Appeal No. UKEATPA/1010/12/RN
UKEATPA/1308/12/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 February 2014

Before

HIS HONOUR JEREMY McMULLEN QC

(SITTING ALONE)

MS L MILLIN — APPELLANT

(1) CAPSTICKS LLP
(2) MR G HAY
(3) MR M HAMILTON
(4) MS A MORLEY — RESPONDENTS

Transcript of Proceedings

JUDGMENT

RULE 3(10) APPLICATION – APPELLANT ONLY

APPEARANCES

For the Appellant	MR CHRISTOPHER JEANS (One of Her Majesty's Counsel) Bar Pro Bono Unit
For the Respondents	Written Submissions (by consent)

SUMMARY

PRACTICE AND PROCEDURE

Case management

Appellate jurisdiction/reasons/Burns-Barke

The EAT would not allow a point raised in a first Notice of Appeal, rejected by an EAT judge at rule 3(7), and not forming part of a second notice drafted by leading counsel accepted to be under rule 3(8), to be revived a year later in a third. There must be finality in litigation and the Respondents had shown prejudice to them in allowing the amendment. **Khuddados** applied.

A point conceded by the Respondents in the agreed list of issues was adjudicated upon and decided against the Claimant. It is reasonably arguable at a full hearing that the Tribunal should not have unpicked the concession.

HIS HONOUR JEREMY McMULLEN QC

Introduction

1. Essential reading for this judgment is the judgment which I gave on behalf of myself and members on 16 August 2013. There are three appeals, as we noted in the judgment. The judgment which I have just cited relates to the first judgment of the Employment Tribunal. Today I am dealing at rule 3(10) level with the second and third judgments. The second is to do with constructive unfair dismissal and sex discrimination, and the third is about costs. Both of these were stayed pending the outcome of the first appeal.

2. The adjectival history of the case is set out in what are now three Notices of Appeal relating to the second judgment. The first was made by Ms Millin itself and provoked a response under rule 3 from HHJ Shanks, who said the following:

> **"There is no point of law which I can discern in the Appellant's long and discursive Notice of Appeal. The Employment Tribunal appears to have directed themselves correctly at paras. 20-36 and gone on to make numerous findings of fact adverse to the Appellant based on an adverse assessment of her credibility. The Appellant is a barrister who does work in the employment field. If she has an arguable ground of appeal she ought to be able to set it out clearly and succinctly in a fresh Notice of Appeal."**

3. Paying careful attention to what the learned Judge had directed, a second Notice of Appeal was submitted, this time drafted by Mr Jeans QC, who appears again pro bono for the Claimant. As is to be expected, it is the fruit of collaboration between him and Ms Millin, bearing in mind Ms Millin's considerable experience and qualification in this field. This second Notice of Appeal is expressly substituted for the first and is a slimmer version. As Mr Jeans points out, it was in order to take on board what Judge Shanks had said in his rule 3 opinion.

4. Of relevance to the appeal today are two matters. One is the Ashley Irons issue and the other is appraisals. Missing from the second Notice of Appeal is the formal pleading in relation

to Ashley Irons. I put it to Mr Jeans that the result of the discussions between the Appellant and Mr Jeans was that this point was abandoned. He is reluctant to accept that, but that is the only outcome that is understandable. Judge Shanks thought there was nothing in the points including the Irons point and so, it appears, did Ms Millin and Mr Jeans. Nevertheless, the Claimant has sought opportunistically to reintroduce the Ashley Irons point. The way it occurred does credit to case management in the EAT and to Ms Millin's team and indeed to Capsticks' team, because the Notice of Appeal at the time made criticisms that were based upon the Tribunal's first judgment. That judgment having been upheld by the EAT, and there is no live appeal to the Court of Appeal, it must then represent what is the correct approach to the facts and to the law. So I gave, in case management, an opportunity to Ms Millin and Mr Jeans to reshape the Notice of Appeal, which they have done. It was necessary to do that, because obviously they could not rely upon matters decided against them in respect of the first judgment and its appeal.

