The Work Agenda 2026 podcast series: Episode 04 – AI in litigation: a sword and shield

Please note, this podcast is a recording of a live session from The Work Agenda conference in February 2026

Lucy Lewis

I'm Lucy Lewis and thanks for tuning in to one of our live podcast recordings from the Work Agenda 2026.

It's no secret that AI is transforming employment disputes at work and in the employment tribunal, from lengthy AI generated grievances to litigants in person using AI to draft claims.

And so, in our closing plenary at the conference, Carla Watling, Tarun Tawakley and Rachel Ward examined how employers should navigate this new landscape, looking at the practical impact on the employment tribunal system and how the same AI tools can be deployed to defend claims.

Tarun Tawakley

The music has stopped, the lights have gone down low. Hello and welcome to the final session of the TWA this year. And as ever, we've saved the best till last. AI, a sword, and a shield. It wouldn't be a Lewis Silkin conference without me talking about AI, but I'm very glad that I'm joined by two much more interesting colleagues for this particular one, which I'll introduce you to in a second. So over the course of the next 50 minutes or so, we're going to cover off two of the hottest topics for 2025, 2026, for employment lawyers. The first is the advent of having to deal with my learned chatbot, which has ruined our professional lives, if I can put it that way, from ER issues, basic grievances, disciplinaries, et cetera, through to actually dealing with litigation and claims before the court. Sort of reminded of this meme that's constantly going around in terms of, I just want AI to do the washing and my chores. Don't do my job. Unfortunately, AI has come in for our jobs, and it's actually

not replacing us in any stretch of the imagination. It's making our jobs much more difficult. It's making our jobs much more complicated. And we're having to adapt our style and the way that we approach disputes and litigation to make sure that we keep up with the times. The second trend then, of course, is, this one's a little bit more difficult, but when law isn't being changed underneath our feet with seismic changes from the government, what we are finding is getting in front of a tribunal is almost impossible.

Anyone that's had a tribunal claim form served on them in the last few months will know it's pretty standard to see a preliminary hearing be listed for late 2027, possibly a full merits hearing 2028, 2029, and if necessary, a remedies hearing in 2030. The tribunals are stretched, frankly, beyond breaking point. And we're all having to rethink our litigation strategy. Because whereas we might have looked at litigation and thought, let's kick it into the long grass,

We're now starting to get to the point where we think, will we still have any witnesses by the time we eventually reach that grass? Will anyone still remember this? What was our document retention policy again? All of these are questions we're to have to start thinking about at a much earlier stage in the process than we are used to, and we need to be ready for this. So a couple of points arise from this by way of just setting the scene for this session. First, as I say, we need to be ready for how AI is changing the way we do our work.

On of my client's in the room who I won't name to save their blushes. But we helped them on a really simple redundancy exercise last year, where 15 people impacted, all very literally straightforward, really clear rationale. The kind of thing that if you'd asked me six months ago, a year ago, I would have told you was a very straightforward two-week process, in out, nice and easy. ~

Every single one of the 15 employees refused to attend an in-person consultation meeting, wanting everything in writing so they can put it through their chatbots and respond back to us instantly. Every single one of them

wanted copies of notes of everything so they could come back to every letter we sent. We had long detailed responses back within 30 seconds so we knew exactly where it was coming from. ~ I think I'm right in saying, although they'll correct me if I'm wrong, I think one employee raised nine grievances, three of which included protected disclosures.

and then positively asserted that they were therefore protected from redundancy because they had made three protected disclosures so we couldn't possibly go ahead with our proposals. There's a real difficulty in having to deal with individuals that are being empowered and enabled, frankly, misled by AI chatbots in terms of what claims they may have and how they can pursue them. We have to rethink our strategy sometimes about how we deal with these ER issues to make sure we try and get ahead of them if we can.

Secondly, then, if we do end up in litigation, we all hope we don't. And if we do, we'll all have retired or been nuked by then. But if we do ever get to day 28, 29 and we end up in one of these cases, we've got to rethink our strategy. As I say, even a good case can become a really, really difficult case if we're going to have to start losing witnesses, if we're not going to have access to the evidence. Frankly, most of us can't remember what we did last week. Forget what happened in a disciplinary hearing three years ago.

We're going to have to think about how this is going to impact our strategy and whether we're going to have to front load costs or rethink the way we approach litigation to make sure we're ready for it. And then the third one is, and this is why we've titled this a sword and a shield. Obviously we all know a few years ago we've been talking about something in the water, all our seats coming back and telling us RTO was the way to go and that was what we were all being pushed for. This year the big pressure on all of us is to utilize AI ourselves.

So as much as we're going to talk about how our employees may be using AI and how we may be coming up against AI law firms and all other interesting new technologies in our day job, we also have to be thinking about how we should be using ourselves, how it can make our job easier, how we can respond to the challenges that we're going to be faced. How are we going to do that? Well, first and foremost, I'm going to be joined by my wonderful colleagues, Carla and Rachel, who are going to take us through these issues.

And in the Lewis-Silkin patented formula, as you'll have seen over the course of today, we're going to do it by reference to a case study. And we're going to do it by reference to our dear friend Max.

But because this is a session about AI, I'm going to introduce this by telling you that, of course, this is the wonderful world of AI. So it's hallucinated. We're still with Max. certain things are still the same. So he's still got a baby. He's still got some sickness issues. But he's got a new role. He's no longer a high-flying executive. Things have all gone a bit wrong for him in this former life. And in this role, he's got a manager that's a little less keen on him. And we've got some unhelpful comments that are coming from this. But he does remember the past. So he's remembered that in the past, he's had a flexible working request that was accepted.

