Appeal No. UKEAT/0272/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 June 2015
Judgment handed down on 17 June 2015

Before

THE HONOURABLE MR JUSTICE LEWIS

(SITTING ALONE)

HARRY RALPH ADEANE MARTINEAU & OTHERS — APPELLANTS

MINISTRY OF JUSTICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR ANDREW SUGARMAN (of Counsel) Instructed by: Browne Jacobson LLP Mowbray House Castle Meadow Road Nottingham NG2 1BJ
For the Respondent	MR CHARLES BOURNE QC (of Counsel) and MS RACHEL KAMM (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS

SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

PART TIME WORKERS

Jurisdiction - Employment Appeal Tribunal - Appeals by persons not party to the proceedings before the Employment Tribunal

Part time workers - discrimination

The appeal concerned claims by fee-paid immigration Judges that they were treated less favourably than salaried Judges as fee-paid Judges were paid one and sixth-sevenths of a day for hearing a day's list of cases and the subsequent writing up of judgments whereas salaried Judges received two full day's salary. A lead case was specified and the Appellants' cases were stayed. The Employment Tribunal ruled that the lead Claimant had not established that there was less favourable treatment. The lead Claimant decided not to appeal. The decision in the lead case was binding on the Appellants. They sought to appeal the decision in the lead case. The Employment Appeal Tribunal held that it had jurisdiction under section 21 of the **Employment Tribunals Act 1996** to hear an appeal on a question of law brought by persons who were not parties to the proceedings in the Employment Tribunal and it was appropriate to exercise that jurisdiction in the circumstances of the present appeal.

The claim essentially required the lead Claimant to establish that the assumption underlying the fee arrangements, namely that the fee paid represented as accurate picture as possible, albeit rough and ready, of the length of time which it took salaried Judges and fee paid Judges to deal with a day's list of cases, both in terms of sitting and decision writing. It would be open to an Employment Tribunal to conclude that the material in a report analysing judicial time in the Asylum and Immigration Tribunal was not sufficient to establish less favourable treatment.

Given, however, that the material in the report was a critical part of the Claimant's case, the Employment Tribunal had to give adequate, albeit brief, reasons why it had reached that conclusion. As it had not done so, the appeal was allowed and the matter remitted to the same Employment Tribunal to reconsider the issue of less favourable treatment following further submissions by the parties.

THE HONOURABLE MR JUSTICE LEWIS

Introduction

1. This is an appeal against a ruling made by Employment Judge Macmillan at a preliminary hearing concerning, amongst other issues, the payment of fees to fee-paid Judges in the First-tier Tribunal (Immigration and Asylum Chamber) for writing up judgments. In essence, the claim was that fee-paid Judges were treated less favourably as they were paid for one full day and six-sevenths of a day for hearing a day's list of cases and the subsequent writing up of judgments whereas salaried Judges were paid for two full days. The Employment Tribunal determined that the Claimant had not established that there was less favourable treatment.

2. The ruling of the Employment Tribunal was given in a case brought by Ms Kyrie James against the Ministry of Justice (the judgment being headed **Miller and others v Ministry of Justice**). That claim was specified as the lead claim pursuant to paragraph 36 of Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Tribunal Regulations"). The claims of the Appellants, Harry Martineau and Patricia Quigley, were stayed pending the outcome of the lead case as their cases (and many others) raised common issues of law and fact with the claim in Ms James' case. The decision in Ms James' case was, however, also binding in the cases of Mr Martineau and Ms Quigley. In the event, Ms James decided not to appeal. Mr Martineau and Ms Quigley sought to appeal the decision in Ms James' case.

3. The first issue is whether the Employment Appeal Tribunal has jurisdiction under section 21 of the **Employment Tribunals Act 1996** ("the Act") to hear an appeal by the

Appellants. If so, there are two grounds of appeal. First, the Appellants contend that the Employment Tribunal failed to have regard to relevant evidence or reached a perverse conclusion in relation to the finding that the Claimant had not established less favourable treatment. The principal evidence in issue was the evidence of Ms James herself and a report by Sir Thayne Forbes on the operation of the system for hearing immigration cases which, the Claimant contended, established or supported her claim that salaried and fee-paid Judges spent a similar amount of time on hearing cases and writing up judgments but fee-paid Judges received one and six-sevenths of a day's pay whereas salaried Judges received two days pay. Secondly, the Appellants contend that the Employment Tribunal failed to give adequate reasons for its decision that there was no less favourable treatment.

The Background

The Proceedings

4. A number of fee-paid immigration Judges contended that the practice of paying them one and six-sevenths of a day in respect of time spent hearing cases and writing up judgments involved less favourable treatment as compared with salaried Judges. On 2 February 2011, all the claims referred to in a particular schedule, and all claims raising the same or similar issues, were combined and transferred to the London Central Region.

5. On 12 March 2012, a further order was made providing that all claims raising the same or similar issues were to be considered together, were to be transferred to the London Central Region and were to be stayed. Following that order, Mr Martineau and Mrs Quigley issued claims and, in accordance with the terms of the order, their claims were transferred to London Central and were stayed.

6. The **Tribunal Regulations** provide for a system for dealing with two or more cases that give rise to common or related issues of fact or law. The Tribunal may specify one or more of the cases as a lead case. Other claims may be stayed pending the outcome of the lead case. The decision in the lead case is binding upon the other cases. The relevant rule is Rule 36 of the **Tribunal Regulations** which provides, so far as material, that:

> **"(1) Where a Tribunal considers that two or more claims give rise to common or related issues of fact or law, the Tribunal or the President may make an order specifying one or more of those claims as a lead case and staying, or in Scotland sisting, the other claims ("the related cases").**
>
> **(2) When the Tribunal makes a decision in respect of the common or related issues is shall send a copy of that decision to each party in each of the related cases and, subject to paragraph (3), that decision shall be binding on each of those parties.**
>
> **(3) Within 28 days after the date on which the Tribunal sent a copy of the decision to a party under paragraph (2), that party may apply in writing for an order that the decision does not apply to, and is not binding on the parties to, a particular related case.**
>
> **(4) If a lead case is withdrawn before the Tribunal makes a decision in respect of the common or related issues, it shall make an order as to–**
>
> **(a) whether another claim is to be specified as a lead case; and**
>
> **(b) whether any order affecting the related cases should be set aside or varied."**

7. On 31 July 2013, the President of Employment Tribunals made an order in accordance with those Rules. In essence, it identified the case of Kyrie James as being the relevant lead case in relation to the fee-paid immigration Judges. Other claims, including those of Mr Martineau and Ms Quigley, continued to be stayed pending the outcome of the lead case.

