THE PREPARATION AND CONDUCT OF EMPLOYMENT APPEALS

A PRACTITIONER'S GUIDE

Nick Smith, Guildhall Chambers

This seminar is designed to give a practical overview of the appeals process as it applies to the EAT. It aims to look at some procedural issues that are not 'the run of the mill' and to give an insight into advocacy in the EAT. It is not (and neither could it be given the time constraints) a detailed review of EAT practice and procedure.

What not to appeal - getting off on the wrong foot

1. It is a fundamental requirement of any appeal to the EAT that the appellant should seek to ***set aside*** the actual decision or order of the employment tribunal. Thus if the correctness of that decision is accepted irrespective of the means by which it was achieved the EAT will not entertain an appeal.

    - It is not permissible to appeal where the sole purpose is to challenge the reasons for the decision or a particular finding of fact (*Harrod v Ministry of Defence* [1981] ICR 8, EAT).

    - An appeal will not be permitted where the object is not to challenge the tribunal's decision but rather to have it confirmed so that the appellant can use the more authoritative ruling of the EAT to influence the outcome of a dispute between himself and a third party, such as HM Revenue and Customs (*Baker v Superite Tools Ltd* [1986] ICR 189, EAT). It was held that the appellate procedure was designed 'for the resolution of genuine disputes on a genuine appeal on an issue of law from a decision of a tribunal' and that the appellant's motives amounted to an abuse.

    - Further, the EAT may refuse to hear the appeal if, at the date of the hearing, there is or remains no issue of any material or practical consequence to be determined between the parties. In *IMI Yorkshire Imperial Ltd v Olender* [1982] ICR 69, the appellant employer in an unfair dismissal case had fully complied with the tribunal's order as to the payment of compensation and reinstatement, indicating that, whatever the result of the appeal the employees would not be affected. The EAT held that, as there was no longer a practical dispute between the parties, there was no issue of law to be decided and it accordingly refused to hear the appeal. The employer was not allowed to pursue the appeal, as it had sought to do, simply to establish as a matter of principle the extent of the disciplinary action which they could legitimately take against employees in similar cases in the future.

The role of the Practice Direction

2. The Employment Appeal Tribunal (Amendment) Rules 2005, SI 2005/1871, are supplemented by the EAT's power to regulate its own procedure (Employment Tribunals Act 1996 s 30(3)). The Rules must therefore be read in conjunction with practice directions issued by the EAT, thus ***practice directions apply in all cases where the Rules themselves do not otherwise provide.*** It is important to note, however, that practice directions are not mandatory so if there is any tension between the two, the Rules will prevail (*Zinda v Governing Body of Barn Hill Community High* [2011] ICR 174, EAT, at para 21).

Interplay with CPR

3. The current practice direction - *Practice Direction (EAT: Procedure)* 2008, para 1.8 states that where 'it is appropriate to the EAT's jurisdiction, procedure, unrestricted rights of representation and restricted costs regime', the EAT will be guided by the CPR.

The right documents

4. An appeal is instituted by the appellant serving on the EAT a notice of appeal in accordance with, as appropriate, Form 1 (in the amended form annexed to the PD), 1A (as amended) or 2 in the Schedule to the Rules (SI 1993/2854 r 3(1)(*a*), as amended: PD para 2.1), together with documentation which differs according to the nature of the appeal.

5. Where the appeal is from a judgment of an employment tribunal it is vital to include the following:

    (i) a copy of any claim and response in the proceedings before the tribunal or an explanation as to why either is not included;

    (ii) a copy of the written record of the judgment of the tribunal which is subject to appeal; and

    (iii) the written reasons for the judgment, or an explanation as to why they are not included (r 3(1)(b), (c), as amended).

6. Where the appeal is from an order of an employment tribunal:

    (i) a copy of the written record of the order of the tribunal, and

    (ii) if available, the written reasons for the order (r 3(1)(e)).

7. Crucially, a notice of appeal will not be validly lodged without the additional documentation (PD para 2.1) and it is important to recognise that both the notice of appeal ***and*** the additional documents be served on the EAT within the time limit.