So was pretty happy about that. But here, when he's made a flexible working request in his new employer, relying on very similar grounds, the employer has said no. And that's upset him. And of course, that's compounded by the unhelpful commentary from his manager. And the reason why I raised this for the purpose of setting the scene is we're going to talk about AI. We're going to talk about new technologies. We're going to talk about how litigation is being disrupted. But the problems are always the same. Ultimately, everything we're going to talk about in this case study

is an issue of human interactions. It's how the flexible working request was handled. It's how the manager has made these comments or been overheard making these comments by the individual. These are things that, as much as we're going to look at everything that happens when they go wrong, the answer to them a lot of the time is still just good old fashioned ER. It's being really clear about your policies, explaining your RTO mandates. It's when you are rejecting these requests, being really clear and explaining the reasons why you can't accommodate it.

articulating the impact on the team. That's not always going to work. You are still sometimes going to get grievances. But a good bit of EQ is going to be worth its weight in gold in this new digital world. So our dear friend Max is unhappy. And he has raised a grievance. And boy, it's a whopper. 55 pages of dense complaints, comparers against colleagues, submissions on points of law.

and lots of reference to the need for accommodations, referencing the Americans with Disabilities Act. If you've not seen this yet, all our chatbots, for some reason, we always talk about the Americanization of the world, chatbots are going to make this so much worse because they're just obsessed with US case law, obsessed with US statutes, and the amount of times I've seen requests for accommodations, I just want to say, it's an adjustment. At least ask for the right bloody thing. There we go. We have to stay measured, keep our co-closure, and deal with it.

With that and trying to stay measured, Carla keep me balanced. Is Max entitled to have used AI as we think he has to have drafted this grievance?

Carla Watling

Yes, well, let's start from the beginning. think lots of you are familiar with the sounds of this and the laughter in the room when this slide came up. All of us are dealing with these multiple complex, lengthier grievances than we've ever seen before. And those of you who've probably seen a lot of these will be very familiar with the telltale signs, you know, the bullet points, the very strange formatting, the bold in completely the wrong places. And it should be immediately apparent to those of you that

Essentially, this is what's happened here. But can Max use the AI in order to draft his grievance? Well, what we need to think about here is, well, what is our workplace policy when it comes to use of AI? Do we have a written policy? Do we have training that we offer our employees in order to understand what are the positive use cases in relation to AI? And what are the less positive use cases?

We also want to be thinking here about whether the system that Max has used in order to draft this grievance is our own, internal, potentially a lot of us are using now closed systems, so they're not... ~

Tarun Tawakley

We do that. Who's got an internal closed system that you're encouraging employees to use? Most people around their own person. And that is very much the normal what you do expecting. But it isn't the one people are using. We're getting a lot of shadow AI still, aren't we?

Carla Watling

Yeah, absolutely. And Max here in this case is just as likely to have drafted this grievance at home using Copilot on his personal system or any other of the AI tools out there as he would be using the closed AI system that you have ~ in your business. Lots of you are using these closed systems, but you will know even within a closed system, it's still possible that the tool is learning off the information that you ingest in it. And if Max is inputting lots of data about his colleagues, the comparators,

he's relying on in his grievance, that's going to be available to everyone else using this closed system. So it is really important to understand what are the policies that you've got in place? What is the training that you're giving your employees about use of AI? And what are the guardrails that you have in place that if you do spot something like this coming down the track, what can you do to make sure that you're managing it in the most efficient way possible?

Tarun Tawakley

But he may not have done it. It's worth being alive to the possibilities here. So had he have used your closed system, how many of your systems save your search terms or have access to search terms that you know of? A couple of you saying yes. We've seen this as well. So these things are coming up more and more. And there is no privilege in an interaction with an AI chatbot, particularly at this stage. We'll come on to talk about when litigation privilege might arise.

using it for drafting pleadings, using it for drafting witness statements, arguably you're going to have a much stronger case on litigation privilege. Certainly in pleadings you'll have the ability to rely on it. But remember, some of the things that have been problems for us for years might suddenly come to our aid. Everyone remembers that awful EAT case that says that raising a grievance is not a dispute, so we can't have a without prejudice conversation safely. And we all sort of curse ourselves at the problems the EAT has caused us.

Well, if it's not good enough to be a dispute for the purposes without prejudice, it's definitely not litigation reasonably in prospect in my submission. So for what it's worth, let's have some fun with these things. And we've definitely had cases where we've been able to get access to some of the prompts and see the information that's been put in, including please draft something which makes up some protected disclosures that we can rely on, because some people do this on their work systems as well. And these search terms prop up in disclosure in exactly the normal way.

The first thing to sort of raise here is just we're going to assume that Max in this scenario has used a personal system because we think that's what's happened on these particular facts. that shouldn't be an assumption you all go away with. Think about what tools people are using. Think about if you are going to be able to get access to their prompts, to the information that's been put in, et cetera, and what you can do to challenge it. But if there has been information that's gone into an open system, this is essentially quite worrying, isn't it, Carla? We've got lots of information about

colleagues here that could be personal data, company sensitive information, there's potentially things that we're going to want to look into here, isn't there?

Carla Watling

Yeah, absolutely. So data protection is obviously going to be a key angle here that we're going to be thinking about. Has Max put very sensitive ~ medical ~ personal information, very sensitive about his colleagues into an open system that could be accessible then by anybody and also potentially information about the business? Now, depending on what that information is, depending on how sensitive it is.

if it is on an open system and, for example, raises issues about your competitors getting access to that kind of information, or indeed your clients having to tell your clients, we've just found out there has been a data breach and this information is available. You have to think carefully as to at what point that is triggered. And it's going to depend on what the content is, what the risks are, and specifically what we think might have happened in this case.

Tarun Tawakley

Thank you. So what we also see in the facts above us is that the employers try to be quite sensible here. It's taken this 55 page document, it's tried to summarise it, and Max has been particularly difficult. Rachel, what should they be doing, or what could they be doing more here?

