

Neutral Citation Number: [2026] EAT 113

Case No: EA-2024-SCO-000077-LP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh, EH3 7HF

Date: 24 July 2026

Before:

THE HONOURABLE LADY HALDANE

Between:

MR RAY JOSEPH

- and -

THE UNIVERSITY OF ABERDEEN

Appellant

Respondent

Mr Ray Joseph, the Appellant
Ms Deborah Miller, for the Respondent

Hearing date: 7 May 2026

JUDGMENT

SUMMARY

Procedure; applications to join additional parties; agent/principal liability; s 109 Equality Act 2010; grounds of appeal not advanced at first instance

Error of law; granting application to strike out the whole of the claimant's claim despite an admission by the respondent that certain correspondence had been fabricated

Did the ET err in refusing to join an additional respondent (the Lawn Tennis Association) pursuant to a motion made by the claimant at the same time as the respondent's motion for strike out?

Did the ET fall into error in concluding that the whole of the claimant's claims fell to be struck out despite an admitted fabrication to one email in a chain of correspondence?

Conceded by the respondent that it was an error to strike out the claimant's claim for direct discrimination so far as predicated upon or potentially emerging from the circumstances surrounding the one admittedly fabricated email.

Appeal upheld on the ground conceded by the respondent.

The appeal so far as directed against the refusal of the ET to join the LTA, being predicated essentially upon grounds not argued at first instance, and not falling within any of the **Rance** exceptions; and in any event not engaging with the relevant principles necessary to establish an agent/principal relationship; accordingly identifying no arguable error of law, appeal refused.

THE HONOURABLE LADY HALDANE:

Introduction

1. The appellant in this case is Raymond Joseph. The respondent is the University of Aberdeen. For ease, I shall refer to parties as the claimant and the respondent, as they were below. This appeal arises from a decision of the ET (EJ Wiseman) dated 6 September 2024 to strike out the claimant's claim and, separately, to refuse his application to join the Lawn Tennis Association ("LTA") as a party to the proceedings. There were originally two grounds of appeal permitted to advance to a Full Hearing following a Rule 3(10) hearing presided over by Judge Clarke. As I will come on to explain in more detail, by the time of the hearing, it was a matter of concession by the respondent that the first ground of appeal, as reformulated by Judge Clarke at the Rule 3(10) hearing, should be allowed, and the matter remitted back on that ground only to the ET. The respondent suggested that the matter could proceed to a hearing on the evidence without the need for a further Preliminary Hearing. It also gave notice that it would renew its previously made motion for a deposit order as a condition precedent of proceeding.

2. The second ground of appeal related to the refusal of the ET to accede to the claimant's application to join the LTA to the proceedings. Judge Clarke, with some hesitation, permitted the ground of appeal challenging this decision to advance to a Full Hearing, expressing the view that although he had misgivings doing so, he did not think the point would take much time. As it turned out, discussion over that issue transpired to be in depth, and analytical. I will return to that point later.

Background

3. The claimant is a tennis coach who applied to the respondent for an advertised post of tennis coordinator. The claimant was invited to interview on 27 November 2023. He was interviewed by a panel, one member of which was a representative of Tennis Scotland. What occurred thereafter

was a matter of dispute between the parties and resulted in the present proceedings.

4. The respondent maintained that it made efforts to contact the claimant by phone and email to offer him the role. On 12 January 2024 the claimant contacted the respondent to ask for an update in relation to his interview. On 16 January 2024 the claimant was advised that in the absence of a response from him the respondent had assumed that he did not wish to accept the job offer, and that the position would be re-advertised, although he was welcome to re-apply. The claimant sent an email to the respondent confirming he had no record of any phone calls or emails from the respondent regarding the outcome of his interview. His position was that if he had in fact been offered the post, he should not have to re-apply for the position. The respondent made an offer to carry across his original application to the new process, but the claimant refused, and lodged a complaint.

