

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

At the Tribunal  
On 21 August 2018

**Before**

**HIS HONOUR JUDGE MARTYN BARKLEM**

**(SITTING ALONE)**

---

MR M N SHEIKH

APPELLANT

ADT (TYCO) FIRE AND SECURITY

RESPONDENT

---

Transcript of Proceedings

JUDGMENT

---

## APPEARANCES

For the Appellant

MR MOHAMMED NAQI  
SHEIKH  
(The Appellant in Person)

For the Respondent

MR EDWARD LEGGARD  
(of Counsel)  
Instructed by:  
Eversheds Sutherland  
(International) LLP  
Eversheds House  
70 Great Bridgewater Street  
Manchester  
M1 5ES

## **SUMMARY**

### **Disability Discrimination – Disability related discrimination**

### **Race Discrimination - Direct**

On the facts as found, an Employment Tribunal did not err in law in holding that the Respondent did not discriminate against the Claimant on grounds of disability and race by reason of its failure to conduct appraisals.

**A**      **HIS HONOUR JUDGE MARTYN BARKLEM**

1.      This is the Hearing of an appeal, which I allowed to go forward to a Full Hearing following a Rule 3 (10) Hearing at which Mr Sheikh, who is the Claimant below, was represented by Miss Ling of counsel under the auspices of the Employment Law Appeal Advice Scheme (“ELAAS”). Following the Rule 3 (10) Hearing, I gave an *ex tempore* Judgment that was transcribed and sent to the parties in late June or early July. I shall borrow heavily from that document in reciting the background to the present appeal.

**B**      2.      I shall use the titles of the parties as they were before the Employment Tribunal (“ET”). The appeal is against the Judgment of the Tribunal comprising Employment Judge Elliott and Members (Ms H Bharadia and Mr W Dixon) sitting at London (South), which followed a four-day hearing in June 2017. The Reasons were sent to the parties on 20 July 2017.

**C**      3.      By its Judgment, the ET rejected claims of unfair discrimination on grounds of race, disability and victimisation. The Reasons record that the Claimant remained an employee of the Respondent at the time of the hearing and that situation continues. Indeed, he tells me today that he is still having difficulty engaging his line manager in relation to the appraisal system of which the Tribunal had been critical.

**D**      4.      At the sift stage, Her Honour Judge Eady QC rejected the appeal under Rule 3 (7). However, at the Rule 3 (10) Hearing, Ms Ling addressed me on only one specific point, which she had identified through analysis of the papers. That is the only point upon which I allowed the case to proceed. All other grounds were dismissed. As is the normal practice, I heard only from the Claimant at that hearing.

**A** 5. Today, the Respondent is represented by Mr Edward Legard for counsel, who submitted a helpful skeleton argument which he has briefly expanded upon today. It is relevant to focus on the Rule 3 (10) Hearing because the Claimant, who is not legally represented, served a skeleton argument for this hearing, which seeks to reargue issues of fact which were before the Tribunal or which amount to new evidence. I have seen the witness statement that he served in the earlier proceedings.

**B** 6. In his measured and courteous submissions, the Claimant continues to maintain that the only appraisal which he had was more of a conversation and that the form itself was incorrectly and inappropriately completed. He told me that there were more than the two non-disabled individuals named in the ET's Judgment who had been promoted ahead of him but the Employment Judge did not ask about those.

**C** 7. It is hard not to feel a degree of sympathy with Mr Sheikh, as with any person who seeks to bring a claim in an area in which the legal and procedural complexities are hard even for lawyers to grasp, let alone a litigant in person. However, as I explained to him today, the Tribunal's role is to decide between rival cases prepared by the parties in advance before a hearing, not to set out to discover evidence for themselves.

8. The core issue which Ms Ling advanced at the Rule 3 (10) Hearing and thus which is live today, is to be found at paragraph 5 (g) of the ET's Reasons, namely that:

**"5. The claimant relies upon the following matters as less favourable treatment because of race and/or disability:**

**D** (g) Since 2006 being denied an opportunity for promotion by way of a grade rise, this is relied upon as race and disability discrimination."

**A** 9. The foundation for this is a document referred to at paragraph 79 and elsewhere of the Tribunal's Reasons. It is at page 83 of the appeal bundle. At the start of the document, headed "Grievance Document: the Claimant records that he has been "waiting 6-7 years for a grade rise, waiting 4 years for an appraisal." Paragraphs 2 and 3 of the substantive text of that document read as follows:

**"2. I have not been given an annual performance review for many years, even though I asked for one to be done. As stated above I have a very good record. If a review was done, I would have been able to work towards higher engineering grade/ promotion.**

**I have continually asked Robbie a number of times but every time it was the same answer "not now I don't have time I'm busy" and yet he has had time for able bodied engineers to pass for promotion. You can check from your own company records how many engineers he has put forward.**