Time limits - strict adherence, the 42 day rule: notice plus all required documents

8. The time for appealing is as follows:

    (i) In the case of an appeal from a judgment of an employment tribunal, where written reasons were requested either (*a*) orally at the tribunal hearing or (*b*) in writing within 14 days of the date when the written record of the judgment was sent to the parties, or where the written reasons were reserved and given in writing by the tribunal, the time limit is 42 days from the date on which the written reasons were sent to the parties (SI 1993/2854 r 3(3)(*a*)(i)).

    (ii) In the case of an appeal from a judgment of an employment tribunal, where written reasons were not requested as above, and written reasons were not reserved, the time limit is 42 days from the date on which the written record of the judgment was sent to the parties (r 3(3)(*a*)(iii)).

    (iii) In the case of an appeal from an order of an employment tribunal, the time limit is 42 days from the date of the order (r 3(3)(*b*)).

When calculating the 42-day period for appealing to the EAT, the date when the relevant document was sent to the appellant - a date normally recorded on the decision, order, written record or written reasons (see PD paras 3.2, 3.3) - is excluded from the calculation (PD para 1.8.1).

The 4PM Rule

9. The document must be served on the EAT by 4 pm on the relevant day; if it is received after 4 pm, it will be deemed to be lodged on the next working day (r 37(1A); PD para 1.8.2). It is to be noted that PD para 1.8.2 stipulates that the ***complete*** document must be received by the EAT by the 4 pm deadline.

10. See *Woodward v Abbey National plc* [2005] IRLR 783, where it was held that this applies in respect of all types of service: delivery by hand or post, and transmission by fax or email. In each case service on a particular day will only be good if the ***complete document*** is received. This means the notice of appeal and all the relevant attachments required by r 3(1)) have been received by the EAT by 4 pm. So far as fax and email transmissions are concerned, the time when they are received is the time when they are recorded electronically as received in full by the EAT.

Tough justice- just don't be late

11. In *Mock v IRC* [1999] IRLR 785, catastrophic failure of counsel's computer causing notice of appeal to be lodged a day late was not a valid excuse.....

12. In *Woodward* (supra) the appellant failed to send the last page of the faxed notice which did not come through until 4.06 on the final day for appealing.

Every appeal lodged out of time must be accompanied by an application to extend time (r 37) setting out the reasons for delay

13. Note also that the time limit for an appeal applies even though there may be a pending application to the tribunal to review its own decision (see PD para 3.4, 3.5).

14. For the latest guidance on the considerations that apply in determining late applications see *Hine v Talbot* (UKEATPA/1783/10):

    (i) There is an interest in the finality of litigation, so stricter rules apply at the appeal stage.

    (ii) The grant of an extension of time is an indulgence and will only be granted in rare and exceptional cases.

    (iii) The EAT must first be satisfied that it has been given a full honest and acceptable explanation for the delay in submitting the appeal.

    (iv) The merits are rarely relevant.

    (v) Lack of prejudice to the other side will not normally be a relevant factor though prejudice against a respondent would be a factor against granting and extension.

    (vi) The judge's discretion remains unfettered despite these guidelines.

Responding to the notice of appeal – Respondent's reply.

15. Only if the appeal is accepted at the sift or subsequently on an appeal under rule a 3(10) preliminary hearing, is the respondent required to respond formally. Grounds of resistance must be set out substantially in accordance with Form 3 and delivered to the EAT usually within 14 days. It is common to rely on the reasons given by the tribunal, but note that they can be supplemented by other grounds put forward to the tribunal but not relied upon by it in support of its findings. These should be fully set out in the grounds of resistance.

Cross appeals.

16. Directions as to the time for filing a cross appeal will be notified to the respondent at the same time as it is directed to file and answer. In practice the time limit for submitting a respondent's answer is not as strictly enforced as that for submitting the notice of appeal. This in part due to the fact the period of compliance is significantly shorter and there is a perception at least that there is inherent unfairness arising from debarment of the responding party. However, the fact the there is a discretion to extend time does not mean that it will be readily available. If a response is not lodged and no extension is granted then the respondent has no means to defend the appeal. If you are in trouble on time you must seek an extension as a matter of course. Otherwise stick to the timetable.

17. Cross appeals though are met with the strictness of approach applicable to appeals both in terms of the sift and the application of time limits: see *Slingsby v Griffiths Smith Solicitors* (a firm) [2009] All ER (D) 150.

