

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal  
On 22 July 2008

**Before**

**HIS HONOUR JUDGE McMULLEN QC**

**(SITTING ALONE)**

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MRS A HARITAKI

APPELLANT

SOUTH EAST ENGLAND DEVELOPMENT AGENCY

RESPONDENT

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Transcript of Proceedings

JUDGMENT

**RULE 3(10) APPLICATION – APPELLANT ONLY**

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## **APPEARANCES**

For the Appellant

MR M JENKINS  
(Representative)  
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## **SUMMARY**

**RACE DISCRIMINATION: Direct**

**PRACTICE AND PROCEDURE: Appellate jurisdiction**

On application of **Race Relations Act 1976** the Employment Tribunal did not err in rejecting the Claimant's complaint that, in context, depiction of her as Mediterranean was unlawful discrimination.

Employment Appeal Tribunal procedure on appeals explained.

## HIS HONOUR JUDGE McMULLEN QC

### Introduction: EAT procedure

1. This application challenges Employment Appeal Tribunal practice so it is necessary to describe the Rule 3 system. Appeals to the EAT from an Employment Tribunal are governed by s21 of the **Employment Tribunals Act 1996**:

**“An appeal lies to the Appeal Tribunal on any question of law arising from any decision of, or arising in any proceedings, before, an employment tribunal.”**

And there is listed a number of statutes. It is immediately apparent that an appeal lies as of right and not by permission - or as it is put in s37 “leave”.

2. It is regulated by the material which is put before the EAT and that must involve a question of law. The 1993 Rules of the EAT, as amended, set up a preliminary stage when an appeal is received so that by Rule 3:

**“A Notice of Appeal must be served on the EAT with full enclosures of all relevant documents.”**

The documents are prescribed both in the Practice Direction [2008] IRLR 621 and the Practice Statement 2005. They must be submitted within 42 days. A properly instituted Notice of Appeal, that is one which is in time and with all the relevant documents, is then put into the “sift”. The sift is effected by Rule 3:

**“(7) Where it appears to a judge or the Registrar that a notice of appeal ...–**

**(a) discloses no reasonable grounds for bringing the appeal; or**

**(b) is an abuse of the Appeal Tribunal’s process or is otherwise likely to obstruct the just disposal of proceedings,**

**he shall notify the Appellant ... accordingly informing him of the reasons for his opinion and, subject to paragraphs (8) and (10), no further action shall be taken on the notice of appeal ....**

**(8) Where notification has been given under paragraph (7), the appellant ... may serve a fresh notice of appeal ... within the time remaining under paragraph (3) ...**

or within 28 days from the date on which the notification given under paragraph 7 was sent to him, whichever is the longer period.

(9) Where the appellant ... serves a fresh notice of appeal ... under paragraph (8), a judge or the Registrar shall consider such fresh notice of appeal ... with regard to jurisdiction as though it were an original notice of appeal lodged pursuant to paragraphs (1) and (3) ....

(10) Where notification has been given under paragraph (7) and within 28 days of the date the notification was sent, an appellant ... expresses dissatisfaction in writing with the reasons given by the judge or Registrar for his opinion, he is entitled to have the matter heard before a judge who shall make a direction as to whether any further action should be taken on the notice of appeal ....”

3. This is expanded by the Practice Direction as follows:

“9.6 The judge or Registrar, having considered the Notice of Appeal and, if appropriate, having obtained any additional information, may decide that it or any of the grounds contained in it discloses no reasonable grounds for bringing the appeal or is an abuse of the process or otherwise likely to obstruct the just disposal of the proceedings. Reasons will be sent and within 28 days the appellant may submit a fresh Notice of Appeal for further consideration or request an oral hearing before a judge. At that hearing the judge may confirm the earlier decision or order that the appeal proceeds to a Preliminary or Full Hearing. A hearing under Rule 3(10), including judgment and any directions, will normally last not more than one and a half hours. A judge or Registrar may also follow the Rule 3(7) procedure, of his or her own initiative, or on application, at any later stage of the proceedings, if appropriate.”