5. The claimant also brought a claim against the respondent in the ET. As finally formulated, his claim came to allege indirect discrimination because of the protected characteristics of race, sex, and/or sexual orientation, direct discrimination because of those characteristics, harassment because of those characteristics and victimisation. It also emerged that when the claimant asked to see copies of the email correspondence the respondent relied upon in support of its assertion that it had offered him the position, one of the respondents' employees deliberately altered one email before providing it to the claimant to insert an apparent deadline for acceptance of the post. That admission notwithstanding, the ET concluded that, read short, the claimant's claim had no real prospects of success since he could not show that all of the relevant documents were fabricated, with the exception of the one email which the respondent conceded had been altered after the event.

6. The claimant's appeal was initially sifted out under Rule 3(7). He then asserted his right to have the matter considered by another Judge at a hearing under Rule 3(10). Judge Clarke expressed understandable concern that the claim had been struck out notwithstanding an admission of fabricating the terms of one of the emails in the chain of correspondence that was at the heart of the claim. He considered that it was arguable that concluding that the claim was bound to fail despite that concession amounted to an error of law. Although the claimant appealed the strike out of all of

his claims, after discussion at the Rule 3(10) hearing, Judge Clarke concluded that if there was an arguable error in the decision of the ET, it lay in striking out the whole claim against a background of focussing exclusively on whether there had been wholesale fabrication of all of the documents relating to the offer of a job to the claimant. In so doing, the ET overlooked the separate question of whether the admitted improper amendment to one email raised the question of whether the respondent had discriminated against the claimant in the circumstances in which it came to retract the offer, or treat it as lapsed. For that reason, Judge Clarke allowed the matter to proceed to Full Hearing only on the following ground, reformulated after discussion with the claimant at the hearing as follows:

“That the tribunal erred in law when striking out the claimant’s complaint of direct discrimination on the basis of the protected characteristics he had identified, by failing properly to appreciate that his claim also extended to a complaint about the circumstances in which any job offer that had been made had been retracted or allowed to lapse. This could be categorised as potential perversity or a procedural irregularity.”

7. It is that ground of appeal, as re-formulated, to which there is no longer any opposition.

Refusal to join the LTA as a respondent

8. The same cannot be said for the second ground of appeal allowed to proceed to Full Hearing, namely that the ET fell into error in refusing to join the LTA as a respondent to the claim. Understandably, given its decision in relation to the claim for strike out, the ET did not consider that there was a requirement to dwell on this application at length. However, it did give reasons for refusing the application which were (i) it was the University which advertised the vacancy for a University tennis coordinator (ii) it would have been the University who would have employed the claimant had he become tennis coordinator (iii) the respondent accepted it was the correct respondent to the claim (iv) the claim brought by the claimant was that the University discriminated against him when it did not offer him the job and (v) the fact that the LTA provided 50% of the funding for the position does not alter the fact that the claimant would have been employed by the respondent, who

would have paid his salary.

Submissions for the claimant

9. The claimant challenged the conclusion of the ET on this question on a number of fronts. I intend no disrespect to the detail of the claimant's submissions when I summarise his arguments as follows: the ET had fallen into error in not granting the application to join the LTA as a respondent by failing to appreciate the joint liability of the LTA with the respondent; and by failing to appreciate the applicable principles of principal and agent liability. The LTA were the coordinator for this and other similar positions, the LTA provided 50% of the funding, and they were the creators of the post, as it was an LTA initiative. The fact that a representative from Tennis Scotland rather than the LTA attended the interview was immaterial, they operated an inclusion policy which was a policy created by the LTA and it was this policy the claimant said had been applied in the recruitment round to his detriment.

10. The claimant placed reliance on a number of documentary productions which he said supported his contention that the LTA had a close and authoritative role, and was ultimately the principal, with the respondent acting as agent, in the context of the appointment of tennis coordinator. It was therefore an error for the ET to conclude that since the respondent was a separate legal entity, and had accepted that they were the correct respondent, that there could be no liability attached to the LTA. The ET had failed to take into consideration the potential for a principal/agent relationship to exist as between the LTA and the respondent, given their level of control and involvement with the role. If, properly understood, the LTA was the principal in the relationship, with the respondent as agent, then the terms of s 109 of the **Equality Act 2010** ("EqA") were properly engaged. That section provides as follows:

"109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.”