Drafting the notice of appeal.

18. In February this year HHJ Richardson (EAT) gave an interesting and sometimes amusing talk to the ILS on the top points that he and his fellow judges find help cases to success in the EAT. There was also an encore from HHJ McMullen. Here are some of the points he raised on the issue of the notice of appeal:

> *"The notice of appeal is the first chance you get engage in advocacy. If subsequent argument is not in the grounds you will be in trouble. Crisp points will help you get it through the sift….*
>
> *In drafting it, avoid temptation to cut and paste from closing submissions into notice of appeal (whether this is done literally or figuratively).*
>
> *Start with the ET's reasons and see what the problem was afresh – if the appeal has a prospect of success it will be in there.*
>
> *For instance in unfair dismissal substitution cases there are tell-tale sentences identify them in the notice of appeal. (See below re spotting appeal points).*
>
> *Similarly in discrimination cases look at reasons and ask yourself if the ET has set out the relevant elements of discrimination coherently in its judgment, if something is missing that is the chink in the armour which should go straight to the top of the notice.*
>
> *If there is a genuine perversity argument - missing evidence or bogus reasoning, this needs to be identified clearly, be concise and focused.*
>
> *Good notices of appeal are nearly always short".*

Preliminary hearing cases: Rule 3(7) to 3(10).

19. What to do if your paper appeal is knocked out at sift stage? Commonly the immediate response is to seek a hearing under rule 3(10).

20. What is less commonly deployed is the opportunity to serve a fresh notice of appeal under Rule 3(8). If you have a good point, and it fell 'at the first hurdle', it could well be that it was not presented in the best possible light. Rule 3(8) represents a golden chance to review why you had not made it past the sift and perhaps be openly critical of yourself. This might also be a good time to get a second opinion....

21. If the EAT notifies the appellant that the notice of appeal does not disclose a reasonable ground of appeal then the appellant may serve a fresh notice of appeal within the time limit for serving a notice of appeal, or within 28 days from the date on which the notification was

sent to him whichever is the later. The notice is then treated as it if were the original notice of appeal and had been lodged in time. Significantly it is open to the appellant to then utilise the rule 3(10) procedure in the event that a fresh notice of appeal is also rejected.

22. The appellant is therefore left with a number of options if the paper appeal is rejected on the sift:

    (i) Appeal under the 3(10) seeking a PHR, or

    (ii) Submit a further fresh and amended notice of appeal under rule 3(8),

    (iii) If that fails, appeal the second "fresh" notice of appeal by seeking a preliminary hearing under rule 3(10) see *Haritaki* v South East England Development Agency [2008] IRLR 945. Here HHJ McMullin made it clear that you cannot appeal by way of a 3(1)hearing against the rejection of the original notice of appeal and then if that fails go back to the start of the process and issue a fresh notice of appeal. This case gives some useful statistic regarding the breakdown of the EAT's caseload and general approach to PHR's.

Appellant only PHR's

23. It is normally only the appellant and/or his representative who should attend to make submissions on the issue whether the notice of appeal raises a point of law with a reasonable prospect of success (PD para 9.10).

24. Unless the respondent makes a cross-appeal, or the EAT orders a hearing with all parties present, the respondent is not required to attend and, if he does so, he will not usually be permitted to take part in it (PD para 9.10.1).

25. The EAT will only rarely invite the respondent to attend the PHR, this will be typically be where there is an issue such as an application to admit fresh evidence, or where there is an issue over agreeing a note of evidence.

26. It is essential that the any representations made at the PHR do no mislead the Judge into allowing an appeal to proceed to a full hearing. This will give rise to a strong likelihood that there will be an application for costs in the event that the full hearing demonstrates that the appeal was misconceived on the flawed grounds. Note, if the appellant does not attend, the appeal may be dealt with on written submissions and may be dismissed, either wholly or in part, or be allowed to proceed (PD para 9.10.2).

27. Further it is of note that where the grounds of appeal all relate to a single issue, the EAT will be cautious, particularly where the entire ambit of the case is a narrow one, before allowing the appeal to proceed on one ground but not on others: see *Vincent v M J Gallagher Contractors Ltd* [2003] EWCA Civ 640, [2003] ICR 1244.) That is not to say that it is good practice for the appellant to overload his notice of appeal with a variety of grounds.