5. However, what was not necessitated is the Ashley Irons point. For that, permission is needed to amend. Very helpfully, Mr Jeans has accepted that submissions made by the Respondents through counsel, Mr Andrew Short QC, are properly before me, because at some stage, if I were to allow the amendment, it would be subject to any submissions in opposition made by the Respondents.

6. The proper approach to the case falls into the following sequence, it seems to me:

(1) Should permission be given to amend to include the Ashley Irons point? If not, the issue is closed.

(2) If permission is given, was it an issue that was to be determined by the Tribunal and did the Tribunal err in failing to decide it?

(3) If it was an issue, was it actually decided by reference to the parts of the judgment from which it can be derived?

(4) If it was not decided, does the point have a reasonable prospect of success?

The rule 3 hearing

7. This comes about because, subsequent to our appeal, there has been a lot of correspondence in order to see a way forward in these cases, and I am grateful to Ms Millin, Mr Jeans, Mr Short and Capsticks themselves for making the issues clearer to me. The purpose of the rule 3 hearing is to see whether or not there is a reasonable prospect of success, in which case I would send the case to a hearing. In these two cases before me, that is the second judgment and the third judgment on costs, firm findings have been made and opinions given by, respectively, Judges Shanks and David Richardson. Nevertheless I make my own decision here irrespective of the views expressed by other judges because I have had the opportunity to hear full argument in an extended rule 3 hearing from leading counsel. But when no point of law arises, then the case is dismissed. My approach to these matters is set out in **Haritaki v SEEDA** [2008] IRLR 945 at paragraphs 1-13, and it has been approved in, for example**, Evans v University of Oxford** [2010] EWCA Civ 1240 by the Court of Appeal.

The legislation

8. Allegations were made of constructive unfair dismissal pursuant to sections 95 and 98 of the **Employment Rights Act 1996** and discrimination contrary to the **Equality Act** on the grounds of the Claimant's sex. That is the substantive law. The procedural law is contained in the Tribunal's Rules, which requires the Tribunal to give reasons and to explain why matters which were before it have been dealt with or not dealt with so that these are understandable to the parties and on appeal. An important correlative is that the reasons have to be understood by

the parties who have sat through the proceedings. For the postscript set out in **English v Emery Reimbold and Strick** [2003] IRLR 710 makes it clear that there has to be some knowledge which is in the hands of the parties. The findings should include a brief statement of the facts, the applicable law, how the law has been applied to the facts, the Tribunal's conclusions and should explain why one party's evidence or case has been preferred over the other.

The grounds of appeal

9. In respect of the second judgment, and therefore the first in my list today, three points are made. The first is that the Tribunal failed to deal with the Ashley Irons point. The second is that the Tribunal failed correctly to apply a concession in relation to appraisals. And the third is that the Tribunal failed to give a satisfactory narrative of the facts so that the parties could see the basic statement of the problem. I will take each of those in turn.

The Ashley Irons point

10. I reject the application to amend to include the Ashley Irons point. The reason for this is there has to be some finality in the litigation. The application is made more than a year later than the Notice of Appeal or its re-cast Notice of Appeal pursuant to rule 3(8), as to which no point is taken, was submitted. Ms Millin, in her direct correspondence to the court, indicates that there was nothing in the first judgment or in our judgment on appeal which provoked the introduction of the Ashley Irons point sought now to be advanced. She accepts that the decision to issue the second Notice of Appeal, where the Ashley Irons point is absent, was made between her and Mr Jeans and that the third Notice of Appeal, the subject of the current application, was made following discussions and reflection and it was their joint reflection that this was an important point and should be raised. Mr Jeans points out that generally speaking

the overriding objective in the EAT is to see that reasonably arguable points are dealt with at the sift stage, so that we would not robustly dismiss applications that are made, for example, as they are often are, at a rule 3(10) hearing. See the judgment of Underhill J, as he then was, in **Readman v Devon Primary Care Trust** UKEAT/0116/11. That does not deal specifically with the point which arises in this case.