The Claim

8. The claim concerning the fees paid to fee-paid immigration Judges came before Employment Judge Macmillan. The claim is based upon regulation 5(1) and (2) of the **Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000** which provides that:

> **"(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker–**
>
> **(a) as regards the terms of his contract; or**
>
> **(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.**
>
> **(2) The right conferred by paragraph (1) applies only if–**
>
> **(a) the treatment is on the ground that the worker is a part-time worker, and**
>
> **(b) the treatment is not justified on objective grounds."**

9. It would be for the Claimant, Ms James, to establish that fee-paid Judges were subjected to less favourable treatment than salaried Judges on the ground that they were part-time workers. If she established that, the burden would then be upon the Respondent to establish that the less favourable treatment was justified on objective grounds.

The Decision of the Employment Tribunal

10. At paragraph 126, the Employment Tribunal noted that a salaried Judge writing up a judgment during the working day would be paid that Judge's normal salary. The issue concerned the arrangements made relating to the fees paid to fee-paid Judges for writing up judgments. The Employment Judge analysed the issue in the following way:

> **"129. The dispute concerns the payment of fees for single judge hearings. I have heard no evidence concerning the fees for panel hearings. The current arrangements were negotiated by the Council of Immigration Judges on behalf of their members with the then Chief Adjudicator (the President of the tribunal) and the administration in 2002 and have remained in place ever since,. The arrangements reflected a then new working pattern known as 1+1 which had been the subject of two pilot studies before being rolled out nationally. It followed recommendations made by Messrs Price-Waterhouse-Cooper and has been subsequently endorsed in a report by a High Court Judge, Sir Thayne Forbes. The pattern anticipates that over a two day period one day is spent sitting hearing a number of cases and the next writing up the judgments from those cases. The agreement between the Council of Immigration Judges and the administration was renewed in 2005. The issue in these claims is that whereas a salaried judge receives two days pay for the 1+1 sitting pattern, the fee paid judge receives on 1 and 6/7th daily fees.**
>
> **130. The rationale behind the difference is said to be that the fee is as accurate a reflection as possible of the time taken to write up judgments and that salaried judges will be expected to utilise the remaining one-seventh of the writing up day on other judicial business. The rationale depends upon three assumptions: that the working day is 7 hours long; that fee paid judges always write up at home and that salaried judges always write up in their chambers at the tribunal. The first two assumptions appear to be sound, the third less so. A fee paid immigration judge can claim an additional fee for each judgment which they type up personally or which is typed up at their expense, the fee being £15, £35 or £45 depending on the type of case.**
>
> **131. The issue here is whether there is less favourable treatment of fee paid judges. For that to be the case I would have to be satisfied that the rationale underlying the agreement was mistaken in that the composite fee did not represent an as accurate picture as possible, albeit rough and ready, of the length of time which it took both salaried and fee paid judges to dispose of a days list both sitting and decision writing and that the true position was that it took two full days of seven hours or that it was not generally the case that salaried judges devoted the remaining hour of the second day to other judicial business.**
>
> **132. Ms Kyrie James is both the only lead claimant and only claimant witness on this point. Her evidence on it was absolutely minimal, running to two short paragraphs in her witness statement which were supplemented by a single decision. She merely asserts that the writing up day for all fee paid immigration judges is a full day and that she personally always does more that 1+1. There is no suggestion, let alone evidence, that the Council of Immigration Judges is seeking to renegotiate the agreement they last made in 2005, a point I put to Ms James specifically and no other fee paid Immigration and Asylum judge has been called to support her assertions. Mr Rogers' lengthy submissions on this point are therefore based almost entirely on surmise, plus his interpretation of the Forbes report and conclusions which he believes can be drawn from the answers given in cross examination by Judge Michael Clements the current Chamber President. It may well be the case that Ms James personally takes more than a day to write her judgments**

> **as she types them all, a slower way of producing a document than dictating it for others to type – she is of course paid extra for typing them – and because from the number of occasions when she has been prevented from sitting by her Resident Judge because judgments were outstanding, she seems to be generally slow in producing them. I have heard no direct evidence about how long the typical salaried Immigration Judge spends judgment writing or what they do with the rest of their day when they have finished. However, there can be no doubt that, unlike the fee paid judge, once they have finished decision writing they are under a continuing commitment to the court.**
>
> **133. Current statistics show that the 1+1 pattern does not hold good in practice when it comes to the sitting day as 46% of hearings finish by 2.00pm and a further 18% by 3.00pm. That would suggest some leeway in the first day of the 1+1 pattern for decision writing."**

11. The Employment Tribunal's conclusion on this issue is set out at paragraph 143 in the following terms:

> **"143. For the reasons given in paragraph 126 above it is simply not open to me on the evidence to find less favourable treatment of fee paid Immigration and Asylum Judges in the way the composite fee for the 1+1 sitting pattern is calculated. I am not even able to say the [sic] Ms James personally is less favourably treated given that she types her own decisions and is paid extra for so doing and there is evidence to suggest that she is rather slow at producing decisions in any event."**

12. The reference to paragraph 126 must be intended to be a reference to paragraph 132 of the judgment of the Employment Tribunal.

The Appeal

13. Ms James decided not to appeal against the decision of the Employment Tribunal. The decision had been served on solicitors acting for, amongst others, Mr Martineau and Ms Quigley as they were bound by the decision in Ms James' case. They did seek to appeal on five grounds. The President, Langstaff J, ordered that Mr Martineau and Ms Quigley be joined as Appellants pursuant to Rule 18 of the **Employment Appeal Tribunal Rules 1992** ("the EAT Rules"). The matter then came before the President on a preliminary hearing. He considered that it was arguable that they were not properly parties to the appeal and considered that that was a preliminary issue for the Employment Appeal Tribunal to consider. The President considered that, subject to the Employment Appeal Tribunal having jurisdiction to hear an appeal by persons such as Mr Martineau and Ms Quigley, two of the five grounds of appeal should go forward to a full hearing.

