Appeal No. UKEATPA/0287/16/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 26 October 2016
Judgment handed down on 20 December 2016

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MS C LIDDINGTON APPELLANT

2GETHER NHS FOUNDATION TRUST RESPONDENT

JUDGMENT

RULE 3(10) APPLICATION - APPELLANT ONLY

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant

SUMMARY

UNFAIR DISMISSAL - Constructive dismissal

UNFAIR DISMISSAL - Reasonableness of dismissal

CONTRACT OF EMPLOYMENT - Written particulars

THE HONOURABLE MRS JUSTICE SLADE DBE

1. This is an application by Ms Liddington ("the Claimant") under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** to determine whether her grounds of appeal disclose reasonable grounds for bringing the appeal: whether they disclose a reasonably arguable error of law. HH Judge Eady QC concluded on the sift that there were no such grounds. I have been asked by Mr Geere, who is assisting the Claimant to determine the application on the papers. Ill health prevented Mr Geere and the Claimant from attending an oral Rule 3(10) Hearing. He is to be treated as a lay person assisting the Claimant Pro Bono. Mr Geere prepared written submissions dated 25 October 2016 for the purpose of the Rule 3(10) application and represented the Claimant before the Employment Tribunal ("ET").

2. The Claimant seeks to appeal the decision of the ET, Employment Judge Pirani ("the EJ") sitting alone. Following a four day hearing, by a Judgment with Reasons sent to the parties on 15 March 2016 the ET dismissed the Claimant's claims of constructive unfair dismissal, for notice pay and her complaint that 2gether NHS Foundation Trust ("the Respondent") had failed to provide her with written particulars of her contract of employment as required by the **Employment Rights Act 1996** ("ERA").

Outline Relevant Facts

3. The Employment Tribunal ("ET") held:

> **"19. … The claimant joined Herefordshire Primary Care Trust on 16 February 2009 as a band 5 Staff Nurse. She received particulars of employment at that time …**
>
> **20. The Respondent Trust ("the Trust") took over responsibility for Herefordshire Community Mental Health Services from Herefordshire PCT in 2011. Accordingly, the claimant TUPE transferred from that organisation to the Trust."**

The date of the **TUPE** transfer was 1 April 2011.

4. The Respondent provided mental health nursing care to the residents at a care home in Hereford. The Claimant worked for the Respondent at the care home.

5. After the Claimant made a safeguarding referral about the care home, concerns were raised about her by the Care Director at the Home.

6. The Claimant was sent home on 8 March 2013 and suspended from duty on 11 March.

7. The Claimant was invited to an investigation meeting on 2 May 2013 following which a report was produced on 21 May 2013 the Claimant said that this was not sent to her until 12 step 2014, a delay of more than three months. There were four allegations against the Claimant one of which was:

> **"iii. failed to maintain accurate medical records"**

The report concluded that there was a case to answer on all four complaints

8. The ET held that the Claimant was off sick from 3 May and remained so until her resignation on 22 July 2014 with what her GP described as a stress related illness.

9. A disciplinary hearing took place on 18 November 2013. The Claimant was accompanied by a UNISON representative, Kym Ypres-Smith. The ET held:

> **"34. The panel concluded that three out of the four allegations were upheld and that this constituted serious misconduct. The claimant was given a final written warning valid for 18 months, confirmed in a letter dated 19 November 2014 (264-8). She was also required to complete a "performance plan" (see at 266) .**
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> **35. Under the heading allegation three, failing to maintain accurate medical records, the letter said that by the claimant's own admission she had identified a number of situations where her records were inaccurate, inconsistent and contradictory. Within the same section, the letter goes on to say "when considering the use of your personal diary it was the view of the panel that this could compromise patient confidentiality. The panels [sic] view and acknowledged good practice for record keeping is that using personal diaries is not the appropriate method for secure record-keeping" (265)."**

10. By letter dated 9 December 2013 the Claimant appealed against the disciplinary action.

11. On 10 January 2014 the Claimant e-mailed Ms Furniss, Deputy Service Director with a copy to Carol Sparks, Director of Organisational Development saying of the disciplinary meeting:

> **"Reading the notes has also raised another issue. To the best of my knowledge I did NOT record any phone numbers or addresses in my red diary yet see in the notes (page 3) it is alleged that 'patient details were recorded with a partial addresses and phone numbers'. Can you please substantiate this allegation by providing me with a further copy of the redacted pages from my red diary with the redacted items in question highlighted" (305)."**

12. The ET recorded that the Claimant had provided the Respondent with un-redacted copies of pages of her red personal diary. Patient details were redacted on these pages by the Respondent for the purpose of the investigation report but that the Claimant retained copies of the un-redacted pages.