Submissions for the respondent

11. The respondent invited the EAT to allow the appeal only on the basis already conceded. Ms. Miller pointed out that the ground of appeal identified by Judge Clarke was very specific, and related to whether the claim advanced extended to a job offer made and then retracted and allowed to lapse. He had been clear that the appeal permitted to advance related to the claim of direct discrimination only, and she drew my attention to paragraph 27 of the Rule 3(10) decision which was in the following terms:

“In discussion with the claimant today, his focus was on the complaint of direct discrimination. He was unable to articulate his complaint of indirect discrimination or harassment in the terms set out by statute. As for victimisation, the claimant had been unaware when bringing his claim that he needed to identify a protected act in terms defined by section 27 of the Equality Act 2010. Those other complaints were properly dismissed. My focus will therefore be on the claimant’s challenge to the ET’s conclusion about his complaint of direct discrimination.”

12. Since on any view any claim involving the LTA could be based on indirect discrimination only, that was enough to dispose of the matter, but in any event, Ms. Miller submitted that the ET had not fallen into error in addressing this issue. She pointed out that there was no mention of the LTA in the ET1, with the first reference to the LTA emerging only at the stage of further and better particulars. The ET had approached the question in a manner consistent with how it had been articulated by the claimant. The factors relied upon by the claimant did not support the existence of

a principal/agent relationship, rather the situation was not uncommon and properly construed only involved the LTA providing support for the position without creating an agency relationship. More fundamentally, the only live claim being remitted related to the direct discrimination claims and there was therefore no live claim to which the LTA could be added.

13. Further and in any event, the appeal so far as predicated on the ET decision being a perverse one was ill founded. The decision of the ET was one that was available to them and having regard to the high threshold for perversity (under reference to **Yeboah v Crofton** 2002 IRLR 634, CA at para 93) this was not made out. The factors taken into account by the ET in refusing the application were entirely open to them. It was an entirely relevant consideration that there was already a respondent who had accepted they were the correct respondent.

14. It was significant that, it had not been argued before the ET that the respondent and the LTA were in an agent/principal relationship either as a generality, or in terms of s 109 of the EqA. The general rule is that a party will not be permitted to raise points or issues of law that were not part of the submissions made to the ET (**Jones v Governing Body of Burdett Coutts School** [1999] ICR 38; **Secretary of State for Health and anor v Rance and ors** 2007 IRLR 665). Although a discretion was vested in the EAT to allow new points in exceptional circumstances, the grounds on which such discretion should be exercised were carefully circumscribed (**Rance**) and in any event none existed in the present case.

15. For the avoidance of any doubt, the ET was in any event not obliged to identify at its own hand a possible claim under s 109 EqA (**Pawlika v Gregory Park Holdings Ltd (t/a Four Seasons Hotel)** [2024] EAT 27, referring in turn to **Drysdale v Department of Transport (Maritime and Coastguard Agency)** 2014 EWCA Civ 1093).

16. Finally and in any event, the respondent submitted that the claimant's submissions were based on error of fact. No representative of the LTA sat on the interview panel, rather a representative from Tennis Scotland, a separate legal entity, had sat on the panel. The LTA provided 50% of the funding for the post but took no part in the recruitment process. For all those reasons, the respondent

submitted the appeal so far as predicated on an error on the part of the ET to the application to join the LTA to proceedings was misconceived and should be refused.