**3. I have trained many new recruits. They have all been promoted therefore; my ability and technical know-how is not an issue. I have not been promoted or given a higher grade because of my health condition. Indeed only recently Ellen Bradley stated without any justification or evidence that "you can't do basic grade 4 work", *again this is another example of victimisation.*"**

**B**

10. The ET dealt with what it describes as the promotion issue from paragraphs 97 to 112 of the Reasons as follows:

**"The promotion issue**

**97. The claimant has worked as a grade 4 since 2006. The respondent does not have a particularly effective appraisal process. We were told that this is a matter that the respondent is now seeking to address.**

**C**

**98. Engineers could request an appraisal if they wished and normally did so if they were seeking a grade increase. The claimant had such an appraisal in November 2012 and we say the appraisal document at page 270 of the bundle. The claimant took great issue with the fact that it was dated 21 November 2012, a day when he says he was on holiday. Neither the claimant nor his appraiser Mr Baldwinson deny that the appraisal took place and we find that it took place around the 21 November 2012, although not on that exact date. The claimant's evidence was that Mr Baldwinson made derogatory comments about his IT skills in the appraisal meeting. In his grievance meeting (notes page 63) the claimant made reference to Mr Baldwinson carrying out his appraisal.**

**99. In that appraisal the claimant scored 72 out of 124. Mr Baldwinson encouraged him to improve his basic IT skills.**

**100. From 2007/2008 up to 2010 the process for achieving a grade increase or promotion was for Field Line Manager's Manager, (in this case Mr Baldwinson's manager Mr Andy Mercer) to notify the Field Line Manager of engineers that he believed should take a grade test. It is crucial to achieving promotion or a grade rise to pass a grade test.**

**D**

**101. After 2010 there were three stages to achieving a promotion or grade increase. Firstly[sic] the engineer would request an appraisal at which goals would be set. Secondly, again at the instigation of the engineer, a follow-up appraisal would be set to see whether the goals had been achieved. If they had, the third stage was to sit the written grade test.**

**102. We find that the claimant did not ask for a second appraisal. He did not suggest that he did.**

A

103. Mr Baldwinson gave evidence as to this process for seeking a grade increase and his evidence was corroborated by Mr O'Neil. We find that the process described above was the process for seeking a grade increase.

104. It is not in dispute that the claimant never undertook a grade test which is a prerequisite for a grade increase.

105. The claimant did not identify anyone whom he said had been promoted above him. The tribunal asked him about the list on page 29C, a mileage list, showing the names of the other engineers managed by Mr Baldwinson in 2013. He said that Dave Kennedy joined the respondent after himself and had been promoted twice. We were told whether Mr Kennedy was or was not disabled. Again in answer to Tribunal questions, we were told that Mr Kennedy is Irish. The claimant thought he was white British so we find that he is white. However, we were not told anything about Mr Kennedy's skill set or the reason why he was promoted.

106. In answer to the Tribunal's question as to whether there was anyone whom the claimant had trained and was higher than him, the claimant said, "*there is one, Mark Walker in Wales, he was my apprentice from day one.*" We were not told whether Mr Walker had a disability and we were not told his racial group or anything about his skill set.

B

107. The claimant's case was that Mr Jones and Mr O'Neil as the grievance officers should have done an analysis of all those who were promoted since 2006. In his grievance letter (page 41) he said he has been '*waiting 6-7 years for a grade rise.*' At the bottom of page 41 he said that Mr Baldwinson had had time to approve "*abled bodied engineers*" for promotion and on page 42 he complained that he had trained new recruits who had been promoted. At no time did he mention any names.

108. The claimant made a very generic complaint about his lack of promotion and he did not mention any names of those whom he considered had been unfairly promoted above him. This made it difficult for the respondent to investigate. Mr Jones as the grievance officer asked Mr Baldwinson about the claimant's performance and was told that the claimant was not sufficiently proficient in IT and this was the area in which he needed to develop.

C

109. The claimant specialises in signalling through cable work. The direction for the respondent was towards wireless systems, CCTV, IP addresses and routing so that computer programming was increasingly important. The respondent provides some IT training but not in the basics. In his appraisal on page 273 the claimant scored zero for computer skills for general computer awareness and basic operation/inputs, e.g. keyboard and mouse skills within menu driven systems or programmes. He also scored zero on ability to operate computer/keypads, to configure, interrogate and retrieve data and carry out designated tasks and applied actions appropriate to the job function.

110. Mr Baldwinson's handwritten comment at the end of the appraisal document, page 277 was: "*Naqie needs to get general awareness of computer skills and needs to be able to interrogate P/C programs.*"

111. The claimant did not take things forward after his appraisal with Mr Baldwinson. He did not request a second appraisal or a grade test to demonstrate his skills.

112. The grievance officer Mr Jones was asked by the claimant why he did not investigate the lack of promotion going back to 2006. Mr Jones said he had made enquiries of the manager and been told there was a gap in the claimant's skill set, this had been raised with the claimant who had been asked to work on it. We find in those circumstances it was not necessary for Mr Jones to go back to 2006 in his investigation and it remained open to the claimant to seek to demonstrate to the respondent that he held the skills that they were looking."