13. The Respondent sent the Claimant a copy of the diary extracts.

14. On 5 February 2014 in an e-mail to Ms Sparks the Claimant repeated a request that the redacted items be highlighted.

15. Also on 5 February 2014 the Claimant e-mailed Ms Sparks suggesting that instead of being signed off sick for a further period from 1 March she take March as holiday so as to reduce the amount of annual leave that needed to be carried forward into 2014/15.

16. The evidence before the ET was that Ms Sparks thought that she had e-mailed a reply to the Claimant on 12 February. However the EJ accepted at paragraph 43 the evidence of the Claimant and Mr Geere that the Claimant did not receive that e-mail.

17. The Claimant was invited to attend an appeal hearing on 30 April 2014. The ET held:

> **"46. The claimant was no longer represented by her UNISON representative because she had lost confidence in her. Nonetheless, the respondent wrote to Ms Ypres-Smith asking, among other things, whether during the disciplinary hearing she was satisfied that all parties were treated with dignity and respect. Ms Ypres-Smith replied that she was satisfied with the way in which the disciplinary hearing was conducted (327)."**

18. Ms Furniss, who had chaired the disciplinary hearing produced a report for the appeal hearing which stated that whilst the Claimant:

> **"had provided an explanation as to why she had used her personal diary to record work-related activities it was the view of the panel that it was not an appropriate method for recording her clinical activity and did not meet the requirements of doing so. …"**

19. The Claimant had enlisted the assistance of Mr Geere to help prepare for the appeal hearing. She produced a statement for the appeal. At paragraph 7.2 the Claimant stated:

> **"The allegation I recorded phone numbers/addresses has not been substantiated. Please see Appendix G of the Investigation Report. Which of the redacted entries recorded phone numbers or addresses? It is wholly unfair for false allegations of this serious nature to be made against me and [the] issue demonstrates the nature of the conduct I have been subjected to."**

20. The hearing was not completed on 30 April and it was resumed on 7 May 2014. On that morning the Claimant raised three grievances which included:

> **"I have received no response to my email dated 5 February 2014 from Carol Sparks regarding my holiday pay. Again this is a failure to follow due process and amounts to an unlawful detriment."**

21. On 14 May 2014 Ms Willmott-Miller, the recently appointed Assistant Director of Human Resources, responded to the Claimant saying that Carol Sparks had replied to her e-mail of 5 February.

22. By letter dated 19 May 2014 the Respondent rejected the Claimant's appeal.

23. On 30 May 2014 the Claimant wrote to Ms Sparks copying in Ms Willmott-Miller stating at paragraph 5.1:

> **"I did not receive any response to the e-mail of 5 February and Ms Willmott-Miller has failed to confirm the date and time of response or to provide a copy."**

And at paragraph 7.3 the Claimant re-iterated paragraph 7.2 of her statement and wrote:

> **"In paragraph 7.2 of my statement, I said, quite clearly: "The allegation I recorded phone numbers/addresses has not been substantiated. Please see Appendix G of the Investigation Report. Which of the redacted entries record phone numbers or addresses? It is wholly unfair for false allegations of this serious nature to be made against me and this issue demonstrates the nature of the conduct I have been subjected to." This has been distorted by Trish Jay into "You cannot recall that you had recorded telephone numbers in your red diary and wanted copies of this to be provided." Trish Jay then proceeds in her decision to ignore the issue altogether. This is indicative of the whole approach adopted in relation to my appeal. There has been no attempt to establish truth at all."**

The Claimant wrote:

> **"Unless the issues I have raised (including those raised in this letter) are dealt with, I see no way I can safely return to work for the Trust."**

24. Ms Willmott-Miller replied on 9 June 2014. In response to paragraph 5.1 she wrote:

> **"59. … "I can confirm that Carol Sparks responded to your e-mail dated 5th February 2014 on 12th February 2014. I have attached a copy of the e-mail sent to you". At the end of the letter there is a list of enclosures which are said to include an e-mail from Carol Sparks "dated 12 May 2014". Indeed, the email copied was dated 12 May 2014 (see at 310)."**

25. With regard to the issue of the request for the offending passages in her diary to be identified referred to by the Claimant in paragraph 7.3 of her letter, Ms Willmott-Miller wrote:

> **"… Having reviewed appendix G of the investigation report, the appeal panel did not overturn the decision of the disciplinary panel that patient confidentiality was compromised in respect of the information in your diary. I trust that this resolves the issue regarding point 7.3."**

26. On 27 June the Claimant said that she was not well enough to attend a grievance hearing and did not anticipate feeling able to until at least points 5.1 and 7.3 of her previous letter had been properly resolved. The Claimant stated again that she had not received a reply from Carol Sparks to her e-mail of 5 February 2014 and questioned how it was that the alleged reply shows

a date of 12 May 2014. As for her point 7.3, the Claimant wrote that she did not ask for a further copy of her diary. She stated:

> **"… What I asked for is details of the redacted entries the Trust claims include telephone numbers and addresses of patients. The Trust persists in ignoring the point I am making. …"**

27. Ms Willmott-Miller replied on 11 July 2014 stating in relation to point 5.1 that Carol Sparks responded to the Claimant's e-mail of 5 February on 12 February 2014 and that she had attached a copy of the e-mail sent to her. As for point 7.3 Ms Willmott-Miller stated:

> **"… I understand the issue of redacted telephone numbers and patient addresses was dealt with in full at the hearing. This process cannot be resurrected and has now been concluded."**

28. The Claimant resigned by e-mail on 22 July 2014. She wrote that in the view of the response from Ms Willmott-Miller she was left with no choice but to "tender her resignation by the way of constructive dismissal and with immediate effect".

Grounds of Appeal

29. The grounds of appeal will be considered under the headings in the Notice of Appeal and in the Claimant's skeleton argument of 19 October 2016.

Ground 7.1

Failure to correctly apply the law when drawing conclusions

30. Mr Geere contended that whilst the EJ in paragraph 82 correctly stated the law on repudiatory breach of the implied term of trust and confidence based on cumulative conduct and a "last straw" leading to the Claimant resigning and being entitled to claim constructive dismissal, he failed to apply it when reaching his decision in paragraphs 103 to 107.

31. In paragraphs 75 to 92 the EJ cited and set out quotations from many authorities on constructive dismissal. Mr Geere relies on the passage cited from **Barke v Seetec BusinessTechnology Centre Ltd** UKEAT/0917/04 in which the EAT held at paragraph 26:

> **"(1) where in a constructive dismissal case a course of conduct culminating in a last straw on the part of the employers is relied upon as amounting to a fundamental breach by the employer of the implied term of trust and confidence, the Tribunal must consider whether the course of conduct cumulatively amounts such a breach; it is not necessary for each individual incident which makes up the course of conduct or the last straw to be itself a breach of conduct. (*Lewis, Meikle*). The question is- does the cumulative series of acts or omissions *taken together* [original emphasis] amount to a breach of the implied term."**

32. Mr Geere referred to paragraphs 103 to 107 as examples of the EJ failing to apply the correct approach to the question of whether the Respondent had been in breach of the implied term of trust and confidence. Paragraphs 103 and 104 are arguably examples of an error in approach. As cited in paragraph 82 the correct approach to a claim that there has been a breach of trust and confidence based on a "last straw" does not require a claimant to establish that each individual incident which makes up the course of the conduct or the last straw to be of itself a breach of contract. It is the cumulative effect of the conduct including that constituting the last straw which is to be considered.