28. The parties can assume that the EAT will have read the documents in advance (PD para 1.10) and the hearing, including judgment and directions, will normally last no more than one hour (PD para 9.11).

Amendment of notice of appeal.

29. It is not uncommon for there to be last minute amendments to the grounds of appeal, particularly where the appellant is being advised by a pro bono lawyer at the door of the EAT. Do not under estimate the EAT's gratitude to ELAS. To quote HHJ Richardson:

> *"It means a lot to the EAT. We really appreciate barristers who get involved in this".*

30. Thus where amendments to the notice of appeal (or cross-appeal) are sought to be made at a PH, there are two situations to be considered (see PD para 9.14).

31. First, although permission to amend may be granted where the proposed amendment is produced at the hearing, if the amendment has not previously been notified to the other party, and but for the amendment, the appeal may not have been permitted to proceed, the other party may apply on notice to vary or discharge the permission to proceed and for consequential directions as to the hearing or disposal of the appeal or cross-appeal (PD para 9.14.1).

32. Secondly, if a draft amendment is not available at the PH, an application for permission to amend, in writing on notice to the other party, will be permitted to be made within 14 days. But, in this case, if the appeal may not have been permitted to proceed but for the proposed amendment, the order on the PH may provide for the appeal or cross-appeal to be dismissed if the application for permission to amend is not in fact made. On the other hand, if the application for permission is made and refused, any party will have liberty to apply, in writing on notice to the other party, as to the hearing or disposal of the appeal (PD para 9.14.2).

33. If the appeal is permitted to proceed to a full hearing, the following listing category will be assigned (although the President reserves the discretion to alter any relevant category as circumstances require) (PD para 9.18):

    P (recommended to be heard in the President's list).

    A (complex, and raising point(s) of law of public importance).

    B (any other cases).

Full hearing cases - fundamentals.

Getting the bundle right.

34. The constitution of the bundle of documents says as much about the quality of preparation as any element of the process. The bundle should reflect the logic of the case and conversely, if done badly, can have a deleterious effect on the view the EAT has of the parties. This is likely to have a negative effect on the appellant who has ultimate responsibility for the preparation of the bundle. At the very least an overblown bundle will cause irritation to the bench, not a good starting point particularly as the appellant's lawyer will usually be the first to speak.

35. The bundle must include only those exhibits used before the employment tribunal which are considered **necessary** for the appeal that is, that they are **relevant** to the points of law raised in the appeal and are **likely to be referred to at the hearing** (PD para 6.1).

36. Ideally the preparation of the bundle should reflect the skeleton argument that will be used at the hearing; in a perfect world it should be considered holistically with the skeleton argument. Documents that are not going to be referred to in the skeleton should not be there. Where there is a significant disconnect between the skeleton argument and the bundle, there is a real danger that the applicant's lawyer will appear not to have prepared properly. To a large degree appeals are about credibility. Para 6 PD sets out the requirements for core documents in detail, it is a 'must read' document.

37. The documents in the core bundle should be numbered by item, and then paginated continuously and indexed, in the following order (PD para 6.2):

    (i) judgment, decision or order appealed from and written reasons.

    (ii) sealed notice of appeal.

(iii) respondent's answer if a FH, respondent's submissions if a PH.

(iv) ET1 claim (and any additional information or written answers).

(v) ET3 response (and any additional information or written answers).

(vi) questionnaire and replies (discrimination and equal pay cases).

(vii) relevant orders, judgments and written reasons of the employment tribunal.

(viii) relevant orders and judgments of the EAT.

(ix) affidavits and employment tribunal comments (where ordered).

(x) any documents agreed or ordered pursuant to PD para 7.

38. Other documents relevant to the particular hearing (for example, the particulars or contract of employment and any procedures) referred to in the employment tribunal may follow in the core bundle. There is a major clue in PD para 6.3:

> *"No bundle containing more than 100 pages should be agreed or lodged without the permission of the Registrar or order of a judge, which will not be granted without the provision of an essential reading list as soon as practicable thereafter; if permitted or ordered, further pages should follow, with continuing pagination, in an additional bundle or bundles if appropriate"*

39. This does seem draconian, but the reality is that the one document that will receive the most scrutiny is of course the ET's Judgement.