Rachel Ward

Yes, I think that's a very sensible first step to try and have arranged a meeting with Max. That would have been a great opportunity to sort of hear from him in his own words what the issues are rather than relying on this 55 page document. Sadly, he won't engage with that. ~ So I think I think we need to think about alternative steps and.

Tarun Tawakley

Before we do, it's quite a powerful thing with someone that is just interacting with you by a chat bot, actually getting them into a room. I talked about the difficulties some of you are having with redundancy exercise, but actually just sort of coming in and going, 55 pages here, we're going to have to try and summarize some themes of it. Can you confirm A, B, C and D? You can get a bit of power actually from bringing them into a room.

Rachel Ward

totally agree, then he could be, I mean, he might want to go on sick leave. So we do get lots of cases where an employee sort of raise, ~ raise agreements and they sort of don't want to deal with this anymore. So it's not uncommon. So I think we have to be prepared for that. So we have our plan A, try and get, try and get Max or whoever it is in a room.

Tarun Tawakley

Get

Tarad into the room. Freudian slips are just growing and growing and growing.

Rachel Ward

changing the case study. But yeah, try and get him in the room or whoever is in the room and try and kind of talk to them directly. But sadly, that's not the case here. And I think we need to then remember or sort of go back to basics. So just because grievance is raised or kind of drafted or written with the aid of AI, it is still a grievance. And so I think going back to basics, so we need to think about the ACAS code and also what your internal grievance procedures and policies say. And I

Obviously, it's very difficult when you get a 55 page document, start thinking, oh gosh, need to get every single detail I'm going to need to carefully examine and analyze. But I think for the purpose of a grievance, we're really, really focusing on the facts. So I would say forget all the references to the incorrect US probably made up legislation. And I would really just get your yellow highlighter out if you're sort of old fashioned like me.

Maybe you could use, if you do use the closed AI system, you might be able to get them to help you this, but really just kind of highlight the facts. Like what are the facts that being complained about? Because you might be able to take this 55 page document and recreate a list of, you know, one A4 sheet of paper of the facts that are being complained about, the way his boss has spoken to him and those sorts of things. And that makes the process far more manageable. It means that we can potentially summarize.

summarise the issues, we may be able to, even though we won't meet with us, we may be able to write to Max and say, we've tried to summarise and categorise your complaints into this more kind of summarised form, would you agree with us that this is basically the essence of your grievance? We may not have any success with that, but I think it's still worth doing. And then I think we also need to think about the questions that we need to ask him, because if he won't meet with us, we might need to...

At the same time as going through the facts, prepare a list of questions. What do we need to do? Because you're probably going to have to investigate some of the allegations, speak to other witnesses. So I think we need to be to do that. So the starting point really is working out what the facts are.

Tarun Tawakley

That's right. Can you think of anything sort of unusual that you might do or a clever tactic that you might adopt to try and avoid or limit the possibility of these 55 page dense grievances?

Rachel Ward

Well, think when they come in, I mean, I think there's ways that we can talk about trying to avoid them coming in in the first place. But I think when they do come in, I think maybe start thinking we should be thinking about other processes that we might want to deploy. So we could think about mediation, whether a grievance comes in. One of the main questions that we're often really keen to understand is what outcome are you seeking? What do you want to achieve? And I'm sure I think we'll come on to this. one of the.

AI law firms out there, I saw on their website a few days ago, the kind of front page says something like, have you been mistreated by your employer? Don't resign. Instead, you should be a thorn in their side. Come to us for advice. And so I think if really they're just doing it to kind of engineer an exit discussion, then having this discussion early on to say, okay, what is it you want? What outcome are you seeking?

is probably a good way to potentially avoid having to go through this very long drawn out process. I think you may want to think about some informal steps such as we have the Lewis Silkin and I think we're going to come back to this, but the solutions pathway, which is sort of an early mechanism for informally dealing with concerns raised, trying to resolve them at an early stage without...

really having to go through a grievance process which is probably going to entrench positions and create probably quite difficult situations between employees and their colleagues. So I think they're all the things that we could be thinking about to try and deal with these things in a kind of more contained way.

Tarun Tawakley

Rachel's much more measured than me. I just want to have a policy that says you can submit a grievance, but here's our online form and there's a 1,000 per character limit. Off you go. Sort of the Twitter version of grievances, if you can have it that way. Get your grievance into a thousand characters and we'll consider it.

Rachel Ward

I mean you could try doing that, think the problem might be doing I mean it's a good idea but you probably would still get someone still saying see attached and sending you in their huge document.

Tarun Tawakley

won't allow it. won't allow it. Speaking of things we won't allow, we do eventually get Max into a grievance meeting. Hooray. Unfortunately, he surreptitiously records it. And we've got a set of notes here that are seemingly verbatim but seem to have been generated using some sort of technology as well, and worryingly, because of course naturally we're talking about projects and allocation and requirements. When we're talking about whether you can have a flexible working request, we're talking about some pretty sensitive projects within the company here.

It's sort of a real mix of issues in here for us. mean, Rachel, what do you think the sort of initial points are? Let's park the AI aspects of it. We've just got good old fashioned recording without consent. What are the issues to start with with that?

Rachel Ward

Yes, I'm sure lots of you have probably had to deal with this situation. So I think the first issue in him recording without consent is that there may be data protection issues to think about. We're probably also thinking very quickly about whether he's breached any of our own policies that we might be able to sort of use against him. some you may have disciplinary procedure that very clearly defines covert recording as a disciplinary offence, potentially as a gross misconduct offence.