33. In this case the Claimant continually asked the Respondent to identify the passages in her diary which they relied upon for the serious allegation that she had broken patient confidentiality by recording partial addresses and telephone numbers. Since this formed a basis albeit not the only one, of the disciplinary action against her which was not overturned on appeal, in my judgment it is arguable that failing and finally in the e-mail of 11 July 2014 refusing to identify the passages in her diary on which the Respondent relied to support such a serious allegation could be said to be a sufficiently serious last straw in a course of conduct constituting constructive dismissal. Further, the failure to deal with the justified concern that the Respondent had not been honest with her in saying that a reply had been sent on 12

February 2014 in response to her e-mail of 5 February 2014 could be said to provide support for an allegation of behaviour causing loss of trust and confidence.

34. In my judgment it is arguable that the EJ misunderstood the case being advanced by the Claimant. In both paragraphs 103 and 104 he considered the conduct of the Respondent up to the determination of the appeal hearing and not the case being advanced by the Claimant, that the e-mail of 11 July 2014 was the final straw as it was a final refusal to deal with her concerns.

35. At paragraph 132 the EJ held:

> **"132. In conclusion:**
>
> **i. The two breaches relied on were not calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.**
>
> **ii. The last straw case fails because there were no previous repudiatory breaches of contract in any event.**
>
> **iii. Further, there was no cumulative breach of the implied term of trust and confidence."**

36. In my judgment it is arguable that paragraph 132 (ii) shows that the EJ erred in his approach to whether the Claimant had established that the Respondent was in breach of the implied term of trust and confidence entitling her to resign. It is arguable that it was not necessary for the Claimant to establish that there were "previous repudiatory breaches of contract". Further, it is arguable that the EJ erred by failing to consider whether the two matters of failing to state which passages in the diary the Respondent was relying upon to support the conclusion that the Claimant had there recorded addresses and telephone numbers or to explain why she may not have received a reply to her e-mail of 5 February and the way in which her enquires were dealt with were in themselves breaches of the implied term of trust and confidence. Accordingly Paragraph 132 (i) could also be said to display an error of law in the consideration of whether a breach of trust and confidence had been established.

37. Ground 7.1 is to proceed to a Full Hearing.

Ground 7.2

Misdirection

38. Mr Geere contended that the EJ erred insofar as he relied upon the citation of commercial cases in paragraph 78 and a requirement in establishing a repudiatory breach for the contract breaker to be shown to have "an intention to abandon and altogether refuse to perform the contract".

39. There is a danger in over citation of authority even in an attempt, as may have been the intention of the EJ, to explain principles to a lay representative or party. Whilst there was no error in failing to refer to an authority relied upon by Mr Geere, **Bliss v South East Thames Regional Health Authority** [1987] ICR 700, it is arguable that the citation of paragraph 61 of **Eminence Property Developments Ltd v Heaney** [2010] EWCA Civ 1168 displays an error in the approach to the issue of constructive dismissal on the basis of the implied term of trust and confidence which was before the EJ in this case.

40. Ground 7.2 is to proceed to a Full Hearing.

Ground 7.3

Inappropriate questioning during cross-examination

41. Mr Geere summarised this ground of appeal as follows:

> **" The Tribunal engaged in inappropriate questioning of the Claimant during cross examination by the Respondent's witness [sic] as reported at paragraph 103 to 107 and drew inappropriate conclusions from answers given to such questioning'.**

I agree that this challenge to the decision is arguable.

42. Whilst it is sometimes appropriate and helpful for an Employment Judge to ask questions of a party in order to obtain clarification of the issues care must be taken not to cross the line of giving the appearance of favourable assistance to one party which can disadvantage the other. It is arguable that not only could the questions put by the EJ to the Claimant in paragraphs 103 and 104 have given rise to the risk of such appearance but more importantly that they displayed an error in the understanding of the Claimant's case and in displaying the error identified in ground 7.1 of the Notice of Appeal. Further it is arguable that, contrary to the decision of the EJ in paragraph 106, evidence in 2016 of whether the Claimant considered that what occurred in 2013 and 2014 were breaches of contract was irrelevant and that the ET erred in rejecting submission of Mr Geere set out in paragraph 105 (i) to that effect.