40. Again to quote HHJ Richardson:

> *"Documents, this is a second opportunity to look helpful. Get involved in the selection of the documents for the bundles"*

He went on say:

> *" it is very rare for the EAT to look at more than a small number of documents. If mentioned in the skeleton it is likely that we will look at it. Also bear in mind that EAT lay members can live a long way away and their bundle should be able to fit through a letter box. Otherwise they may have to go to the post office to collect it and that makes them a bit grumpy. It is helpful and good advocacy if the bundle is sensible in size. Stephen Sedley's law of documents is a good point of reference.."*

41. HHJ Richardson appears to have a sense of humour. : **"**Sedley J's Laws of Documents" are as follows:-

> First Law
> Documents may be assembled in any order, provided it is not chronological, numerical or alphabetical.
>
> Second Law
> Documents shall in no circumstances be paginated continuously.
>
> Third Law
> No two copies of any bundle shall have the same pagination.
>
> Fourth Law
> Every document shall carry at least three numbers in different places.

Fifth Law
Any important documents shall be omitted.

Sixth Law
At least 10 per cent of the documents shall appear more than once in the bundle.

Seventh Law
As many photocopies as practicable shall be illegible, truncated or cropped.

Eighth Law

(a) At least 80 per cent of the documents shall be irrelevant.

(b) Counsel shall refer in court to no more than 10 per cent of the documents, but these may include as many irrelevant ones as counsel or solicitor deems appropriate.

Ninth Law
Only one side of any double-sided document shall be reproduced.

Tenth Law
Transcriptions of manuscript documents shall bear as little relation as reasonably practicable to the original.

Eleventh law
Documents shall be held together, in the absolute discretion of the solicitor assembling them, by:

(a) a steel pin sharp enough to injure the reader;

(b) a staple too short to penetrate the full thickness of the bundle;

(c) tape binding so stitched that the bundle cannot be fully opened; or

(d) a ring or arch binder so damaged that the two arcs do not meet.

But seriously folks.

42. From my point of view the aim of the game is for there to be a coherent, cogent set of submissions that help the decision makers.

43. With regard to documents; 'Sedley's Fifth and Eighth Laws are directly on point. In the circumstances, parties should not simply seek to go along with the inclusion of documents in the bundle as this may seem like the line of least resistance. If you are confronted by a lazy opponent who wants to "chuck it all in", stand your ground, not least so as to make the judge aware that you understand what is required and you think the other side are clueless.

44. If there is disagreement between the parties or difficulty in preparing the bundles, the Registrar may give appropriate directions, either on written application on notice by one or more of the parties or of his own initiative (PD para 6.8). Make use of this provision.

The small but commonly overlooked Hansard point

45. It is established principle that when primary legislation is ambiguous then, under certain circumstances, the court may refer to statements made in the House of Commons or House of Lords in an attempt to interpret the meaning of the legislation. Before this ruling, such an action would have been seen as a breach of parliamentary privilege. If a party intends to refer to any extract from Hansard in support of any argument, as permitted by

the decisions in *Pepper (Inspector of Taxes) v Hart* [1993] IRLR 33 HL and *Pickstone v Freemans plc* [1988] 2 All ER 803, [1988] IRLR 357,it must serve on all other parties and the EAT copies of any such extract together with a brief summary of the argument intended to be based on it not less than five clear working days before the first day of the hearing (see *Practice Note* [1995] 1 All ER 234, [1995] 1 WLR 192).

Skeleton arguments

46. Again, to quote HHJ Richardson:

> *"PD 13 is a good pointer. Concise is good. The order that you want is important and should be carefully considered this should be set out in the skeleton. Relate the skeleton argument to the notice of appeal to assist EAT in cross referencing".*

47. PD 13 is of course hugely important and again contains a number of clues as to good appellate litigation practice:

    13.1 "a well structured skeleton argument helps the members and the parties focus on the points of law required to be decided and so makes the oral hearing more effective."

    13.2 "the skeleton argument should be concise and should identify and summarise points of law, the steps in the legal argument and the statutory provisions and authorities relied upon, it is not however the purpose of the skeleton argument to argue the case in paper in detail...."

When does a skeleton become the recently deceased?