The Issues

14. Against that background, the three issues that arise on this appeal are:

(1) Does the Employment Appeal Tribunal have jurisdiction to hear an appeal by persons who were not parties to the proceedings in the Employment Tribunal in which the decision subject to appeal was made?;

(2) Did the Employment Tribunal fail to have regard to relevant evidence, or reach a perverse conclusion in concluding that the Claimant had not established less favourable treatment?; and

(3) Had the Tribunal given adequate reasons for its decision that the Claimant had not established that there was less favourable treatment?

The First Issue - Jurisdiction

The Contentions

15. The Appellants contend that the Employment Appeal Tribunal has jurisdiction under section 21 of the **Act** to hear appeals in any case involving a point of law raised in proceedings before an Employment Tribunal under the statutes or statutory instruments specified in section 21. They contend that there is no restriction on the persons who may bring such an appeal. Any risk of abuse is controlled by rules made under section 30 of the **Act**. At present the relevant rules are contained in Rule 3(7) of the **EAT Rules**. Appeals by persons such as the Appellants, who are bound by the decision in the proceedings in Ms James' case do not constitute an abuse of process within the meaning of those rules. The Appellants put forward two other bases upon which their appeal is properly brought. They contend that the effect of the order made under Rule 36 together with the order that their cases be considered with the case of Ms James, among others, is that they were parties to the proceedings in the Employment Tribunal. Alternatively, they submit that the President was entitled to join them

as a party to the appeal proceedings in the Employment Appeal Tribunal under Rule 18 of the **EAT Rules**.

16. The Respondent contends that it is inherent in section 21 of the **Act** that only parties to the proceedings before the Employment Tribunal can appeal against decisions in those proceedings. The Appellants were not parties to those proceedings and so the Employment Appeal Tribunal cannot entertain an appeal brought by them. The Respondent contends that Rule 18 of the EAT only enables persons to be joined to an appeal if the appeal is properly brought within the meaning of section 21 of the **Act**. As this appeal was not properly brought (as the parties to the proceedings in the Employment Tribunal have not appealed), there is no validly constituted appeal to which the Appellants can be made parties. The Respondent contends that the proper course of action would have been for the Appellants to have applied under Rule 36(3) of Schedule 1 to the **Tribunal Regulations** for an order that the decision in Ms James' case does not apply to their case and appeal that refusal. Ultimately, it appears that the Respondent accepted that the Appellants would be entitled to appeal a decision in their individual claims dismissing those claims, as the claims were bound to fail by reason of the decision in Ms James' case. Such an appeal, the Respondent contends, would only apply to the outcome of their individual cases and not to any other case.

The Statutory Provisions

17. The jurisdiction of the Employment Appeal Tribunal is prescribed by statute and the scope of that jurisdiction depends upon the proper construction of those statutory provisions. Section 20 of the **Act** provides that the Employment Appeal Tribunal is to continue in existence. Section 21 of the **Act** as amended, under the heading "Jurisdiction", confers

jurisdiction upon the Employment Appeal Tribunal to entertain appeals. It provides, so far as material, that:

> **"(1) 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 under or by virtue of**
>
> **…**
>
> **(j) the Part-time Workers (Prevention of Less Favourable Treatment Regulations 2000"**

18. There are also provisions contained under the heading "Procedure". Section 29A of the **Act** provides for the giving of directions "about the procedure" of the Employment Appeal Tribunal. Section 30 of the **Act** provides, so far as material, that:

> **"30.— Appeal Tribunal procedure rules.**
>
> **(1) The Lord Chancellor, after consultation with the Lord President of the Court of Session, shall make rules ("Appeal Tribunal procedure rules") with respect to proceedings before the Appeal Tribunal.**
>
> **(2) Appeal Tribunal procedure rules may, in particular, include provision—**
>
> **(a) with respect to the manner in which, and the time within which, an appeal may be brought,**
>
> **(b) with respect to the manner in which any application or complaint to the Appeal Tribunal may be made,**
>
> **(c) for requiring persons to attend to give evidence and produce documents and for authorising the administration of oaths to witnesses,**
>
> **(d) for requiring or enabling the Appeal Tribunal to sit in private in circumstances in which an employment tribunal is required or empowered to sit in private by virtue of section 10A of this Act, and**
>
> **…**
>
> **(f) for interlocutory matters arising on any appeal or application to the Appeal Tribunal to be dealt with by an officer of the Appeal Tribunal."**

19. The present rules are the **EAT Rules**. They were made under provisions of the **Employment Protection (Consolidation) Act 1978** but those provisions have been repealed and the **EAT Rules** take effect as if made under section 30 of the **Act**: see sections 45 and 45, and Schedule 1, and paragraph 2 of Schedule 2 to the **Act**. Rule 3(7) of the **EAT Rules** provides that:

> **"(7) Where it appears to a judge or the Registrar that a notice of Appeal or a document provided under paragraph (5) or (6) –**
>
> **(a) discloses no reasonable grounds for bringing the appeal;**
>
> **(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 or special advocate informing him of the reasons for his opinion and, subject to paragraph 10 no further action shall be taken on the notice of appeal or document provided under paragraph (5) or (6)."**

20. Rule 3(10) of the **EAT Rules** enables an Appellant who is dissatisfied with the reasons given for such an opinion to have the matter heard before a Judge who shall make a direction as to whether any further action is to be taken on the Notice of Appeal.

Conclusions on the Jurisdictional Issue

21. In my judgment, the Employment Appeal Tribunal jurisdiction does, in principle, have jurisdiction under section 21 of the **Act** to entertain an appeal on any question of law arising from any decision of, or arising in any proceedings before, an Employment Tribunal under one of the specified statutes or statutory instruments even where the appeal is brought by a person who was not a party to the proceedings in the Employment Tribunal. Any limit or restriction on the ability of persons who were not parties to the proceedings to bring an appeal must be sought in other provisions and is not contained in section 21 of the **Act** itself. I reach that conclusion for the following reasons.

22. First, and principally, the wording of section 21 of the **Act** itself operates by conferring jurisdiction in respect of one type of issue ("any question of law") which arises in certain specified circumstances, that is where the question arises "from any decision" or "in any proceedings" before an Employment Tribunal under one of the specified statutes or statutory instruments. The section itself does not expressly limit appeals to persons who were parties to the proceedings in the Employment Tribunal. Provided that the appeal is an appeal falling with the description specified in section 21 of the **Act**, it falls within the jurisdiction of the Employment Appeal Tribunal.