D

11. The argument advanced at the Rule 3 (10) Hearing was that the Tribunal did not deal with the issue of the failure to grant appraisals over a period of 4 years, as had been asserted by the

**A** Claimant in his grievance. The Tribunal had made reference at paragraph 105 to a number of other individuals managed by Mr Baldwinson, he being the Robbie referred to in the Grievance letter. Although it had found as fact that there was a single appraisal in 2012 (see paragraph 98), the Tribunal did not address the Claimant's case that he had asked for but had been refused an appraisal.

12. Paragraphs 105 and 106 refer to two individuals, Mr Kennedy and Mr Walker, each of whom had apparently been promoted. It was contended on behalf of the Claimant that it ought not to have been for him to establish the disability status or skill set of those employees when the information would have been in the hands of the Respondent as the Grievance letter made abundantly clear was the case.

**B**

13. In the concluding paragraph of my Rule 3 (10) Judgment, I stated that I was satisfied it was arguable that the ET erred in law in failing to address a live issue before it, namely the Claimant's case that, from 2006 he had been discriminated against by being subject to a detriment on grounds of disability. In the alternative, as it is not possible to ascertain from that section of the Judgment why the Claimant failed on this aspect of the claim, it was equally arguable that the Judgment was in this respect not Meek-compliant (see Meek v City of Birmingham District Council [1987] IRLR 250).

**C**

14. In his skeleton argument at paragraph 1.4, Mr Legard points out that I allowed the appeal to proceed on a single ground but it was not entirely clear from my Judgment what precise ground I had given permission to advance. On reflection, I think he is quite right in that very politely-put criticism.

**D**



**A** 15. Amended grounds were settled following the hearing. Reading them afresh today and having looked carefully at the transcript of my *ex tempore* Judgment, I am not sure that they accurately encapsulate the single ground I have permitted to proceed, although I must have seen and approved them shortly after the hearing.

16. The grounds of appeal read as follows:

**“1. The Employment Appeal Tribunal (“EAT”) erred in law in dismissing the Claimant’s claim that he had been denied an opportunity for promotion by way of a grade rise on the grounds of disability, in that:**

**(a) The tribunal made findings of fact at paragraph 101 and 102 that since 2010 the process of promotion required the engineer to request an appraisal and then a second appraisal, and that the Claimant had not suggested that he had asked for a second appraisal and then not made one.**

**B** **(b) The tribunal did not take into account the Claimant’s evidence, set out inter alia in his grievance letter dated 13 June 2014, that he had made numerous requests for appraisals.**

**(c) This evidence ran directly counter to the tribunal’s findings at paragraph 102 and;**

**(d) It also raises the question of why one only appraisal took place between 2010 and 2012, which the tribunal failed to address.**

**2. Further or alternatively, the tribunal’s reasoning on this point was not Meek compliant.”**

**C** 17. The nub of the live issue in the appeal as I had understood it to be advanced, was that the ET had failed to deal with the Claimant’s assertion in his grievance letter that the Respondent would be able to identify individuals who had been promoted from its own records. The sentence from the letter at page 83 of the Appeal Bundle reading, “*you can check from your own records how many engineers he’s put forward,*” which was not quoted in the Judgment. Further, that in recording at paragraphs 105 and 106, the Tribunal had no information as to the disability status or skill sets of the two individuals who, based on a 2013 list, it was effectively requiring the Claimant to provide evidence, which would have been exclusive within the Respondent’s  
**D** knowledge.

**A** 18. I accept the submission by Mr Legard that the Tribunal having found as fact, on evidence which it was entitled to accept, that there was only one appraisal and that the Claimant had not thereafter sought another (see paragraphs 98 and 102), the ground of appeal as drafted must fail. However, in fairness to the Claimant, I should address the other matters raised at the Rule 3 (10) Hearing, which I regarded as arguable.

19. Mr Legard submits that the task of the Tribunal on the issue in question was to establish not why the Claimant had not progressed beyond grade 4, but to decide whether there was evidence before it from which it could conclude, absent any explanation, that the reason for his failure to progress was his disability. To that end the onus was on the Claimant to establish a *prima facie* case including the adducing of comparator evidence showing that his treatment was less favourable.

**B**

20. As to the failure to look back to 2006, Mr Legard points to the finding at paragraph 198 of the Tribunal's Reasons which reads as follows, so far as is relevant:

**C** "198.....Part of his complaint was that the grievance officers did not investigation [sic] his lack of promotion going back to 2006. We have made findings above as to the reasons why the grievance officers did not investigate back to 2006 and this had nothing to do with the complaint of discrimination. The claimant fails to establish a causal link between the protected act and any deficiency in the investigation or grievance process."

21. In the circumstances, I am satisfied that there is a full answer to the points, which I earlier held to be arguable. There was, in my judgment, no error of law by the Tribunal and accordingly I dismiss this appeal.

**D**