Also, it would be interesting if there was a meeting, I know Max refused, but if there was a, when there are meetings, I think if you have that line in your script or if the person is saying, please can you confirm you're not recording this meeting, and the employee confirms that, and then actually it turns out they were being dishonest, that's potentially another sort of disciplinary issue that we might want to use. So they're the main issues that I'd be advising on.

Tarun Tawakley

I think that's absolutely right, it's worth remembering that just... to utilise all the tools that are available to employees, we're going to see potentially more and more old fashioned breaches of their duties. We're going to see these surreptitious recordings. We're going to see information being taken off company systems. And we've got to remember that there's two parts to this. keep going back to this sword and shield analogy, which at some point is going to hoist me on my own baton. But for now, it's working, so I'm going to stick with it. But we've got to think about how we can use this as a sword. And going back to that, very clearly, there is some sensitive company information that's been discussed in this meeting that, if nothing else, seems to have been recorded possibly on a personal device. Carla, what are the options that an employer might have? I you spend half your life in the high court, injuncting naughty employees like this. What could we all be doing here?

Carla Watling

Well, there is a very exciting option out there, but it is only for certain cases where really there is a critical risk to the business. But where in, as in this case, the information is highly confidential, it's trade secret grade, if it gets out, you know, this is going to cause a massive hit to the bottom line if this information was to fall into the wrong hands.

And we see this all the time with employees leaving with things that they shouldn't do, whether that's on, you know, they forwarded things to a personal email account, whether they've been slightly smarter and taken photographs of screens in the office. We have all sorts of tools to uncover that these days. But generally, it's a lot

easier these days because we have so much information digitally available to us within a handset device. It's very easy for employees to take that data. Now, in this case, the recording itself

on Max's personal phone, we may be able to go to the High Court to get an order which would effectively say, this is our property and you need to give it back. Now, again, that's not going to be appropriate in many cases, but where it is critical, where it is very important and where it is particularly valuable, that is a mechanism that is available to you. This isn't about damages, this isn't about money, this is about convincing a judge.

that if this information is not returned to you immediately on threat of contempt of court, there could be real serious consequences. So this is an incredibly powerful tool. Judges are not going to hand out these sorts of orders lightly. So you're going to need to prepare an application that's backed by witness evidence. You're going to have to explain at length what this information is, why it is so confidential, and why it is important to protect it through this mechanism.

But that's an incredibly powerful tool if you can do it in the appropriate cases.

Tarun Tawakley

Yeah, it's one way of thinking about sort of a nuclear deterrent and also sort of vaguely reminiscent of toddlers saying it's mine, I want it back. So that wonderful mix of the two things. But it is a powerful remedy where you can say, this is my property. I am entitled to it back. Delivery up. And crucially, again, you're not going to deploy this too quickly. And you're not going to go and injunk the current employee because you're going be really alive to constructive dismissal risks and all the rest of it. But deploying it at the right time in the litigation is an incredibly powerful tool. Again, remember, in the high court, cost recovery is standard. If you've got a good case, you may well be able to sting the employee with a cost spill for the litigation.

as well, which can be incredibly powerful leverage in whatever employment tribunal or other dispute may be bubbling under. So it's worth thinking about both options that are available to you. But if this has gone into an AI tool, and again, possibly an open source AI tool, where, again, we're talking about some really sensitive information going in there, what are the possible options or strategies that we might adopt there?

Carla Watling

Well, ultimately the damage might have already been done and there is not a way to undo what goes into that black box. You know, once it is on that open AI tool, there isn't an order that we can go and get that will take it back. But there are damage limitation measures. So what I would be saying in this scenario is we need to investigate what else Max has done in cases where there's a clear breach of his potential contractual duties. If you have those in your contracts.

and at least your IT, AI policies, what else might be out there? Has he also taken information off your company systems? Linking back to Taron's point, you know, it's a sword and a shield. You want to be thinking about how you can get that information back, how you can protect the organisation, and there is some very useful judicial authority that already exists within the High Court.

And we've deployed this in many letters that I've been involved in writing, which says employees are not allowed to retain confidential information for the purposes of seeking legal advice in the context of whistleblowing or because there is litigation on foot. If it's confidential information and it belongs to the business, they have to give it back, even if it is squarely relevant to their claims that they're bringing in the employment tribunal. Whilst you wouldn't want to take these steps lightly,

you do have to think about them at a very early stage because delay is a potential issue that you're likely to come across if you were ever to fight one of these applications. So you do have to move with speed if this is a critical issue to the company.

Tarun Tawakley

And throughout this, you can be asking questions. What information have you fed in? Like I said, there's no privilege in those early interactions with the chat bot. What information have you fed in? What are your prompts? How did you prepare these notes, et cetera? But ultimately, if you are going to have this awful situation, which

again, I'm sure has never happened to any of you here, where you've got two versions of notes from the meeting which seem to bear no resemblance to what you are pretty sure was said with your experienced note taker taking a very detailed note of it. But what do employers do in these circumstances?

Rachel Ward

think it's pretty simple. mean, most of you have probably seen this. It seems to come up an unbelievable amount in my cases as well. But I think what I would always suggest is say, fine, we've got the official version, which we think is the correct one. And we'll keep the other version on file. So we're not going to try and agree an amalgamated version of the notes. But we'll keep both on file so we don't need to get into an argument about it. And it just keeps things a lot more simple, no argument.

Tarun Tawakley

Yeah, think those are the sorts of things you can deal with in cross-examination if you need to. If there is a clear record of the meeting, keep that. It's not worth the dispute at this stage about it. There may be other very good things to dispute about the recording, surreptitious nature of that recording without consent, the fact that it seems to have been fed into things. By all means, have your fun there. This is not the hill to die on, as much as I want to die on many hills over the course of this. So moving the slides on and.