23. Secondly, there are mechanisms for controlling appeals brought by persons who were not parties in the Employment Tribunal proceedings themselves where it is considered

inappropriate to permit such appeals. The power conferred by section 30(1) of the **Act** to make rules "with respect to proceedings" before the Employment Appeal Tribunal is broad enough to include rules providing who may or may not bring proceedings. Concerns over the bringing of appeals in inappropriate circumstances or by inappropriate persons are intended to be controlled by the making of rules under section 30 of the **Act** rather than reading implied limitations into the provisions of section 21 of the **Act**.

24. Indeed, at present, Rule 3(7) of the **EAT Rules** enables a Judge or Registrar to direct that no further action be taken on a Notice of Appeal if, amongst other things, the Notice of Appeal "is an abuse of the [Employment] Appeal Tribunal's process" or "is otherwise likely to obstruct the just disposal of proceedings". In most circumstances, the parties concerned by a decision of the Employment Tribunal will be the parties to the proceedings before that Tribunal. If they do not seek to appeal in respect of any question of law arising out of the decision or the proceedings, it would often, probably usually, be an abuse of process for some other person to seek to appeal any question of law or it would be likely to obstruct the just disposal of proceedings between the parties to the proceedings. There may, however, be other, relatively rare occasions, when a person is sufficiently affected by a decision reached in one set of proceedings that it would not be an abuse of process to allow an appeal by that person in respect of those proceedings to proceed. One such example might arise in relation to appeals in a case specified as a lead case under Rule 36 of Schedule 1 to the **Tribunals Regulations**. A decision in such a lead case will be binding on other persons in related cases, that is those cases which raise common issues of law or fact and which have been stayed pending the outcome of the lead case. The original Claimant in the proceedings may, for whatever reason, decide not to appeal. There may, therefore, be some cases in which the bringing of an appeal by persons not parties to the proceedings in the Employment Tribunal would be appropriate.

25. Thirdly, section 21 of the **Act** is to be construed in a context where it can be assumed that Parliament would not have intended to preclude an appeal by a person who was not a party to proceedings in the Employment Tribunal if that could, conceivably, cause injustice. The Court of Appeal has considered this issue in a different context in **George Wimpey UK Ltd v Tewksbury Borough Council** [2008] 1 WLR 1649. There, a statutory application was brought in the High Court by George Wimpey UK Ltd under section 287 of the **Town and Country Planning Act 1990** to quash the decision of the local authority to adopt a local plan. The High Court granted the application to the extent of quashing the part of the local plan relating to land owned by MA Holdings and allocating it for residential development. MA Holdings sought to appeal to the Court of Appeal pursuant to Part 52 of the **Civil Procedure Rules** ("the CPR"). The precise wording of those rules differs from the wording of section 21 of the **Act** in the present case. The decision in the **George Wimpey** case, therefore, is not binding as to the interpretation to be given to section 21 of the **Act**. What is relevant, however, is the preliminary observation made Dyson LJ (as he then was) at paragraph 9 of his judgment. He observed that:

> **"It would be surprising if the effect of the CPR were that a person affected by a decision could not in any circumstances seek permission to appeal unless he were a party to the proceedings below. Such a rule could work a real injustice, particularly in a case where a person who was not a party to the proceedings at first instance, but who has a real interest in their outcome, wishes to appeal, the losing party does not wish to appeal and an appeal would have real prospects of success."**

26. Similar considerations apply in relation to section 21 of the **Act**. It would also be surprising if the wording of section 21 of the **Act** were interpreted as including limitations preventing non-parties appealing to the Employment Appeal Tribunal in circumstances where such restrictions could work a real injustice. There is no express limitation in the wording of section 21 of the **Act** requiring that result. The Respondent contends that such a limitation is inherent in the reference to proceedings. In my judgment, the wording of section 21 is not inherently implied in that way.

27. Further, and contrary to the submission of the Respondent, the ability of non-parties to appeal does not depend upon them having made an application under Rule 36(3) of Schedule 1 to the **Tribunal Regulations** for an order that the decision in the lead case does not apply to them. Such applications are concerned with the question of whether there is a reason why the decision in the lead case ought not to be regarded as applicable to another case. They are not concerned with challenging the correctness as a matter of law of the decision in the lead case. Any appeal against a decision refusing to make an order under Rule 36(3) would be concerned with the correctness in law of that decision, not the underlying decision in the lead case. In the present case, the Appellants made an application under Rule 36(3) and that was withdrawn as it was inevitable, as recognised by the Respondent, that the application would fail. There was no reason why the decision in the lead case of James should not apply to their case. The real issue was whether the decision in the lead case of James was correct in law.

28. The Respondent also relies upon the provisions of **CPR** 19.12 dealing with group litigation, that is cases involving claims giving rise to common or related issues of fact where a group litigation order has been made relating to the management of such claims. A judgment in one claim is binding on the other claims to which the order applies. **CPR** 19.2 specifically provides that a party who is adversely affected by a judgment or order which is binding on him may seek permission to appeal the order. The Respondent draws attention to the fact that there is no equivalent provision in Rule 36 of Schedule 1 to the **Tribunal Regulations** and submits that, given the absence of such a provision, non-parties cannot bring an appeal in respect of lead cases binding upon them. The **CPR** Rules do not apply to claims brought in Employment Tribunals. More fundamentally, the issue here concerns the proper interpretation of section 21 of the **1996 Act**. It is not permissible to use subordinate legislation such as the **CPR** as an aid to construing primary legislation conferring jurisdiction on the Employment Appeal Tribunal.

29. For those reasons, the Employment Appeal Tribunal does have jurisdiction under section 21 of the **Act** to hear an appeal brought by a person who was not a party to the proceedings in the Employment Tribunal. For completeness, I note that that conclusion is consistent with the views expressed by the Employment Appeal Tribunal in **USDAW v Ethel Austin Ltd (in Administration)** UKEAT/0547/12/GE. There the Secretary of State for Business, Skills and Innovation was a party to one set of proceedings before the Employment Tribunal involving a particular issue but was not a party in a second set of proceedings. Appeals in both cases were heard together in the Employment Appeal Tribunal. The Secretary of State, however, did not participate. Following the single judgment in the two cases, the Secretary of State sought permission from the Employment Appeal Tribunal to appeal to the Court of Appeal under section 37 of the **Act**. That section is in similar terms to section 31 in that it provides that "an appeal on any question of law lies from any decision or order" of the Employment Appeal Tribunal to the Court of Appeal. The Employment Appeal Tribunal expressed the view that appeals from non-parties were permissible under section 37 of the **Act**. Ultimately, however, the Employment Appeal Tribunal decided the application for permission to appeal on a different basis.