4. The practice is supplemented by an approach taken by the listing officer to both of the sub-rules. The first is that where an Appellant seeks to utilise the opportunity to submit a fresh Notice of Appeal under Rule 3(8) that is generally put back in front of the same judge who decided and gave an opinion under Rule 3(7). That does not always occur but if practicable it does, since there is considerable saving of judicial time and the judge who has read the papers once is in the best position to decide whether or not a fresh Notice of Appeal does get over the jurisdictional issues which were in the way of the Appellant when the judge gave an opinion under Rule 3(7).

5. The second is that where an Appellant seeks to use the opportunity to have a matter heard before a judge there is an oral hearing, usually before a different judge. That again is not

invariable but the listing officer will do what she can to see that a different mind approaches the oral hearing and makes a decision. In Scotland, it is usually the same judge.

6. Dealing with the two steps in sequence, it is clear that the time limits in this jurisdiction are extremely generous, 42 days is longer than any other appeal process. It is elongated by an additional 28 days for an Appellant to put in a fresh Notice of Appeal. In between those two stages there is some administrative and judicial consideration, say two to three weeks. In practice a person is given almost three months in which to finalise an appeal against a judgment of an Employment Tribunal.

7. An issue has sometimes arisen as to whether the right to put in a fresh Notice of Appeal and the right to have a hearing before a judge are mutually exclusive. They are not. The words of Rule 3(8) make clear that all an Appellant has to do when receiving the opinion of the judge is, as of right, to submit a fresh Notice of Appeal. No permission is required and no expression is required as to the quality of the judicial decision making; as compared with what occurs in Rule 3(10).

8. This stage reconstitutes the Notice of Appeal and the use of the word “fresh” on a number of occasions in this rule indicates that it is indeed an entirely new Notice of Appeal. The use of the word “jurisdiction” in Rule 3(9) reinforces that position. Although the rule says “Registrar or judge” it is almost invariably a judge who decides these matters. The judge then considers the fresh Notice of Appeal.

9. It shoulders out of the way the original Notice of Appeal and stands entirely in its place. The concept of a fresh Notice of Appeal with its own jurisdiction, as satisfying the time limits

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and so on, is that the old Notice of Appeal is no more and the Appellant runs the appeal on the basis of the fresh Notice of Appeal.

10. Although the concept of the fresh Notice of Appeal might indicate that if a judge decides against it on Rule 3(7) there is a fresh opportunity to make a further fresh Notice of Appeal. That would be an abuse of the process. This is a once and for all opportunity offered to an Appellant. The Appellant may submit a fresh Notice of Appeal but may do so only once.

11. Once an original Notice of Appeal, or a fresh Notice of Appeal, has been submitted the Appellant may then, on receipt of a judge's opinion against the appeal, or against any particular ground, make an application under Rule 3(10) for the matter to be heard before a judge.

12. It is important to understand that this is not an appeal from the first judge but is an oral application made to a judge and the matter is dealt with entirely afresh, so that the second judge makes his or her own decision upon the material available which will by then include more papers than were available with the appeal, and will include a Skeleton Argument and oral argument at a hearing. Alternatively it can be done on the papers. The point is that it is the second judge who makes the decision afresh on all the material at the time.

13. It can be seen that an Appellant can put in a Notice of Appeal, can have an opinion against the Notice of Appeal expressed, may put in a fresh Notice of Appeal, may suffer the same fate and then may come before a judge under Rule 3(10). Thus a Rule 3(10) hearing may arise directly from a Rule 3(7) opinion or from a Rule 3(8) opinion.

14. The utility of this procedure is demonstrated by the history. In 1993 to 1994 an issue came to light between the Lord Chancellor and the then President, Mr Justice Wood, born of complaints that procedures in the EAT were taking a very long time to complete and appeals were going stale.