11. I accept that generally speaking a benevolent approach is taken to amendments, particularly when they are sought to be made by a litigant in person at a hearing. But here an opinion was given by Judge Shanks, pointing out the defects in the original Notice of Appeal the Appellant herself submitted. Those defects were sought to be corrected, now with Mr Jeans in charge, by the second Notice of Appeal. From that date, therefore, the Respondents could be assured that the Ashley Irons point was not to be advanced at a hearing. So, in my judgment, the application has to based upon an attenuated form of the rules in **Khudados v Leggate** [2005] ICR 1013. I invited Ms Millin in pre-appeal correspondence to say how she dealt with the **Khudados** point and she simply said that she would have further reflections with Mr Jeans. The Respondents, helpfully putting submissions in at this stage, make two points. First, there is a very substantial delay. It is over a year and nothing has happened. Indeed the chronology shows that I was due to hear this case, and the case was listed in front of me, on 21 November 2012, at which stage the Ashley Irons amendment was not in play. So there was an opportunity at an oral hearing, which indeed involved my sending the first judgment to a full hearing, for the Ashley Irons point to be made and it was not.

12. In addition, the Respondents point out that there is prejudice in allowing this amendment to be made. This arises because Judge Martin was asked for her comments about the Ashley Irons point in a direction I gave under the **Burns-Barke** procedure. She has provided her notes.

I am very grateful to her for going back over this case. But of particular importance is her response as follows:

> **"The agreed issues did not relate to less favourable treatment of the Claimant in relation to the treatment given to Mr Irons. The Tribunal spent a day in chambers considering the agreed issues, the evidence and the submissions made about them. Given the passage of time, it is not possible to confirm what deliberations there were in relation to Mr Irons specifically, however bearing in mind the agreed issues, it is likely that the Tribunal did not discuss them in great detail."**

13. What the Respondents say is that, given the passage of time and the way in which the Judge has responded, the Respondents will be prejudiced by having to deal with the Ashley Irons point at this stage. I respectfully agree, and so I will not exercise discretion in favour of the Appellant to amend at this stage. Time and again, in these proceedings at the Employment Tribunal and the EAT, it has been pointed out how rare a species of litigant in person she is, and indeed she has the advantage to be represented by leading counsel.

14. I do bear in mind that the vast majority of the time taken in the previous appeal was to do with a criticism the Claimant made about her unfair treatment in respect of her submissions as opposed to how she would have been treated had she been counsel or leading counsel. All of that was dismissed. But in this case, she has been representing herself and has been represented by leading counsel with no opposition from the Respondents. There cannot be unfairness in that.

15. So, in my judgment, finality in litigation requires that the Claimant be fastened with the decision which she made on legal advice when she submitted the second Notice of Appeal and may not reinsert this matter a year later in the circumstances which face the Employment Judge. The matter cannot be rectified.

16. If I am wrong about the way in which I approach the exercise of discretion on that amendment, I will turn to the second point, which is whether there this was an issue. In summary, my judgment is that it was not an issue which had to be decided. I have been shown the claim form, the Claimant's evidence, how the matter was developed in cross-examination and in submission, and it is fair to say that this matter was ventilated before the Employment Tribunal. But the Judge says that the Irons matter was not in the agreed list of issues. I regard this as very important. Mummery LJ long ago, in **Hendricks v The Commissioner of Police for the Metropolis** [2003] IRLR 95, said that Tribunals in difficult claims of discrimination should hold case management meetings and determine the list of issues to be tried, and they should be relatively short. That was done in this case. A case management hearing was conducted by Employment Judge Martin and an agreed list of issues was accepted. Changes to that list of issues were sought to be introduced and were refused. So there remained an agreed list of issues, and the Irons point, as now formulated, formed no part of it. In my judgment, the Tribunal was entitled to stick to the list of issues presented to it jointly by the parties, upon which there had been an oral hearing to thrash the matter out. It cannot be criticised for not making a decision on a matter that was not so identified. Indeed, this will be my approach to the appraisals issue, which follows later in this judgment.