30. If I found that the Employment Appeal Tribunal had jurisdiction to entertain the appeal, the Respondent invited me to consider again whether it was appropriate for these two Appellants to be allowed to bring the appeal. On the facts of this particular case, the bringing of this appeal by these two Appellants would not amount to an abuse of process or otherwise obstruct the just disposal of the proceedings. I accept that, even in cases specified as lead cases under Rule 36 of Schedule 1 to the **Tribunal Regulations**, the Employment Appeal Tribunal would be cautious about parties other than those who participated in the proceedings below being allowed to pursue an appeal. That would particularly be the case if the lead Claimant

wished to appeal. There would need to be a good reason for any of the Claimants whose claim had been stayed to be allowed to appeal in those circumstances. Even if the lead Claimant had indicated that he or she did not wish to appeal, there may be a real issue as to who should be permitted to carry on the appeal. In the present case, however, the lead Claimant, Ms James, does not wish to appeal (and that fact is confirmed by a witness statement filed by Mr Martineau). There is no suggestion that any other person wishes to appeal or that an appeal by Mr Martineau and Ms Quigley would be an abuse of process. Rather, the position is that they are bound by the decision in Ms James' case. The decision has been served upon them. They consider that the decision is wrong on two points of law. The President at the preliminary hearing considered that the Notice of Appeal did disclose two arguable grounds of appeal and those should go forward to a full hearing. In all the circumstances, therefore, the Employment Appeal Tribunal has jurisdiction to hear the appeal and there is no reason on the facts of this particular case for it to decline to do so under Rule 3(7) of the **EAT Rules**.

31. I note that it would have been open to the Appellants to have applied to have the stay lifted in their cases and an order dismissing their claims, the reason being that the decision in the case of James applied to their claims and meant that the claims could not succeed. The Respondent accepts that the Appellants could have appealed such a decision on a question of law as, on any analysis, that would have been a decision in proceedings in the Employment Tribunal to which they were a party. The fact that they could appeal an order ultimately made in their cases would not, of itself, assist in the interpretation of section 21 of the **Act** and the question of whether a person who was not a party to proceedings in an Employment Tribunal could appeal on a question of law arising from a decision in those proceedings. For the reasons given above, the Employment Appeal Tribunal would have jurisdiction to hear such an appeal under section 21 of the **Act**. The question is whether the fact that the Appellants could take

steps to obtain decisions in their own cases, and appeal decisions in their own cases, means it is an abuse of process under Rule 3(7) of the **EAT Rules** to seek to appeal against the decision in the lead case of James. In my judgment, it was not an abuse of process. The aim underlying the system of lead cases is to ensure that there is proper management of cases giving rise to common issues of law or fact. The sensible course is for that decision to be appealed, rather than seeking to lift the stay in other cases, obtain decisions in those other cases and appeal those decisions. Further, if the aim is to ensure that any decision on an appeal is binding on other stayed cases, the other case would have to be specified as a lead case (otherwise any decision on appeal would only apply to the case under appeal not other related cases). Given that the lead Claimant did not wish to appeal, and there is nothing to suggest that the appeals brought by Mr Martineau or Ms Quigley are otherwise inappropriately brought, there is no basis for directing that their Notices of Appeal should not proceed simply because they would, at some stage, be able to appeal decisions dismissing their own claims.

32. In the light of that conclusion, it is possible to deal relatively shortly with the other grounds upon which it is said that the Employment Appeal Tribunal has jurisdiction to deal with this appeal. First, this is not a case where Mr Martineau and Ms Quigley are already parties to the proceedings in Ms James' case below. Their cases were ordered to be "considered together" under Rule 10 of Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** with other claims by virtue of the order of 12 March 2012. In fact, the claims of Mr Martineau and Ms Quigley were stayed under that order. The case management order of 31 July 2013 specified that Ms James' case be the lead case. The Claimants were not parties to the proceedings involving Ms James. Rather, their cases remained separate. As it happened, Ms James' case became a lead case whilst their cases remained stayed and the decision in Ms James' case was to be binding in their case. But

that did not make the Appellants parties to the proceedings in the Employment Tribunal involving Ms James' claim. The reference in the notes in the Supreme Court Practice to the consolidation of claims under the **CPR** having the effect that the claims are combined and "will proceed thereafter as one claim" does not alter matters. The note is considering an order under **CPR** 3.1(2)(g) to consolidate proceedings and not an order that claims should be considered together. The note is dealing with the effect of provisions of the **CPR** not the rules applicable in Employment Tribunals. Further, the reference to "effect" is ambiguous. The practical effect may be that consolidated claims proceed together as if they were one claim. Such claims do not, certainly in the context of the system of specification of lead cases in the **Tribunal Regulations**, become legally one claim. They remain separate claims.

33. Secondly, Rule 18 of the **EAT Rules** does not provide a separate route by which appeals by Mr Martineau and Ms Quigley may be brought in the Employment Appeal Tribunal. That rule provides that the Employment Appeal Tribunal may direct that "any person not already a party to proceedings be added as a party". There needs first to be an appeal which the Employment Appeal Tribunal has jurisdiction to entertain and then directions can be given that persons be added as parties to the proceedings in the Employment Appeal Tribunal. Here, unless there is jurisdiction for the Employment Appeal Tribunal to hear the appeal brought by Mr Martineau and Ms Quigley there will be no proceedings to which they may be joined. In truth, either the Employment Appeal Tribunal has jurisdiction to entertain their appeals under section 21 of the **Act** or it does not. Rule 18 of the **EAT Rules** does not assist in determining that question.

The Second and Third Issues - Perversity and Reasons

34. The Appellants contend that, in deciding that there was no less favourable treatment, the Employment Tribunal failed to have regard to relevant evidence, or reached a decision that was perverse or failed to give adequate reasons for its conclusion. The evidence principally relied upon is the evidence of Ms James and a report by Sir Thayne Forbes, dated 12 December 2009, entitled "An Analysis of Judicial Time in the AIT".