15. In due course an approach was taken which was to allow more cases to be heard at a full hearing. The culmination of a number of changes was the Practice Direction introduced under the Burton Presidency in December 2002. By that stage concerns had been expressed by the European Court of Human Rights and the Court of Appeal about the delays in Employment Tribunal and Employment Appeal Tribunal proceedings.

16. Burton P began a process of consultation over the introduction of a new Practice Direction and amendment of the EAT Rules. The outcome has been a very substantial overhaul in our small jurisdiction on the lines of the radical approaches taken by Auld LJ for criminal procedure and Lord Woolf for civil procedure. So we now have a code constituted of a statute, rules, a Practice Statement and a Practice Direction for the handling of appeals and the results have been very striking.

17. The Tribunal Service report 2008 is published today. This shows that against the target of 75 per cent of appeals being heard within 26 weeks at the EAT, there is achievement of 89 per cent. In the year April 2007 to March 2008 1,841 potential appeals were received at the EAT of which 265 were not properly instituted, that means that they would go no further. Of these potential appeals, 210 were withdrawn and 236 were the subject of a ruling by the Registrar against an application to extend time, in other words they were out of time.

18. For the purposes of Rule 3 it is instructive to note that 917 cases were found to contain no question of law. That is half of the potential appeals. In that year 210 proceeded to a hearing before a judge under Rule 3(10) usually orally but sometimes on the papers; so roughly 20 per cent of those cases subjected to an opinion under Rule 3(7), in whole or in part, went on to a hearing. 29 of the 210 were allowed to go to a preliminary or full hearing on all or part of the case. The numbers do not precisely correlate because cases are being determined on a day-by-day basis both on paper and in court but the impression given is that roughly half of the appeals received involve no question of law.

19. That leaves the way clear for full and preliminary hearings. There were 459 full hearings registered and 197 preliminary hearings, thus 656 registered hearings, of which 466 were heard at a full hearing and 184 at a preliminary hearing.

20. The waiting time now is nil. The procedural steps require various stages to be met and timescales to be followed. In practice there is no delay. If cases are properly instituted, and parties follow the case management orders of the judge on the sift, their case will be heard without any delay.

21. The reforms of the Burton Presidency have been retained and carried forward by the current President in his Practice Direction.

22. So it is that the concerns expressed at judicial level and by the parties through consultation and our user groups in London and Edinburgh have, we hope, been met. It is in large part due to the approach taken by judges under the respective presidents to Rule 3 as to

which the Court of Appeal has expressed a number of views, none critical of these adjectival changes.

### **The Application**

23. In this application under Rule 3 the Claimant has the advantage to be represented by Mr Jenkins who has written a Skeleton Argument. It shows some familiarity with arcane legal language and a misunderstanding of the judicial role under Rule 3.

24. The procedural aspects of the case - which I have attempted to deal with above in order to indicate my provisional approach to Rule 3 - was that the case came before HHJ Peter Clark, who found in his opinion it raised no substantial questions of law. A fresh Notice of Appeal was submitted and he came to the same conclusion. Mr Jenkins raised a number of issues as to Judge Clark's role in giving his first and second opinions but when I made it clear that I was to listen to the case based upon the fresh Notice of Appeal those criticisms fell away. Lord Woolf directed lawyers and judges to avoid Latin. Mr Jenkins accused Judge Clark of being a judge promoting his own cause: *nemo iudex*. In my view, Latin should not be used in court unless English is deficient, because it creates distance and mystery to non-lawyers. He should have checked the meaning (and spelling) in John Gray's excellent **Lawyers' Latin – a vade mecum**, for he would then have understood how misplaced the maxim is here.

25. The case was heard by an Employment Tribunal at London South under the Chairmanship of Employment Judge Zuke. It is condensed into a single issue for the purposes of the appeal but arising out of what the Tribunal described as a very wide range of allegations. These were set out at case management discussions by the Employment Tribunal in paragraph 3 of its judgment. The Claimant is Greek and alleged discrimination on grounds of nationality  
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and national origins. She was employed by the Respondent for less than a year as an area manager. The Respondent is the government-funded development agency for the South-East of England.