Low and behold, here comes the claim, which arguably actually is being handled incredibly efficiently by current standards in the tribunal. We've got only just under two years or so for preliminary hearing and then a trial off into the future. But there is a serious point to make about all of this. Because as much as we joke and joke about the fact we may not have our witnesses and that we may all be vaporized by then, there's a real cost to businesses in terms of the uncertainty of these claims dragging on, on the system as it is today. Start wrapping in uncapped unfair dismissal, start capping in claims after six months, start bringing in all the claims for guaranteed hours and all of the other things that we might see clogging up the courts. This is possibly only going to get worse. And we have to be thinking about what are our current litigation holes?

For starters, if nothing else, you'd have picked this up from Colin's first session. But if you've got a data retention policy that's tied to a three-month time limit for claims, you're already going to be thinking about making that six months very, very soon later this year, because there's a longer period within which to bring the claims. ACAS conciliation is being stretched and stretched and stretched. You're going to need to, frankly, need something longer than that. You're going to need to think about how you keep litigation holds, particularly if you do have individuals leave between when the claim is issued and then when they

when it's eventually heard, which normally might result in that data being lost. You have to think very, very carefully about all these things. But before we get into the legal side of this, just practically on the tactical side of things, what should employers be doing here? Do you front reload costs? Do you just sit there and enjoy the 18 months of silence and let them wither away on the vine?

Rachel Ward

Yeah, I mean, I think it probably depends on the case that you're dealing with. So, I think, I mean, that timeframe would be quite ~ a positive thing, I think, for claimants. I had a claim from a client on Friday that we've got a July 2027 Rach, I think you've got one for even later. So I think if we are dealing with mainly London tribunals, we've got a very long wait. And in lots of cases, you might be able

Tarun Tawakley

any of you are in Scotland, they are threatening to list a 35 day hearing for me in July. if you need to do something, either don't dismiss anyone in Scotland or dismiss them all in Scotland to get it all done with. Find a way of gaming that system.

Rachel Ward

Yeah, much quicker, no witness statements. But I think, I mean, in lots of cases, you might think, actually, we'll just spend some legal costs and spend some time preparing grounds of resistance, putting in a strong response, and then we'll just sit on our hands. We don't need to do anything. We'll wait. The claimant might get bored. They

might find a new job. And then they'll just lose interest. I mean, that might be positive thinking. So I think the other option might be trying to kind of

front-load things a bit. Obviously, there's a cost consequence for that and you might not really, some of your most senior people, if they're involved, might not want to spend time having witness interviews at this very early stage. But it can be really valuable because you can find out sort of more details about the case at an early stage. And also, it's very beneficial to those witnesses if you're not going to be proofing them maybe for two years that they did take a proof at the very, very early stages that they can.

~ that they can go back to if they need to. So I think it probably depends on the facts of the case. If you've got a really terribly pleaded case, you might be able to have some fun and games with sort of further and better particular requests. You need to be a little bit careful with those because claimants can use them to sort of try and expand their claims. But you might be able to kind of pin down the issues, get some kind of vexatious maybe or cases with little prospects of success struck out or at least make...

threats that you're going to do that. But I think you're right, Tarun. I think we need to be thinking about litigation holds. We need to be thinking about exits. So if you've got any people in the business who are going to be leaving, particularly under settlement agreements, that we make sure we have wording in there dealing with their future assistant to help with tribunal cases. So I think it is going to cause employers lots of issues, even if they might be quite happy to kind of get a final hearing listed in 2028 or 2030, as you said a bit earlier.

Tarun Tawakley

I think that's right. And also, we, again, joke about this, but we always talk about how will tribunals deal with the fact that there's a claim for three years ongoing loss. Well, I think it will be a historic claim by the time they get to the tribunal in current system, because they'll be able to show they've actually had three years of loss or not by the time we get to the tribunal. But it is worth thinking about. We talked in the opening session about tactics to try and deal with unfair dismissal being uncapped and available after six months. One of the good old fashioned things we can do is learn from the current PLCs and the need to mitigate notice period. You you've got the contractual obligation, of course, to pay someone in lieu of their notice or to let them work their notice. There's no reason for that to be a lump sum up front. You could, in theory, build in something that says, we want you to mitigate your notice. We're going to pay you monthly on an ongoing basis, and we're going to ask for evidence of your attempts to mitigate your notice throughout. So you put the owners of mitigation on claimants at a much earlier stage and get access to early disclosure, effectively, of their attempts to mitigate their loss.

There are lots of clever things that we can still think about over and above everything that was on your wonderful word cloud earlier. The only other thing I'm going to do at this stage is just do a little bit of crystal ball gazing, if you'll indulge me, because ~ the system, as I say, is broken. And we're seeing the government thinking about various changes. But it's not just going to be the government. We're going to see the tribunal system itself, no doubt, suggest changes. We're going to see bodies like, as you know, I'm the chair of the Law Society's Employment Law Committee.

We've got very strong views on these things. ELA, no doubt, will have its own views on these things. We're going to see lots of proposals, no doubt, in the coming weeks and months in terms of how we might deal with this. But one thing that I feel very strongly about that you might see is a two-stage ACAS conciliation, for example. So at the moment, as we know, we have ACAS conciliation up front. There's a question mark for all of us about whether we engage with that and whether we want to see the employees willing to put their money where their mouth is. Do you settle claims before they're even issued?