35. In the present case, the Employment Tribunal analysed the issue in the following way. The pattern for dealing with immigration cases before single Judge panels originally anticipated that a day would be spent hearing a number of cases and the next day writing up judgments (although the statistics available at the material time showed that it was not, in fact, the case that the entirety of one day was spent hearing cases and the next writing judgments: see paragraph 133 of the Tribunal decision set out above). Salaried Judges would be receiving two days salary for the two days in which they were attending to their judicial duties. The fee-paid Judges would be present in the Immigration Tribunal on the day they were conducting the hearings in the cases allocated to them but would not be in the Tribunal on the next day when they would be writing up their judgments. The arrangements were that the fee-paid Judges would be paid a fee equivalent to one full day (to reflect the sitting day) and six-sevenths of a full day (to reflect the time taken to write up judgments).

36. As the Employment Tribunal explained, the rationale underlying the difference was that the fee arrangements for fee-paid Judges (1) reflected as accurately as possible the amount of time taken by Judges to write up judgments and (2) salaried Judges would be expected to utilise the time equivalent to the one-seventh of a day not spent writing up decisions on other

duties. The Employment Tribunal considered that, for there to be less favourable treatment, it had to be satisfied that:

> **"the rationale underlying the agreement was mistaken in that the composite fee did not represent an as accurate position as possible, albeit rough and ready, of the length of time which it took both salaried and fee–paid judges to dispose of a day's list both sitting and decision writing time"**

as the true position was that either the task of dealing with a day's list of cases by sitting and writing up decisions (1) "took two full days of seven hours" or (2) "that it was not generally the case that salaried judges devoted the remaining hour of the second day to other judicial business".

37. First, it is accepted now that the Employment Judge correctly identified the question that he needed to answer. Secondly, against that background, it was for the Claimant to establish that the system of payment for hearings, including the arrangements for the payment of fees to fee-paid Judges for writing up judgments, constituted less favourable treatment than that afforded to salaried Judges. In the context of this case, that meant that the Claimant had to establish either that it did take two full days of seven hours to deal with the hearing of cases and subsequent writing up of judgments, or that salaried Judges did not in fact utilise an amount of time equivalent to one-seventh of a day on tasks other than sitting and writing up judgments. Thirdly the question involved a comparison of the treatment of a typical fee-paid Judge with a typical salaried Judge. What was relevant was whether a typical fee-paid Judge spent two days of seven hours dealing with a day's list of cases, not whether the lead Claimant, Ms James, herself took that amount of time to deal with a day's list, or whether a typical salaried Judge did not spend one-seventh of a day doing other work. This was because the Tribunal was dealing with a lead case specified as such pursuant to Rule 36 of Schedule 1 to the **Tribunal Regulations**. The focus had to be upon typical fee-paid and salaried Judges as the Employment Tribunal was considering whether there were common issues of fact and law

that could be determined in respect of all fee-paid immigration Judges in respect of single panel hearings: see, by analogy, **Moultrie and others v Ministry of Justice** [2015] IRLR 264 at paragraphs 14 and 31.

38. The principal material at issue in this appeal is the evidence of Ms James and the report of Sir Thayne Forbes. The Employment Tribunal considered that Ms James' evidence was minimal, amounting to mere assertion that the writing up day for all fee-paid immigration Judges was a full day's work and she personally always took more time than that. The fact that Ms James took longer than a day, and appeared for whatever reason to be slower at producing judgments, would not justify a conclusion about how much time a typical fee-paid Judge would spend writing up judgments. The Employment Tribunal was, therefore, entitled to conclude that her evidence did not justify a conclusion that there was less favourable treatment of fee-paid immigration Judges in the way that the fee was fixed for dealing with a day's list of cases. Furthermore, the reasons for the conclusion in respect of the evidence of Ms James are adequately expressed.

39. The second matter concerns the report of Sir Thayne Forbes. It is important to analyse what that material consisted of and the use that the Claimant sought to make of that report. A report may contain evidence of facts or it may contain an expression of the views of the author on particular matters. A report may contain expert evidence, that is it may contain the views of an appropriately qualified expert on matters on which expert evidence is required. Here it is agreed that the Forbes report is not expert evidence in the latter sense. Sir Thayne Forbes was not instructed as an expert in this case to express an opinion on a matter requiring expertise. Rather, the Claimant was submitting that the report contained factual information as to what the work load of a salaried immigration Judge and a fee-paid immigration Judge was or,

alternatively, that Sir Thayne Forbes was expressing his personal views on certain matters and that those views were based implicitly on factual matters relating to the work load of immigration Judges. On that basis the Claimant was, in effect, inviting the Employment Tribunal to infer from the material in the report that certain facts existed (in particular that the typical fee-paid and salaried Judge spent two full days of seven hours each dealing with a day's sitting list, i.e. hearing cases and writing up judgments) and were relying on that material to demonstrate that the rationale underlying the system of fees for fee-paid immigration Judges was not sound.

40. The report was dated 12 December 2009. It was a review and analysis of the judicial time in what was then the Asylum and Immigration Tribunal with regard to the appropriate allocation of a Judge's time between preparation and hearing of a case and the writing of determinations and the appropriate work load for the judicial day in the light of the circumstances at the time the review was carried out. As such, the exercise was not concerned specifically with identifying the number of hours worked by a fee-paid or salaried Judge in respect of a day's list or undertaking a comparison of the work of the two categories of Judges.

41. The report identifies the sources of information relied upon. These included, but were not limited to, a wide range of statistics for April 2008 to August 2009 including details of the daily activities of the Judges. These statistics were not produced in evidence in this case (and are not, so far as can be discerned set out, annexed, or specifically described in the report itself). Sir Thayne also read a number of reports prepared by others, spoke with a number of immigration Judges and observed certain Asylum and Immigration Tribunal proceedings.