17. So the Tribunal is here criticised in the Notice of Appeal for failing to make a decision, and make any findings or a decision, on the Ashley Irons issue. I do not consider the Tribunal was obliged so to do in the light of the agreed list of issues and the personalities before it. It will be recalled that they were all solicitors or barristers. So I reject, if I am wrong about the first point, the second point, which is that the Tribunal erred in failing to make a decision on the issue.

18. However, lest I be wrong about that too, I will consider the merits, as the Respondents invite me to do. The Respondents contend that the issue was decided because the Tribunal upheld all of the Respondents' explanations as to why things were going as they were, and I invited Mr Jeans to go through Capsticks' submission with me by reference to the findings which are apt to cover it. The overall finding by the Tribunal, which is supported by cogent reasoning, is that the Respondents' evidence was credible and accepted, and the Claimant's was neither. That means that the explanation given by the Respondents for the various criticisms made by the Claimant was accepted too. That, in my judgment, is apt to include the criticisms in relation to sex discrimination, which she made and, let us say, involved Ashley Irons. The Respondents point to at least three passages where they contend a decision has been made in favour of the Respondents' explanation. The explanation as to the treatment of Ashley Irons is that he was in a different category and not an apt comparator in sex discrimination. He had not been criticised or given a warning for his file maintenance, as the Claimant had. Secondly, that on analysis, the criticisms which were made and came originally from the coroner about his management of the file was the subject of very substantial deconstruction by counsel, with the file in front of him, of the way the Claimant said Mr Irons dealt with the case that produced by the criticism by the coroner.

19. The passages relied on by the Respondents which I uphold were paragraph 40H(viii) (although that reference is suspect because there are two paragraph 40s, but it appears on page 85) the passage in paragraph 39G(vi) and in one other place. Although not expressly referring to the actual comparison the Claimant sought to make with Mr Irons, it seems to me that those findings are apt to include the criticism the Claimant makes and the Tribunal's acceptance of the Respondents' case upon it. I hold that the material in the judgment is

sufficient to show the Tribunal did deal with this point. So the prospect of this procedural point succeeding is remote. It does not have a reasonable prospect of success.

20. I then turn to the fourth possibility, which is that, if I am wrong on the previous three, if the point was not in fact decided, what should happen next? Mr Jeans does not shrink from the contention that the whole case must be set aside, and the matter must be referred to a freshly constituted Employment Tribunal. However, before me are the Employment Judge's notes, which she took on a judicial laptop. The only way of describing the treatment of the issue of the Ashley Irons comparison is that there has been very proper and robust cross-examination without any credible response from the Claimant of the issue which provoked the coroner's criticism. In short, it is a criticism of Mr Irons for not preparing the matter by not chasing up the client. But, as we see demonstrated by Mr Short QC's cross-examination, it appears that there were at least eight iterations by Mr Irons of his request to the clients.

21. This may not be a very satisfactory way of resolving the matter, and I bear in mind the strong words of Sedley LJ in **Anya v University of Oxford & Anr** [2001] IRLR 377 that matters should not be left to appellate bodies but should be in the hands of the Tribunal whose duty it is to make decisions. But if I were to allow this matter to go to a full hearing, and it were to succeed there and be sent back to a fresh Tribunal, with this kind of cross-examination, I cannot see the point succeeding and I do not consider it is in the interests of justice for this matter to take up further time. The Claimant can see what it is that Miss Morley relied upon in her dealings with Ashley Irons and why it was that no disciplinary action was taken against him. The Employment Tribunal and indeed our judgment in the EAT indicates that the Claimant is not prepared, when a plain case is made to her, to accept it. This may be just one of those. But, looking as we do at the record of the proceedings in the Employment Tribunal, as

recorded by the notes of the Judge, this point would go nowhere and I would do the Claimant no service if I were to set *en train* a process to have this case tried again on the Ashley Irons point.