Is there any tactical benefit in doing so? Do you even understand the claim at the stage that you're having the ACAS conciliation? Again, ACAS do a wonderful job, and they're horribly under-resourced. But the number of times where you get a call from ACAS and they say, would you like to conciliate this claim? And you say, who's the claimant? What's it about? And they sort of have to go back and sort of try and work out some of those bits of information. Actually, there might be some benefit in actually trying to sort of stagger the tribunal process, where you say, have your pre-claims conciliation now if you want, but actually,

Maybe after the pleadings are exchanged, there should just be another stay with a second period of conciliation where you try and settle armed with the information about what the claim is, what the defence looks like. Could the Employment Tribunal learn some things from the High Court? We've got masters and all sorts of wonderful things in the High Court that you can go and visit at. I have less good memories of those. I just remember being shouted at them a lot in my junior years because

that just seems to attract that type of judge for some reason. But there you go. Assuming we could find ones that were a little less shouty, you can go there and get a couple of preliminary hearings, get lists of issues agreed up front, knockout issues. So if you are going to front load your disclosure or anything else, you've got clarity on the issues and the documents you're holding. So you don't have to hold a whole bunch of irrelevant information that you can release because you know what the list of issues are. You can narrow it down. Could the tribunal go even more bold?

Could we see something like what we have in the High Court with small claims, fast track, multi-track equivalents in the employment tribunal? If we are going to be having more multimillion pound senior executive claims, is it right that they're handled in the same way as claims that could and should be sorted without legal representation, without fees, without cost recovery? There's a really genuinely open question about

This was implemented, as Colin mentioned earlier, without consultation. No one really thought about the consequences. There was just, if only there had been a surreptitious recording of that meeting. But there was a question mark about what was agreed or what was not agreed between employer and union sides. But there was that discomfort, and this came out as result of that. You could very easily see a proposal where people say, well, look, if we are going to do this, let's handle these cases appropriately.

Let's have a simple version of the employment tribunal, the equivalent to the smallest claims court in the high court or county courts, where basic claims are handled, limited disclosure, maximum number of witness statements, maximum page numbers of those witness statements, guaranteed hearing within six months. Simple justice, safe justice, quick justice, like the tribunals of old. Fast track, some sort of hybrid between that and what I'm about to explain, which is multitrack on the other end. This is your.

senior executives, your football managers, whoever else it might be, claiming their millions for being dismissed unfairly. Why shouldn't there be fees in those cases? Why shouldn't there be cost recovery in those cases? The core principles of the tribunal maybe don't need to apply in the same way in the future. This is all just random speculation from my part. But the reason why I raise it now is if we are going to talk about what we can all be doing to prepare for unfair dismissal,

being ~ available after six months to prepare for unfair dismissal being uncapped. To the extent you have access to lobbying bodies with ELO, with the Law Society, with CBI, or whoever else you might be talking to. We all know how easy and cheap and risk free it is to lump in an unfair dismissal or even a discrimination claim today. Very unlikely to get a cost award against you. We saw the impact that fees had on bringing these claims. Actually, even if you had uncapped unfair dismissal, even if you had unfair dismissal after six months, would we see the same numbers if multi-track cases or their equivalent in what I'm describing in this hypothetical world were subject to a £2,000 issue fee and cost recovery? Open question. If you want to think about how to limit the impact on it, maybe that's your best bet. Anyway, I'll leave it there. That's enough crystal ball gazing from me. But it's just something to think about in terms of where the future might go and where we might focus our efforts. But going back to what we were talking about earlier, we talked about the difficulty of deploying the delivery up or any other high court action we might want to take at that stage. Once we're into litigation, once he's left, once he's resigned the claim, construction is missed, we've got a little bit more freedom, don't we? So these sorts of options we talked about earlier in terms of alternative forums where we might look to pursue max become much more available to us now, don't they?

Carla Watling

Absolutely, and it is worth thinking about the broader context here. You know, if Max does have this confidential information and there is a risk of it getting out, what else do we need to be thinking about? Are there any post-termination restrictions in play?

If there are, what are we going to do about those? Is our play that we're going to seek to try and enforce those in some way? Are we going to be thinking about writing to the new employer to alert them to the fact that Max is under all of these duties and obligations? and also we'd expect him to participate in our ongoing investigation in order to uncover what has happened to our confidential information. So yes, once he's out the door, once the constructive unfair dismissal claim has landed, there is a lot more flexibility, although of course, we are still dealing with a litigant in person here, represented by an AI law firm or not. So we do have to take into account that judicial guidance in terms of how we should be litigating on our side. And whilst it's very tempting, particularly in a forum like the High Court, where you are dealing with cost shifting, you are dealing with some potentially quite powerful orders that courts can make. We do have to consider our own professional obligations and making sure that we are only putting those points where it is indeed appropriate to do so.

Tarun Tawakley

Thank you. I'm going to deal with the two questions that have come in so far now before we move on to the next bit of the case study because they're going to take the case in a slightly different direction. But there's a really good question here about can we push back on employees using AI if we ourselves are using AI, for example, in grievance investigations, et cetera? Yes, absolutely, depending on how it is being used. It goes back to the really good point that was being made by Carla and Rachel about is it an open system? Is it a closed system? What information is being put in there? There's a massive difference between using a closed AI system in a responsible way to facilitate handling cases more effectively and putting company information at risk, putting personal data at risk in an open software system. So I think it's absolutely one of those cases where you can have your cake and eat it here, depending on how it is being used. Do I think you can have something in your grievance policy that says you cannot use AI to draft your grievance? No.

That probably goes a bit too far. Clever things like character limits, et cetera, I think, are more areas where you can play around with. But I think trying to ban someone from using AI full stop to draft agreements probably won't work. There's another question here about

How do we deal with the fact that we won't know for sure if they're using a public AI tool? Won't it be our word against theirs? Really good question again. Again, it comes back to there is no privilege in the prompts. These are all potentially disclosable documents. These are questions you can ask in the investigation. And if the employee lies to you and then that comes undone in disclosure, again, you've got potential arguments you can raise. You've got contributory faults. You've got polky arguments. And again, for the sake of emphasizing something that was said earlier again, in a world of

unfair dismissal after six months in a world of uncapped compensation. Polky arguments, contributory fault arguments would have been dismissed any event. These are going to be even more valuable than they ever were, because it isn't just 118 to 0. It's potentially millions to 0. So do think about how to deploy these points. It's definitely worth trying to do. The third question I'm going to deal with as we move on, because we've now got the witness statement.

in and again it looks like it's got all of the telltale hallmarks of AI in it. Can you use AI to draft your witness statement?

