operations. £20k cost award made against Claimant. Instructed by EEF.

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### **Westlake and others v University of Bath - Bristol ET 2018**

Nick conducted a very interesting case for the University brought by PhD students questioning whether their title as volunteers was a lawful reflection of their status in the context of claims for National Minimum Wage. Instructed by Veale Wasbrough Vizards (VWV).

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### **Meeson v Stadco Ltd - Birmingham ET 2018**

Nick was instructed to act for the Respondent in a multifaceted case in which a dismissed former senior automotive engineer alleged that he had been the victim of disability discrimination because he suffered from Asperger's Syndrome. Case had a complex interlocutory history with the Claimant's case having been dismissed for breach of an unless order and subsequently reinstated. Multiday trial with huge amount of data relating to his condition, disability not admitted. Instructed by EEF.

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### **Sharples v Retirement Security Ltd**

Birmingham ET 2018. Nick acted for the employer in an a very rare application for interim relief following the dismissal of a chief executive. Instructed by VWV.

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### **GMB & Unite v Shepleys, Interserve and others - Manchester ET 2019**

Nick Instructed to act for transferee in significant/ high value Tupe failure to inform and consult case arising from service provision change regarding the awarding of contract for the decommissioning of Sellafield Nuclear Power Station. Instructing solicitors: BPE.

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### **B v L Cardiff ET [2011]**

Case involving the fallout from the pre packed administration of a company manufacturing a very well known drinking cup for toddlers. Nick acted for newco.

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### **Hashman v Milton Park Southampton ET [2011]**

Represented the Respondent in a preliminary hearing to determine whether a hunt saboteur had a 'philosophical' belief for the purposes of the Religious and Philosophical Belief Regulations 2006. The decision remains the only authority on point.

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### **FVG Birmingham ET [2012]**

Nick successfully argued that a college could receive the protection of a Restricted Reporting Order on a permanent basis under Rule 50 of the 2004 Employment Tribunal rules of procedure. The long established effect of the rule had been to provide anonymity solely for the duration of the proceedings. The Tribunal held that Rule 10 (the power for an Employment Judge to make such orders as he thinks fit) could properly be construed to give effect to Article 8 ECHR so as to protect an individual's right to privacy. The respondent was a college specialising in the care and education of severely mentally or physically disabled students. It had developed a policy dealing with sexual health and wellbeing whereby disabled students were able to be provided with assistance by volunteer employees so as to facilitate sexual gratification. By applying Article 8 to the circumstances of the case, the tribunal was able to preserve the identity of the students, staff, and college and the Claimant (although the Claimant strongly objected to the making of the order on the grounds that she wanted a public enquiry into the college and its policy). The decision in this case and subsequent submissions made by those engaged in the review of the ET rules have been an underlying factor in the creation of permanent restrictive reporting order in the July 2013 ET rules.

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### **Clarke v ABMU Cardiff ET [2012]**

Nick successfully represented a Local Health Board in this complex and protracted whistleblowing claim in which it was alleged that a bank nurse had suffered a detriment as a consequence of an alleged disclosure regarding a terminally ill patient. Following a highly detailed cross examination, The ET held C did not make a qualifying disclosure on the grounds of reasonable belief and that LHB's removal of C from the approved list of bank nursing staff had no causal connection with her alleged disclosure. C made a series of very serious allegations about a particular treating Dr which were found to have no reasonable basis. Cost application pending.

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### **Davies v DWP Liverpool ET [2013]**

This high profile case involved allegations of racial harassment on the grounds of association under S 13 EqA; victimisation and constructive dismissal. Nick was able to demonstrate that senior civil servants had

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failed to respond reasonably to her grievances following the discovery of appalling racist notes in her desk. An award of aggravated damages of £10,000 (in addition to £53,000 for loss of earnings, PI damages and injury feelings which was the highest award made for aggravated damages in the country in 2012). Nick also secured costs for his client.

