

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 23 May 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

PROFESSOR K C MOHANTY JP

MR M WORTHINGTON

(1) ESPORTA HEALTH CLUBS
(2) MR L VARELLAS

APPELLANTS

MR L ROGET

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants

MR RICHARD REES
(Representative)
Peninsula Business Services Ltd
The Peninsula
2 Cheetham Hill Road
Manchester
Lancashire
M4 4FB

For the Respondent

MR L ROGET
(The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

The Employment Tribunal made an award for injury to feelings based on what was said in a closing submission without receiving any evidence on the question. Appeal allowed: the closing submission was no more than comment and argument and did not constitute material evidence. Some material evidence of injury to feelings was required. Matter remitted to Employment Tribunal for evidence to be heard and the question of injury to feelings considered afresh.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Esporta Health Clubs (“Esporta”) and Mr Varellas against one aspect of a judgment of the Employment Tribunal sitting in East London dated 13 February 2012.
2. Mr Leo Roget, a former employee of Esporta, brought claims of victimisation contrary to the **Race Relations Act 1976** and race discrimination against Esporta and Mr Varellas. There was also a claim for wrongful dismissal against Esporta.
3. The Employment Tribunal upheld the claims of wrongful dismissal and victimisation. It awarded £5,000 to Mr Roget for injury to feelings and £121 for wrongful dismissal.
4. The appeal was originally on wider grounds, but a single ground was advanced at a rule 3(10) hearing and found to disclose reasonable grounds for appealing. It concerns the award for injury to feelings. As we shall see, the point is a short one.
5. The Tribunal has confirmed that it did not receive evidence of injury to feelings (see the responses of the Tribunal to the Employment Appeal Tribunal’s questions under the **Burns-Barke** procedure last year) – the only material which the Tribunal has told us about relating to injury to feelings came from submissions. The Tribunal acted on that material. Since it did not take any evidence on the question of injury to feelings, it did not afford any opportunity to cross-examine. We have no doubt that the hearing proceeded mainly on the question of liability and all concerned were focused on that issue.
6. Mr Rees submits that the Tribunal could only make an award for injury to feelings upon evidence. He relies on **MOD v Cannock** [1994] IRLR 509, paragraph 144, and UKEAT/0591/12/RN

Abegaze v Shrewsbury College of Arts & Technology [2010] IRLR 238, paragraph 48. He seeks an order allowing the appeal and remitting the matter to the Tribunal for evidence to be heard.

7. We think Mr Rees is correct. A Tribunal does not have to follow the strict rules of evidence (see rule 14(2) of the **Employment Tribunals (Rules of Procedure)**) but it has to have some material evidence on the question of injury to feelings. Almost always the convenient course will be for the matter to be dealt with in witness statements and evidence under oath. Closing submissions are not material evidence. They are the parties' arguments and comments upon evidence already received.

8. In this case the Tribunal has told us that it had no relevant material other than closing submissions. The Tribunal was not entitled to make an award for injury to feelings in reliance on material in closing submissions. Once it became plain that Mr Roget was in effect seeking to give evidence in the midst of his closing submissions the Tribunal should have told him that this was not the right way to do it. We expect that there would have been a discussion about his omission to deal with the matter in evidence and he would have applied to correct that omission.

9. It follows that the appeal will be allowed and the matter remitted to the Employment Tribunal to consider the question of injury to feelings. We will direct that Mr Roget lodge, at the Employment Tribunal, a short statement to deal with the question of injury to feelings. He should do that within 21 days. He should attend for cross-examination. The Tribunal will, after hearing evidence, consider entirely afresh the amount of compensation to award for injury to feelings. Remission will be to the same Tribunal since that Tribunal heard the case and knows all about it.