43. Ground 7.3 is to proceed to a Full Hearing.

Ground 7.4

Failure to consider Claimant's case as pleaded

44. In my judgment it is arguable that paragraph 7 does not accurately identify the actions of the Respondent culminating in the last straw of Ms Willmott-Miller's e-mail of 11 July 2014 which were said to constitute cumulatively a breach of trust and confidence. The EJ rightly sought to identify the conduct relied upon. On appeal the Claimant cannot re-argue the claim before the ET. However it is apparent that the Claimant's principal complaints were those set out in paragraphs 5.1 and 7.2, and later renumbered 7 of her paper prepared for presentation at the appeal hearing. It is arguable that the EJ failed to consider the Claimant's allegation of breach of trust and confidence based on how those issues had been treated by the Respondent at all stages beginning with the investigation of the complaints against her and culminating in the e-mail of 11 July 2014. On that basis did not on the wider basis pleaded which refers to Mr

A Geere being prevented from cross examining the Respondent's witnesses on relevant matters ground 7.4 is to proceed to a Full Hearing.

B **Ground 7.5**

Meek compliance etc

45. Mr Geere asserts in paragraph 7.5(a) a failure by the EJ to refer to relevant facts and uncontested witness evidence. Mr Geere does not identify either in the Notice of Appeal or the C skeleton argument the issue or issues to which such evidence would have been relevant and what the evidence was which was given but omitted from the decision. Failure to mention the Claimant's objections to the bundle is not a ground on which the decision can be challenged.

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46. Ground 7.5(a) does not raise any arguable error of law and it is not to proceed to a Full Hearing.

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47. In ground 7.5(b) Mr Geere contends that the assertion in paragraph 134 that "the claimant was looking for an excuse to resign" was made on the basis of assumptions and did not refer to evidence. I agree that this contention is arguable. The challenge to the decision F under ground 7.5(b) is arguable only on the basis of this identified example. Grounds of appeal must identify the specific passages in the decision which are challenged. A general allegation of "drawing conclusions that fly in the face of the evidence and instead making bold assertions" G does not open the door to challenging unspecified conclusions.

48. Ground 7.5(b) is to proceed to a Full Hearing only on the challenge to the finding that "the claimant was looking for an excuse to resign".

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49. It is said without specifying that the ET failed to provide an accurate or fair summary of the things said during the hearing. Paragraph 7 is referred to. However Mr Geere has contended that paragraph 7 is inaccurate not that it fails to provide reasons for a conclusion or decision. An ET is not required to provide a summary of evidence given at a hearing. What is required is a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost (**Meek v City of Birmingham District Council** [1987] IRLR 250).

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50. Ground 7.5(c) raises no arguable point of law and is not to proceed to a Full Hearing.

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Ground 7.6

Section 11 Points

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51. In ground 7.6(a) Mr Geere contends that:

> **"A statement that continuity of employment will remain unaffected cannot suffice as specifying "the date on which the period of continuous employment began" as required by s4(8) of the Employment Rights Act 1996."**

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52. The Claimant's contract of employment transferred to the Respondent with effect from 1 April 2011 on a **TUPE** transfer. The Claimant accepted that she received a letter on 4 January 2011 stating that her employment would transfer to the Respondent with effect from that date and that her "continuous service will be preserved". It appears from paragraph 141 that the Claimant had been given written particulars of employment by the transferor employer specifying a commencement date of 16 February 2009.

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53. Although on these facts the commencement date of the period of continuous employment is identifiable, in my judgment it is just arguable that **ERA** section 4(8) requires

A the notification of change of employer to give the date on which the period of continuous employment began and that merely stating that continuity of employment is preserved is insufficient.

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54. Ground 7.6(a) is to proceed to a Full Hearing.