22. So, for all those four reasons, this point is dismissed.

The appraisals point

23. I now turn to the appraisals point. This is simple, and I hope my approach will be consistent. The list of issues includes two concessions by the Respondents in relation to appraisals, and they are contained in paragraph 1B(i) viz it was a contractual term that appraisals would be carried out. No appraisal was carried out since 2007 either by Mr Hay or Mr Hamilton. In those circumstances, there would appear to be a breach of the contractual term, which is summarised in the judgment, and for which I have seen the full contract.

24. The Tribunal was bound to approach the case from the list of issues and the concession which was made. And yet it departed from that quite substantially and decided that appraisals were made and therefore it did not need to consider whether there was a fundamental breach. That, it seems to me, is a point which should be made at a full hearing. I will allow this point to go forward, only this appraisals point. There is no question about it arising late in the proceedings. It was there from the very start.

25. So I may be wrong, but I hope I am being consistent when I say that the Employment Tribunal, helpfully guided by a list of issues, should stick to it and nothing else unless it is going to amend it. That operates both in respect of the judgment I have made on the Ashley Irons matter and on appraisals.

The Reasons point

26. I now turn to the general criticism relating to reasons. Often it is that criticisms are made about a Tribunal's lack of reasons. Let us just look at how the Tribunal was invited to approach this case. We know that there is no criticism which survives about its approach to its first judgment. That judgment took each of the issues from the agreed list that was available to it then and worked through it, making findings on the particular issues. True it is it is not a narrative because it is directed to the way in which the parties wanted the points determined. In that judgment, there is a short introductory history of the relationship. No criticism survives.

27. In the second judgment there is not a corresponding passage. However, expressly incorporated in the second judgment is the first judgment, and I hold that it is acceptable for such to be done. Indeed, in **English v Emery Reimbold** the court expressly approves the incorporation by reference of material, counsel's submissions and so on, without them having to be rehearsed and set out. That is what occurred here. It invokes its first judgment. We know the history of the relationship. The criticism is made that there is no general narrative in respect of the second. (I will correct the third Notice of Appeal to indicate that there is no story after the end of the first judgment whereas it appears to say the second.)

28. Be that as it may, the parties can understand the way in which the Tribunal determined the issues which they had themselves put in front of it. It might seem more approachable to have a little story at the beginning about the relationships. But it cannot be said that the reasons for the Tribunal finding as it did on each of the issues is jejune to the point of it being struck down as not being **Meek**-compliant. In my judgment, this second judgment does not fail the **Meek** test.

Costs

29. I then turn to the costs issue. Having discussed it with Mr Jeans, there were two options. One was to send the matter to a full hearing and the second was for a rule 3 hearing to be determined either today or at another time.

30. Judge David Richardson, who dealt with this appeal at the sift stage and who rejected it, did indicate that, if there were to be any criticism upheld on appeal of the first or second judgments, then the costs issue would need to be revisited. I agree with that. I have earmarked one matter. If that succeeds, then it would be appropriate to have an argument at a full hearing on the costs matter because it may be that some of the third judgment on costs would survive. But rather than deal with it myself under rule 3, in which case the only avenue would be for the Claimant to go to the Court of Appeal, or to direct the Judge who hears the second appeal to determine it under 3(10), I hold that there is sufficient material, based upon my allowing the appraisals point to go a full hearing, for there to be a full hearing on the costs issue too. I say that without giving any opinion of the merits of the costs issue itself. This is a pragmatic and I hope logical approach.

31. Since it is an old case, both appeals will be before a three-person Tribunal and the time estimate will be a day. Category A.