Carla Watling

You can, but if you were doing such a thing in the High Court, you would have to disclose that fact squarely on the face of the statement. So those of you who are familiar with litigating in that forum will be very alive to the fact that the way we prepare witness evidence for High Court proceedings is very, different than what you might be used to in tribunal processes, where often the lawyers will do the drafting, they'll present it to the witness, they'll change the odd word here and there, and otherwise they're going to sign off a statement of truth.

Tarun Tawakley

It's being recorded.

Carla Watling

Not so in the High Court. We have to be very aware of our CPR obligations. We have to be mindful not to mislead the court about the preparation of the statements. Often the proofings will be recorded. You will have to maintain a list of every single document that you show that witness in the course of preparing their evidence. And you will have to disclose who produced the drafts.

how those drafts were produced, and indeed, if you used AI in the production of that evidence. So if the Employment Tribunal is going to be looking to the High Court for inspiration, particularly on managing these large and complex claims, that may be something they think about in the future. And of course, whilst the CPR is not directly binding on the Employment Tribunals, there may be scope in the future to look at those rules.

and to seek directions from the tribunal that copy some of those same principles.

Tarun Tawakley

I think that's absolutely right. if we are going to be facing these things, then we are going to see more and more AI be used in the tribunal, particularly because they've got the ability to be a bit more flexible about it. What can we do? Can we be using AI to attack this massive witness statement full of all this information?

Rachel Ward

Yeah, I think going back to your kind of the sword and the shield thing, I definitely think there are lots of kind of sword options that we have with the tools that are available. Just to give you an example of a tool that Taryn and I used last year on a big case that we were involved in, we received eight witness statements that you kind of read one of the, okay, great. And you read the second one and thought, seems a bit familiar. And then by the eighth one, were pretty, they felt very similar. so, there was an AI tool that could at those eight winner statements and pretty much pick out where things were identical, like word for word the same. Maybe sometimes a few details change and a tool was able to go through that and pick up on those points which then

Tarun Tawakley

It sort gave us a similarity score, didn't it? It sort of like, these are 78 % similar, these are 67 % similar.

Rachel Ward

Yeah, really useful, which then on to the topic of using it as a sword of our counsel in that case was then very, it was very helpful to have that be armed with that detail in cross-examination with each, every single witness that got up was asked about how the statement was drafted, whether they spoke to anyone else who helped them, whether some of the words were their own, given that seven other people had used the exact same sentences. And it was very helpful at kind of undermining the credibility of those witnesses and sort of strengthening our client's position. So there are definitely tools, Tarun, that we can use to support.

Tarun Tawakley

And goes back to, all can focus on the AI and the tech aspects of this, but there's the good old fashioned bits that come back to, know, accuracy, honesty, integrity, all these things that are such buzzwords in AI. The reason they are is because they're really important. If you're using AI to draft these witness statements, are they your own words? Is it your own evidence? How can we pick that apart and sort of utilise the fact that you're not actually giving your own evidence to boost our credibility and undermine yours?

Again, depending on how these large language models work and which tool is being used, most of you will know if you ask a chat bot or an AI tool the same question twice, you won't get exactly the same answer because of the way the systems work and the way they sort of generate one word after the other. Is the grievance, 55 pages in all, the same as this claim? Has it articulated the claim differently? Are there inconsistencies between the two that we can pull apart? It's not just a simple case of questioning and sort of interrogating various...

witness statements, potentially you could look at those and go, well, actually, you say in your grievance at this page that this is what you're claiming, but actually here it's something totally different because the tool has just thought about the issue completely differently. If you're not applying your mind to it as a claimant, you leave yourself really exposed to challenge under cross-examination. We should absolutely be having fun with this. I'm yet to find a tool that's good enough to do this, but I'm hoping at one point we're going to have something that will

allow us to put our own witness statements into an AI tool with the bundle, a closed safe tool of course, and say, please tell me if there's anything in my statement that is undermined by any documents in the bundle, wouldn't that be wonderful? We're not there yet. I don't think we're far away and some of the tools that we're getting are getting really, really intelligent at picking up these kinds of things and pulling together threads and I don't know how I'm going to explain that in the high court. But at some point we may have some fun to be had about how we use ~ disclosure in these ways. But.

The one thing to remember is, just as we're talking about, if we're going to go after the other side for their use of prompts and their disclosure and say there's no privilege in all of those, we have to be really aware that the same light can be turned on us. So prompts and disclosure, you're very comfortably going to have litigation privilege over those sorts of things. But if we are going to use these tools, we have to be just as aware that our prompts earlier on the process where we may not have privilege to fall back on.

are potentially up for grabs as well, and we need to educate our managers on how to do it. We all know that just as much fun as we're going to have cross-examining questions saying, you prompted your chat bot to create a protected disclosure. If our manager has, when considering the grievance, asked it to do something equally nefarious on our side, we're going to be hoisted with that particular sword as well. So we need to be really, really alive to it. We're now in the ET, and we've got an AI law firm. Have any of you ever come across these? There's a couple. I won't name them to give them undue publicity. But have you come across some of these AI law firms yet? No? There's this wonderful one, as Rachel says, that encourages you to be a thorn in their side. And there's all sorts of other ones. And to be fair, some of your claimants are thorns in your side. I don't know which one you prefer, some of your angry claimants or some of these AI law firms. We can pick that one up later. But let's just start with the basics of, what happens when you're dealing with one of these? And if most of you haven't dealt with them, consider yourselves lucky because it is a completely different ball game. Let's start with the basics. Can you interact with an AI law firm? Are we bound to correspond with them if they are the claimant's representative?