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### **Baillon v Gwent Police Cardiff ET [2013]**

Nick secured a landmark victory for a police officer who resigned his office as a consequence of calculated acts of bullying and retaliation ACPO ranked officers and their subordinates. The claimant was removed from his much loved role as a traffic officer as a 'punishment' for having the audacity to complain to senior officers about his treatment after an infamous incident involving a car chase and subsequent arrest of a pensioner. The remedies hearing is part heard with a very significant schedule of loss.

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## **Regulatory & Discipline**

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Nick has acted for a wide variety of individuals who have sought to avoid internal disciplinary sanction or consequential regulatory sanction from a FA referee seeking to contest a five-year ban, to a medical student seeking an injunction to restrain her exclusion from medical school, to a Consultant liver transplant specialist contesting an application by the GMC to extend interim suspension before the High Court.

The nature of Nick's employment/disciplinary practice, dovetailed with his significant successes in the field of Whistleblowing has led to increased volumes of instructions in this aspect of law.

### **Featured Regulatory & Discipline cases**

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#### **GMC v Dr Aditya Agrawal [2014] EWHC 1669 Admin**

Nick acted in a landmark High Court case in which the GMC sought a third extension of time in which to decide to bring disciplinary proceedings against a specialist liver surgeon following his suspension. Dr Agrawal had been subject to an interim order since 1st May 2012 when conditions were imposed on his registration. Those conditions remained in place, save for a variation on 25th March 2013, and had been the subject of two further applications for an extension of the order to the Administrative Court. The General Medical Council (GMC) made an application to S 41A(6) of the Medical Act 1983 for a further extension of the order of conditions which was considered by HHJ Raynor on 29th April 2014. In applying the criteria set out in the case of Hiew, the Court concluded on the untested facts it could determine the weight of the case he faced. The Court's assessment of the merits was a fundamental component in determining to reject that application for a further extension and the case against him was dismissed. Nick's submission exposed the grossly dilatory way in which the GMC had conducted the case and its failure to grasp the need for adequate evidence. Nick's submissions as to the strength of the evidence were key to the success in this landmark admin law Judgement. (Direct Access.)



## Sports Law

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Nick has advised in relation to the contractual relationships between sportsmen and women and their employers and/or associations over the last 22 years.

### Featured Sports Law cases

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An FA referee in his arbitration with the FA over allegations of unlawful disciplinary action.

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Contract and bonus disputes with regards to the pay of Premiership/Championship footballers.

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Advice on the severance packages and alleged wrongful dismissal of Premiership football and Rugby managers.

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A Premiership football club in Employment Tribunal proceedings following the dismissal of a trainer.

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A multitude of compromise agreements involving severance packages with Premiership Rugby clubs and their players/coaching staff.

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A Boxing coach in threatened proceedings against his governing body for failing to reinstate his membership of local and national associations.

## Professional Discipline

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Given Nick's very extensive litigation experience in the ET and his ability to "look back from the sharp end," he is able to provide specialist advice and support for employers and employees facing serious internal disciplinary issues. The vast majority of contested tribunal proceedings involving alleged misconduct derive from poorly conducted investigations and disciplinary hearings. Nick is able to assess cases from the outset to ensure the best outcome for both employer and employee and to

ensure that his services at trial are only need if absolutely necessary.

- Advising employers as to how conduct an 'ACAS compliant' disciplinary hearing.
- Advising and representing employees (where permitted) before internal disciplinary panels/conducting appeals on their behalf.
- Conducting internal investigations /preparing investigatory reports for employers.
- Advising employers on avoiding tribunal proceedings by better managing internal disciplinary matters.
- Chairing internal disciplinary hearings/appeal hearings where size and administrative resources do not permit internal appointees.
- Seeking out alternatives to dismissal and taking proactive measures to resolve a dispute internally.
- Obtaining interim injunctions to prevent unlawful dismissal.
- Advising and representing individuals in actions brought by their regulators (see regulatory section below).

## Memberships

- Association of Regulatory & Disciplinary lawyers
- Employment Lawyers Association
- Industrial Law Society