48. In addition to guidance set out in PD13 I have derived guidance from a paper prepared and given by Sir John Mummery, Sir James Hunt and Edmund Lawson QC entitled "Skeleton arguments: a Practitioners Guide". This has broad application and makes good reading for anyone conducting written advocacy.

49. Here are a few of the 'top tips' from this paper.

As to strategy

- Avoid providing the Bench with a "fat stiff" as opposed to a skeleton.
- A skeleton "which on receipt produces an adverse reaction is a negligent own goal".
- A skeleton which is a lengthy recitation of the whole body of the case will not assist.
- Presentation matters enormously.
- Echoing HHJ Richardson's comments about the notice of appeal, the skeleton argument allows the advocate two, (arguably 3 if the advocate drafts the notice of appeal or grounds of resistance) shots at persuading the court of his case.
- To be effective, the submission should provide the court with a reasoned justification for finding in your favour. The judgment will have to do that in any event if you are going to win. Why not perform that task for the court by producing a persuasive document with the qualities of a good judgment"
- Think out your case on your seat and not on your feet "cases are won in chambers"
- Do a battle plan, review all the material, sort out the good from the bad, strip your submissions to essentials, identify the difficulties in your case and face up to them.

As to layout

- Put yourself in the position of the judge. ***He is the consumer***. Make life easy for him
- Make the document user friendly:
    - (i) use one side of A4
    - (ii) use wide margins,
    - (iii) use big spacing a minimum of 1.5
    - (iv) large font TRN minimum 12 to 14;
    - (v) number each paragraph / paginate each page; and
    - (vi) use headings / sub headings / don't use footnotes.
- Offer to make your document available in electronic format.

As to structure.

- Make sure the judge knows it's your skeleton.
- Introduce your case and explain what outcome you want.
- Identify issues next.
- State the facts, be neutral, and never mis-state them. Identify the key documents at this stage.
- Deal with the law:
    - (i) Key statutory text,
    - (ii) Use the strongest cases at the highest level,
    - (iii) Identify essential passages, use short extracts otherwise cross ref to authorities bundle,
    - (iv) Don't cite trite law,
    - (v) Deal with contrary authority.

Submissions.

- Apply the law to the facts point by point, be candid re weak points.
- Start with your strongest point.
- Try to focus on your 3 best points.
- There is nothing worse than overload, show you have judgment.
- Short sentences, short paras, short submissions.
- Balance - "that does not mean that the skeleton argument always has to be a short document: do not aim for succinctness at the expense of persuasiveness. Is judgment going to be reserved, if so a bit more flesh might be welcome.

- Cut out padding or unnecessary verbiage.

- Conclude and set out the order, appeal dismissed, remission etc.

Dealing with your authorities

50. Again much practical help is gained form HHJ Richardson's seminar to the ILS:

> *"Familiar authorities, you no longer need to provide copies of them - Yeboah etc does not need to be in bundle"*

51. In fact the standard authorities such as *Yeboah* and *Meek* are provided in a pile in each EAT Court.

> *"The EAT finds it helpful if advocates also* ***sideline*** *where they want to refer in the authority and highlight if possible – this is a good thing to do before they go in the bundle and sent up to the EAT." This contrasts with the Court of Appeal's requirement in the CPR that authorities should be highlighted.*

52. HHJ Mc Mullen made an interesting point in terms of his approach to a case indicating that the Respondent's skeleton argument is the 'starting point' for his consideration. It his view that the Respondent Counsel will have the best vantage point of the case prior to the appeal hearing starting. He suggested it is a good idea for the appellant to attack the respondents' skeleton first. He also made the point that he conducts a Google search on the advocates before him!

53. Increasingly the EAT will notify the parties in advance of the hearing (usually in the week before the date set) that they would like to be addressed on particular authorities. In practice this tends to cause a bit of a stir as inevitably there will be cases that are not referred to in the skeleton argument. It is important not to panic. This cannot be ignored and will need action on your part. This can be approached in one of two ways. Either, conduct your final prep and simply get 'on top' of these new authorities so that you are ready to deal with them on the day, or seek leave to submit a supplementary skeleton. I have seen both approaches work.