Analysis and Decision

17. In the decision of the ET and in submissions before the EAT, weight was placed on the fact that the respondent had identified itself as the correct respondent as militating against there being a proper basis upon which to join the LTA to these proceedings. In and of itself, such an acceptance would not prevent another respondent being joined to the proceedings, if there were a proper legal basis upon which to do so. Nor would the fact that the claimant would have had a contract with the respondent have necessarily militated, in and of itself, against the LTA being involved. However, the claimant would have to show some connection or relationship between the respondent and LTA that would meet the requirements of an agent/principal relationship. If such a relationship existed, then that would bring the parties, in theory, within the ambit of s 109 EqA. Here the claimant founded on what he argued was material supporting the inference that the true principal in the recruitment process was the LTA, with the respondent acting as its' agent.

18. The difficulties for the claimant in succeeding in this limb of his appeal are, in no particular order of priority (i) the fact that an argument based on agency, or on s 109 EqA was not ventilated, even by inference, before the ET. As the authorities, in particular **Rance** explain, in exceptional circumstances a point may be entertained at appeal that was not aired before the ET. Such factors might include manifest injustice; where the point is a knockout point; where the issue is a discreet point of law where no further inquiry will be necessary; where there has been deception or unfair conduct on the part of the other party, and so on. The examples are numerous, but although the claimant sought to argue an overarching point of injustice, so far as this discreet point is concerned, I was not able to discern where such manifest injustice might arise, in a situation where the claimant has not lost the ability to ventilate his claim (albeit on a more restricted basis following appeal) and any claim against the LTA was not asserted to be better, or stronger, than that against the respondent.

19. Point (ii) is that there seems to be no suggestion that any claim against the LTA would be anything other than an indirect claim, dependent on their being the principal in the recruitment process with the University acting as the agent. As Judge Clarke made clear in his Rule 3(10) decision, all claims other than the claims of direct discrimination were ‘properly dismissed.’ There is therefore no claim based on indirect discrimination remaining live before the EAT or, for that matter the ET.

20. For the avoidance of doubt, in relation to the asserted claim based on agency, the proper approach to identifying whether a relationship of agent and principal exists for the purpose of s 109 was correctly identified by the respondent in submissions as being the well understood common law principles (**Handa v the Station Hotel (Newcastle) Limited & ors** 2025 EAT 62. In that case, under reference to *Bowstead & Reynold on Agency*, the principles were identified thus at paragraph 16:

“(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.

(2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.

(3) Where the agent's authority results from a manifestation of assent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.

(4) A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.”

21. There was nothing in the material presented that would have permitted the conclusion, even inferentially, and all other issues notwithstanding, that the criteria for an agent/principal relationship were met in this case, even on an objective assessment. The fact that the respondent does not assert such a relationship with the LTA whilst perhaps not determinative, is significant, and carries weight. The legal criteria for the existence of such a relationship, as summarized above, are absent. The factors taken into account by the ET in reaching its conclusion were relevant, and provided a basis upon which the ET could reach a permissible conclusion in relation to this matter.

22. For all of the foregoing reasons, therefore, I conclude that the claimant has not established that the ET erred in law in its approach to this matter. It follows that the appeal on this limb falls to be refused.

Disposal

23. As discussed above, the appeal is upheld, of consent, only to the limited extent set out in paragraph 6 above. The matter will therefore be remitted to the ET for consideration of the claimant’s claim of direct discrimination (if any) emerging from the circumstances in which any job offer that had been made had been retracted or allowed to lapse.

24. The parties disagreed as to whether the matter should be remitted to the same, or a differently constituted tribunal. The claimant invited the EAT to remit back to a freshly constituted tribunal whereas the respondent was content the matter should go back to the same ET. The relevant test on this question is set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. Key considerations include whether a fair hearing is still possible, the nature and extent of the error identified, whether the decision was totally flawed and so on. In the present case, the hearing in

question was a procedural one, with error in a narrow area identified. There has been no suggestion of bias or other fundamental flaw on the part of the Tribunal in question and accordingly I see no reason why it is not entirely in accordance with the overriding objective that the matter be remitted back to the same tribunal which will allow for a more efficient and expedient disposal of matters.