26. The central question in the appeal concerns a note written by Ms Wharton, but it was not mentioned until cross-examination of the Claimant. The short issue is this, as set out by the Employment Tribunal:

**“22. Because of the number of complaints that Ms Wharton had received about the Claimant, and because of her reaction to Mr Jones’ complaint, Ms Wharton became very concerned about the Claimant’s attitude and relationships and conveyed those concerns to Mrs Ockenden on 22 December. She wrote: ‘I am aware that her style of communication has an element of different cultures within it. The Mediterraneans can be more parental and direct in their language and tone. This is not going down very well. I have offered to coach her but wonder if you may have some suggestions yourself as to how to manage this?’ ”**

27. The Tribunal’s finding is this:

**“39. It was the Claimant’s case that Ms Wharton’s reference to her Mediterranean background was evidence of racial discrimination. In our view, Ms Wharton’s suggestion that the Claimant’s communication difficulty might be due to her cultural background was supportive of the Claimant in that Ms Wharton was looking for an explanation that did not lie in any inherent character flaw of the Claimant but in an aspect of her behaviour that was capable of modification. Reference to cultural or national traits can involve negative stereotypes but may instead show sensitivity to differences in a positive manner. In our view Ms Wharton’s reference to the Claimant’s cultural background was the latter.”**

28. All of the other complaints failed. The Employment Tribunal found that all oral comments allegedly made by Ms Wharton were not made and these points are not taken further.

### **Discussion and conclusion**

29. The Tribunal addressed itself to the relevant legal provisions both under the victimisation and direct discrimination provisions of the **Race Relations Act 1976** and the burden of proof. Different approaches to claims under the **Race Relations Act** depend on the nature of the racial group relied on. They are not strictly relevant to the issue before me today.

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30. The question is whether or not the Tribunal erred in law in its failure to categorise what was written by Ms Wharton as race discrimination in the form of stereotyping. Before I discuss the law, it is necessary to say that this was not the stated case at any time of the Claimant at the Employment Tribunal. At most, the finding is that the Claimant regarded it as evidence, so as to support her stated case on the agreed issues arising from the cited incidents, of which this was not one. Indeed, it is not clear to me that the Claimant knew of the letter, since her narrative begins much later.

31. Stereotyping is not a statutory term, but the law requires an individual to be treated as such and not as part of a group, as firmly established in **R v Immigration Officer at Prague Airport** [2005] IRLR 115 HL. It is contended that this Tribunal reached a decision which no Tribunal could have reached and misdirected itself on looking into the intention of Ms Wharton.

32. The approach of the Tribunal is highly fact sensitive. The reference to “Mediterraneans” does at first sight indicate a stereotypical approach to people. The Tribunal had the advantage to hear evidence from the actors in this drama and to decide the meaning and effect of the words used. That was a task uniquely for it to perform. It had, on the one hand, the complaint of the Claimant that this constituted race discrimination and on the other this showed an approach by the Respondent to deal sensitively with a number of issues which arose about the Claimant’s conduct. It considered as inherently improbable that Ms Wharton was prejudiced against the Claimant because she is Greek since she short-listed, interviewed and appointed the Claimant herself. There was evidence of difficulties and complaints from users about the

communicative style of the Claimant eg that she was patronising. All of the factual allegations made by the Claimant were dismissed.

33. I consider that this sole issue was not in play at the Employment Tribunal for it to decide. But if I am wrong, the Tribunal's finding about it was not erroneous. I do not construe the Employment Tribunal's reasons as accepting a justification for direct discrimination, for there can be none, but as holding that the words in context were not discriminatory. An Employment Tribunal should be constituted to include at least one person from the panel of Tribunal members with experience in race relations pursuant to ministerial undertakings given in the House in 1976. They would be able to consider the correct approach. There is no dispute on appeal as to the Employment Tribunal's self-direction on the law and I do not consider that the application of the law was in error either.

34. All of the other complaints fail as a matter of fact. The application is dismissed.