55. In ground 7.6(b) Mr Geere contends:

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> **"Paragraph 12 of the Judgment does not correctly set out the pleaded case which was (inter alia) that the conditions in s4(7) of the 1996 Act were not satisfied and so the exception provided for by s4(6) did not apply."**

Paragraph 12 sets out the allegation made by the Claimant that there was:

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> **"A failure to provide new particulars of employment following the change of job role, place of work and entitlement to travel expenses (related to a change of employer)."**

56. The basis of the contention by Mr Geere is explained by the Claimant in her supplemental witness statement of 8 February 2016. At paragraph 5 the Claimant states that it was when Mr Geere was assisting the Claimant with her proceedings before the ET that he noticed that her payslips from April 2012 showed her job title as "Community Practitioner".

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57. The ET3 gives the Claimant's job role from 16 February 2009 (before the transfer) to 22 July 2014 (the termination of her employment with the transferee Respondent) as Community Practitioner. The case presented in the ET3 was therefore that there was no change in the Claimant's job role during the entirety of her employment.

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58. The complaint made by the Claimant in paragraph 4 of her main witness statement was that following a "Management of Change" exercise in 2012 she was allocated her third option

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of a new job role. This was formally notified to her by letter dated 3 April 2012. It was stated to be Community Psychiatric Nurse.

59. In my judgment there was overwhelming evidence before the ET that the role of the Claimant changed from April 2012 and not "immediately after" the transfer as asserted by Mr Geere. The ET set out in paragraph 142, the contention advanced by Mr Geere that the exception in section 4(6)(b) was not satisfied. The contention that the ET erred in law by failing to hold that **ERA** section 4(6) did not apply because section 4(7) was not satisfied is unarguable on the findings of fact and the evidence in the Claimant's witness statements referred to in the decision of the ET.

60. Ground 7.6(b) is not to proceed to a Full Hearing.

Ground 7.7:

Perversity and Bias

61. By ground 7.7(a) it is contended that grounds 7.1 to 7.6 provide evidence of perversity and bias. Whilst some of those grounds raise arguments which have a reasonable prospect of success on appeal they do not support the serious allegation of that the conduct by the EJ of the hearing gave the appearance of bias. Whilst it is arguable that the questioning by the EJ referred to in ground 7.3 was inappropriate and supported a contention that he failed to consider the effect of the "last straw" of the e-mail of 11 July 2014 it is far from demonstrating bias.

62. A ground of appeal alleging perversity must comply with Paragraph 3.8 of the **EAT Practice Direction 2013**. The only particulars of perversity given in ground 7.7 are by

reference back to "points 7.1 to 7.6". I have considered and determined whether they raise reasonable arguable grounds of appeal. No further allegations of perversity are properly raised.

63. Ground 7.7(a) is not to proceed to a Full Hearing.

64. **EAT Practice Direction 2013** paragraph 3.10 provides that:

> **"A party cannot "reserve a right" to amend, alter or add, to a Notice of Appeal …"**

The "difficulties arising from the Respondent's representatives throughout the proceedings" and what should have been acknowledged or addressed by the EJ which are the basis of ground 7.7 (b) have not been identified or specified.

65. Ground 7.7(b) raises no arguable ground of appeal.

66. By ground 7.7(c) Mr Geere states:

> **"A detailed review of the judgment is being prepared … This is being submitted in support of the reconsideration application but will also be relied on in support of this appeal."**

67. Any result of the detailed review "in preparation" referred to for the purpose of a reconsideration application does not form part of the Notice of Appeal which is an appeal from the Judgment of EJ Pirani sent to the parties on 15 March 2016.

68. Ground 7.7(c) contains no arguable ground of appeal and is not to proceed to a Full Hearing.

Disposal

69. Grounds 7.1, 7.2, 7.3, and 7.4 and 7.5(b) only on the limited basis explained in paragraphs 44 and 48 respectively and 7.6 (a) are to proceed to a Full Hearing.

70. Grounds 7.5(a) and (c), 7.6(b) and 7.7(a), (b) and (c) are not to proceed to a Full Hearing. No further action will be taken on those grounds.

71. The fact that some grounds of appeal are to proceed to a Full Hearing is not to be taken as any indication of the ultimate success of the appeal. The task of the court at this Rule 3(10) Hearing is merely to determine whether the Notice of Appeal discloses any reasonable grounds for bringing the appeal.

Time estimate 1 day Category A