42. The report describes the pattern of work of immigration Judges. It noted that the PA Consulting Group had produced a report in 2001 ("the PA Report"). That had recommended that 3 cases was the maximum that a Judge could be expected to manage per sitting day. It had recommended a target of at least 2.25 effective cases per sitting day. The work pattern it recommended was a 1 plus 1 system, that is one day of hearings followed by one day of writing up decisions. A trial of that system was undertaken. The system was subsequently implemented generally. In 2007, the PA Consulting Group carried out a further review and concluded that the 1 plus 1 pattern was working successfully in that it allocated "about the right amount of time overall for the determination of the case". The actual ratio of time spent on hearing, writing up and other case related activities (such as preparation) was 1:3. It also concluded that, over the course of two days the overall case time was "roughly correct" although in fact only half a sitting day was spent sitting in court, the other half of the sitting day being used for writing up and other case related activities. Sir Thayne Forbes said that:

> **"I am bound to say that nothing I have seen, read, observed or heard during my period of research calls into question PA's conclusion in it 2007 Analysis. Furthermore, this view is entirely consistent with my earlier conclusion that the immigration judiciary is currently working to capacity and that there is no "slack" in the system, as presently operated. I will consider the significance of this conclusion in due course."**

43. The report then describes the points system used to determine how many cases would be included in the list for a day's sitting. The more complex cases were allocated three points. Less complex cases were allocated two or one points. The aim of the system was that a list of cases which, between them amounted to six points, would form the cases that were the subject of the 1 plus 1 pattern, that is the number of cases that would form a sitting day and a writing up day. At paragraph 20, the report says this:

> **"It is also of critical importance for a proper understanding of the points system to appreciate that those who devised it did not intend that the 6 points total should simply equal 6 hours (although, in the event, that is how it is treated by administration), but that the 6 points total should be applied flexibly to allocate an appropriate number and mix of cases to each judge's list that will provide an appropriate minimum amount of work for that judge's two day cycle of work. For these purposes, it should be borne in mind that, in the case of fee-paid judges, the fee for each sitting day includes an additional payment to cover a notional writing day, thus giving pragmatic effect to the one plus one system."**

44. The report then noted that the Judges to whom Sir Thayne had spoken agreed that the 1 plus 1 pattern "broadly speaking" made effective use of judicial time. At paragraph 25, the report noted that "each judge's work load over the two-day period (i.e. in hearing each listed case and writing the judgment for each case) is undoubtedly a full two day workload". The report noted that Sir Thayne Forbes was satisfied that the conclusion reached in 2007 that "over the course of the two day cycle the overall case time is about right, still remains valid in 2009". He considered that the points system would ensure that the cases listed before each Judge would provide that Judge with the appropriate work load for the one plus one pattern of work.

45. The paragraphs referred to, however, do not specifically refer to the number of hours of work actually envisaged as being taken up in sitting, writing up or other case related activities. However, there is one reference to the number of hours at paragraph 28 where the report says:

> **"As I have already said and as Nick Renton was at pains to point out, the 6 point does not represent 6 hours, it is the number of points that will produce a list of cases that will take a judge two full days (i.e. a total of 14 hours, including preparation) to hear and to produce the necessary written determination for each such case. The points attributed to each type of case were arrived at on the basis of experience and anecdotal evidence and, as already indicated, it should be noted that there has subsequently been some revision of the points as originally attributed in the 2005 Working Party Report quoted in the previous paragraph. The system is well designed to meet the specific requirements of the AIT …"**

46. Later in the report, in the section containing the conclusions, Sir Thayne Forbes concluded that the one plus one pattern, originally recommended as a means of improving productivity, represented the best pattern of work for Judges in the particular circumstances of the Asylum and Immigration Tribunal. Sir Thayne expressed his view that the Judges were working to capacity and there was no slack in the system and that the ratio of hearing time to writing up time of about 1:3 was reasonable and that:

> **" The points system of listing rightly recognises this and is designed to ensure that each judge is listed with an appropriate number and mix of cases that will provide a full workload of hearing and writing up over the two-day cycle that the One for One Pattern involves. It is tailored to the requirements of the AIT. In my view, it works well – given the current circumstances of the AIT – and is still a satisfactory basis for the appropriate listing of cases."**

47. It is against that background that the decision of the Employment Tribunal needs to be considered. The complaints made in grounds 2a, b and c of the Notice of Appeal are that the Employment Tribunal failed to have regard to relevant evidence, reached a finding for which there was no evidence and which was contrary to the evidence, or reached a finding that no reasonable Tribunal could have reached.

48. The Employment Judge clearly had regard to the Forbes report. He refers to it at paragraph 129 of the judgment. Paragraph 132 refers to the submissions of counsel for the lead Claimant noting that they were based, among other things, on "his interpretation of the Forbes report". There is no doubt that the Employment Tribunal did have regard to the Forbes report and understood that the Claimant relied upon that report.

49. So far as grounds 2b and c are concerned, the central thrust of the Appellant's submission is that the failure to find that there was no less favourable treatment, on the basis that salaried Judges and fee-paid Judges were both working two full seven hour days, was perverse given the material in the Forbes report. In particular, Mr Sugarman for the Appellants relies upon paragraph 28 as factual evidence that Sir Thayne Forbes had been told, had observed or been informed by statistical or other evidence, that a day's list of cases required a total of 14 hours work and that the Employment Tribunal could have inferred from that, and the views expressed in the report, that full-time and salaried Judges were working to full capacity, that is they were working two full seven hour days. On that basis, the Appellants contend that it was perverse for the Employment Tribunal to conclude that they had not established that the assumption underlying the fee arrangements was mistaken.

50. In my judgment, it would not be perverse for the Employment Tribunal to reach the conclusion that the material in the Forbes report was not sufficient to demonstrate that there was less favourable treatment. There were a number of reasons why an Employment Tribunal could legitimately reach that conclusion. By way of example, the report was not specifically concerned with the question of whether there was less favourable treatment of fee-paid Judges as compared with salaried Judges and did not specifically undertake any comparison of their actual work practices. The bulk of the report (until paragraph 28) refers to Judges working to full-capacity but does not address what that capacity actually was. It is only in paragraph 28, where there is a reference to the fact that the points system used to determine how many cases should be included in a list was intended to ensure that a Judge has two full days work, that there is a reference to that involving a total of 14 hours. That is, on one reading, a reference to the assumptions underlying the points system not a statement seeking to record as a matter of fact what salaried and fee-paid Judges had actually been doing by way of working hours. More significantly, perhaps, the report does not provide any indication of whether that was based on what Sir Thayne Forbes saw, or whether it was something that he was told, or whether it was derived from the statistics. No witness gave evidence as to the material upon which the report was founded and the statements in, and the assumptions underlying, the report were never tested in cross-examination. For those, or other reasons, it would be open in principle to an Employment Tribunal to conclude that it was for the Claimant to demonstrate less favourable treatment and to conclude that the report did not amount to sufficiently compelling evidence to demonstrate that there was less favourable treatment. For those reasons, grounds 2a, b and c do not succeed.