Carla Watling

So as I'm sure most of you are aware, anyone can act as a representative in the employment tribunal. They do not need to be an SRA regulated firm because employment tribunal litigation falls under the reserve of non-reserved legal activities. So anyone, whether that encompasses anything, can also act as a representative, I think is probably an open question. But I think there are some...

quite sophisticated looking AI law firms out there that when you get the letter before action in, it's very clear about how you correspond with the firm, that they have authority to act on behalf of their client, they enclose copies of the relevant authority, so it's very, very clear. The client is fully aware as to what they're doing. The AI firm is very clear in terms of the scope of their authority, but it does present...

real live challenges. When I've been on the other side of these, it's very difficult for me to then pick up the phone to have a without prejudice conversation because there isn't a phone line and there isn't a human. You have to interact with it in these very, very particular ways. And ultimately, if you are trying to get rid of potential ~ issues before claims are filed, it really does present difficult challenges.

Tarun Tawakley

Yeah, and it depends on how it's been prompted as well. Agreeing an extension to witness statement deadlines. How are you going to interact with a chat bot to try and agree that? What's the approach the chat bot's going to take versus a solicitor, better or worse, you've had for years on the other side. You can have sensible discussions. You can have reasonable debates. It's a completely different world when you're dealing with one of these AI law firms. But also, there's a really interesting question in terms of things you can probe on. So again, going back to the idea of the sword, what do you poke with?

All of your letters, of your correspondence, of your bundles, all of your witness evidence are going to be going into this large language model on the side of the law firm. What's its machine learning capability? Is it learning from your letters? Is it going to utilise any of your information? Can it? No.

What questions should we be asking these AI law firms and have they thought about them in advance? Query an open question. think some of them have got very excited very early in an unregulated employment tribunal world. I think there is a lot of fun and lot of mileage to be had, even if you're interacting with a chat bot. Someone human at some point is going to read a letter for action from Carla about how their model works and is going to be very, very scared about it and have to think about how the model works, whether it's machine learning from any of the correspondences.

going into it, whether it's machine learning from either the witness statements or other evidence or anything else it's going to have to deal with. But also just be really careful about without prejudice, because we all know.

AI models hallucinate, don't pick up without prejudice always. There is always a risk that sensitive without prejudice correspondence may end up being referred to by these large language models that AI law firms use in open correspondence. There's a risk that bundles of correspondence that aren't marked without prejudice but are clearly without prejudice definitely won't be picked up by these models. So we just have to be much more sharp and careful in our practices here.

How could we be using AI though in this scenario? Is there anything we could be doing more in the tribunal process to sort of make more headway in terms of using it for disclosure, et cetera?

Rachel Ward

Yeah, there's lots of tools out there at the moment that are very helpful for kind of reviewing or kind of trying to narrow down the number of documents or look for issues. There are also some systems where you can ask questions. So you can sort of interrogate documents by asking a question such as, you know, what day was the first grievance meeting held on? And then you get the answer. So that's very helpful. So there are lots of tools that. ~

that can be used for things like witness statement, checking for inconsistencies between statements, things like that. So quite lots of exciting use cases on the other side as well.

Tarun Tawakley

I think that's right. And just to answer two questions in the chat, so the ETs are not yet upping their game with AI. But I no doubt we're going to see some guidance soon on appropriate use of it, use of it in witness statements, et cetera. So watch this space as they sort of grapple with it as the cases go through. Thankfully, they're going through so slowly at the moment that most people aren't. But no, AI law firms don't represent individuals at the ET hearings. So they're very clear on their terms. They will correspond. They will try and settle. They will do various things. And then they will refer it out to barristers or counsel.

to actually fight the case through at the end. So as we get to the end of the session now, and we try and bring this all to a close, we've sort of looked at the way AI has been used through ER issues, grievances, internal problems, disciplinary meetings or grievance meetings, and then in litigation, how to use it as a sword and shield. But I come back to some of the things that we talked about earlier, which is part of the problem with AI is

It does entrench positions, and it's so enthusiastic and eager to help that it's going to just make things worse, and it's going to give individuals bad advice, potentially, about the value of their claims. There's still a huge amount of space for good ER practices and emotional intelligence to try and resolve these disputes. What are you looking for out of this grievance? Can we try and mediate these disputes? What are the other ways of proactively engaging with employees to try and stop yourself barrelling down this role?

Of course, if you do and you end up down there, there are some really good tools. And hopefully we've given you some ideas and tips in terms of how to deploy them and how to attack employees that are using these things against you, but also how to potentially use these tools yourself. But as always, prevention is better than cure. And if we can think more about how we, in this new world with greater risks of unfair dismissal claims, greater capacity for unfair dismissal disputes because people have rights so much earlier.

thinking about how we front load all of these issues and try and deal with them human to human before the AI overlords overtake us all and we just watch them fight it out. I think that probably covers off all of the questions that we've got and we're bang on time. So unless anyone has any final questions they wanted to put into the chat, all it falls on me to do is to thank my wonderful panellists for sharing their insights and thank you all for your questions and your.

interest as we take you through all of this and might your indulgence as I told you about my various views about how the Tribunal system can be improved. Thank you so much.

Lucy Lewis

That was one of the live sessions recorded at the Work Agenda 2026. We hope you enjoyed listening as much as we did delivering it on the day.

Don't forget you can visit our website, lewissilkin.com to find out the latest on the issues covered in this episode, plus those from across the series. And if you did enjoy it, please share with your colleagues and friends, like and add any comments you have. We'd love to hear them. For now though, thanks for listening and goodbye.