51. Grounds 2d and 5 of the Notice of Appeal contend that the Employment Tribunal did not give adequate reasons for its conclusions in relation to less favourable treatment. In that

regard, the Tribunal notes that the Claimant's submissions were based, in part, on the interpretation they placed on the Forbes report but does not state what that interpretation was nor why it was rejected. The essential reasoning is in paragraph 143 where the Employment Tribunal states that it was not open to it on the evidence to find less favourable treatment of fee-paid Judges in the arrangements relating to the composite fee for the one plus one sitting pattern.

52. Rule 62 of the Schedule 1 to **Tribunal Regulations** provides that the Tribunal "shall give reasons for its decision on any disputed issue". Rule 62(4) provides that the reasons "shall be proportionate to the significance of the issue". Further detailed provision is provided in Rule 62(5) as to what the reasons should deal with. Those provisions largely reflect the established case law such as **Meek v City of Birmingham Council** [1987] IRLR 250. As Bingham LJ, as he then was, observed in paragraph 8 of that judgment, the "parties are entitled to be told why they have won or lost".

53. In the present case, the central issue was whether fee-paid Judges were treated less favourably than salaried Judges and, in particular, whether the assumption that the fee-paid Judges were spending one and six-sevenths of a two day hearing cycle sitting and writing up judgments was correct. One of the principal sources of material upon which the Claimant relied was the Forbes report which the Claimant contended included factual evidence, albeit based on hearsay, which she said demonstrated that the typical fee-paid Judge and salaried Judge were in fact working two full seven hour days. The decision of the Employment Tribunal makes it clear that it did not consider that that material was sufficient to demonstrate less favourable treatment. The decision does not, however, set out the reasons why the Tribunal came to that conclusion. The conclusions could have been very brief. There was no

necessity for elaborate or lengthy reasons. But given that, as the Tribunal recognised, the interpretation the Claimant placed upon the Forbes report was a critical part of her case, the Tribunal needed, albeit briefly, to explain why it did not accept that the material in the report was sufficient to establish less favourable treatment. For that reason, the appeal will be allowed. The appropriate and sensible course of action in those circumstances is to remit the matter to the same Employment Tribunal for the Tribunal to reconsider the issue of less favourable treatment after the opportunity for further submissions by the parties. The Employment Tribunal can then determine whether to confirm its original decision, giving adequate reasons, or can determine the appropriate way to proceed to deal with the issue. Remitting the matter to the same Tribunal accords with the principles identified in **Sinclair Roche & Temperly v Heard** [2004] IRLR 763.

54. For completeness, I note that other matters have been referred to by the Appellants. They refer to answers given by the President of the First-tier Tribunal (Immigration and Asylum Chamber) in cross-examination. Reading the evidence given, it is clear that the President was not seeking to give evidence on the amount of time spent by fee-paid Judges on writing up during the second day of the two day cycle when the fee-paid Judge would not be present in the Tribunal but would be working from home (or elsewhere). There was no error, and no failure to give adequate reasons, on the part of the Employment Tribunal in concluding that that evidence did not establish less favourable treatment. Similarly, there was no error by the Employment Tribunal in referring to the fact that there was no evidence that the Council of Immigration Judges was seeking to renegotiate the fee arrangement. That simply meant that no evidence had been adduced that that body considered that the fee arrangements no longer represented an accurate picture of the work being done. The burden was on the Claimant to establish less favourable treatment. She had not adduced any evidence from the Council to

suggest that that was the case. The Employment Tribunal was entitled to conclude, and its reasons are adequate, that the evidence in relation to the Council was not capable of establishing less favourable treatment. The Notice of Appeal refers to a document which the Appellants say evidences a wish on the part of the Council that there be a review of the basis upon which fee-paid Judges were paid. The Claimant did not adduce that material in evidence before the Employment Tribunal. The Tribunal cannot be criticised for not addressing material not produced before it in evidence.

55. One other matter needs to be noted. There were two ways in which it was said that the rationale underlying the fee arrangements might be mistaken. One was the number of hours spent by fee-paid and salaried immigration Judges dealing with a list of cases over the two day cycle. The other was the assumption that salaried Judges spent one hour of the two day cycle on other judicial work rather than on sitting or writing decisions. Again, the Claimant would have to establish that that assumption was wrong if it wanted to use that as a basis for establishing less favourable treatment. As the Employment Tribunal noted, it had not heard direct evidence about what typical salaried Judges did with the rest of their day when they had finished judgment writing. The Tribunal noted, correctly, that salaried Judges remained under a continuing commitment to court whereas a fee-paid Judge would not be, once they had completed the cases. Given its findings, and the evidence before it, the Tribunal was entitled to conclude that the Claimant had not established less favourable treatment on this basis and gave adequate reasons for that conclusion.

Conclusion

56. The Employment Appeal Tribunal has jurisdiction under section 21 of the **Act** to hear appeals on a question of law arising from any decision of, or in any proceedings before an

Employment Tribunal notwithstanding that the person bringing the appeal was not a party to the proceedings in the Employment Tribunal. The Employment Appeal Tribunal will, however, need to ensure that the bringing of an appeal by a person who was not a party to the proceeding does not involve an abuse of process and is not otherwise likely to obstruct the just disposal of proceedings between the persons who were parties, as provided for by Rule 3(7) of the **EAT Rules**. In the present case, the proceedings involved a case specified as a lead case. The lead Claimant did not wish to appeal. The decision was binding on the two Appellants who had brought claims and whose own claims were stayed. The Notice of Appeal disclosed reasonable grounds for appeal. In those circumstances, there is no abuse of process. The Employment Appeal Tribunal has jurisdiction to hear the appeal and it is appropriate to exercise that jurisdiction.

57. The Employment Tribunal would not be acting perversely in concluding that the material before it, including the material in the Forbes report, did not enable the Claimant to discharge the burden of establishing that the fee arrangements relating to the payment of fees for fee-paid Judges in single panel hearings involved less favourable treatment as compared with salaried Judges. Given that the reliance on factual findings said to be contained in the Forbes report constituted a significant part of the Claimant's case, the Tribunal needed, albeit briefly, to explain why it did not accept that the material in the report was sufficient to establish less favourable treatment. For that reason alone, the appeal will be allowed and the matter remitted to the same Employment Tribunal for the Tribunal to reconsider the issue of less favourable treatment following further submissions. The Employment Tribunal can then determine whether to confirm its original decision, giving adequate reasons, or can determine the appropriate way to proceed in relation to the issue.