The *Burns / Barke* procedure

54. The EAT now has the power to refer an appeal back the ET where the issue is the adequacy of reasoning, for amplification or clarification. Historically this was considered not to be possible: see *Tran (Kien) v Greenwich Vietnam Community Project* [2002] IRLR 735. However, following *English v Emery Reimbold & Strick Ltd* [2002] 2 All ER 385 and the decisions in *Burns v Consiginia* (No 2) [2004] IRLR 425 EAT and *Barke v SEETEC Business Technology Centres Ltd* [2005] IRLR 633, it was held that there was a power to remit derived from the provision introduced in the 2004 ET Rules (30(3)(b)) for tribunals to be required to provide reasons if requested by the EAT, alternatively the inherent jurisdiction of the EAT allowed this course of action.

55. The power may be exercised at the sole discretion of the judge or on a preliminary hearing. The appeal is then conducted once the reasons amplification has been provided. In *Woodhouse School v Webster* [2009] IRLR 568 the CA held that the *Burns / Barke* reference should not be made where the reasons given by the tribunal are too deficient to be remedied by amplification. Further the judge who is required to amplify or clarify his reasons should do just that; this is not an opportunity to attempt to justify the original decision.

56. In practice appellants tend to have a 'sinking feeling' when the *Burns / Barke* procedure is applied, as there is an inherent and understandable concern that the tribunal will 'try to row itself out of trouble'. If you are acting for an appellant it is commonly worth fighting this corner and trying to seek to persuade the EAT not to refer the matter back on the grounds the reasoning is 'too far gone' to justify the ET judge attempting to 'patch it up'. This is always a tricky submission to make and one should tread carefully. It is increasingly the practice of the

EAT to notify the parties in advance that they are considering a referral and that they should come prepared to address this issue.

The Hearing

57. Conduct on the day. According to HHJ Richardson:

> *"Category B success depends on identifying points and getting things in order before the day itself. The Judge and members will not have discussed the case before the day itself, they will talk at around 09:15 about the case".*

He also made the following points:

- Be ready to deal with points that are likely to come up (of course).
- Be professional (of course).
- Be helpful with the staff (of course- they do give a briefing on the advocates before-hand)!!!
- EAT will have read the skeleton and the bundle and if you have provided a reading list it will be read. Members will not know unfamiliar authorities and will not have read them before the day.
- Check that the panel has all the documents.
- The best advocates look for a way in that starts otherwise from the top of the skeleton. Get the EAT interested - i.e. comparison of principles in the relevant authorities with how it was approached in the ET decision; this adds value to what is in your skeleton.
- The best advocates are there 'to add value'.
- Don't assume because a point is put to the advocate that judge is against you.

In practice

58. In my experience the following points are usually worth considering:

- If you are relaxed this does come across in your advocacy. When you are well prepared and on top of the brief it should be a really enjoyable experience.
- Be flexible; use your skeleton as a launch pad, not as a script.
- Be prepared for the wing men/women to get heavily involved (unlike a typical ET).
- In multi case conjoined appeals, make sure you agree the batting order and stick to it, last minute changes to this can be hugely unsettling and may be used as tactic to unnerve you.
- Recognise an open door when you see one and do not bang on it.
- Get to the heart of the matter as quickly and safely as you can.
- Remember you are dealing with - typically - excellent judges who will grasp clearly made points readily.
- Do not repeat yourself unless you have to.

- If your opponent makes an incorrect assertion or has misled the EAT wait until he has sat down and deal with the points carefully at that stage. Only interrupt if you really have to.

- Be keen to spot whether new points of law are being raised (this will be allowed only in exceptional circumstances: see *Lipscombe v Forestry Commission* [2007] All ER (D)). Here a litigant in person addressed the Court of Appeal on a point not taken at the hearing below which involved undisputed facts and which was decisive as to whether the tribunal had jurisdiction. It was held in this case that exceptionally the matter would be allowed to proceed. See also *Rance v Secretary of State for Health* [2007] IRLR 665 for a review of the applicable principles.

- Guard against the advocate telling the EAT what he recalls the evidence to have been. The EAT is focussing on the findings fact made by the ET not the recollections of the lawyers. It is an easy and commonly made mistake.

Fresh evidence

59. What happens if evidence comes to light that would have had a significant effect on the outcome of the ET hearing? Do you seek a review of the ET decision or seek to appeal to the EAT adducing the new evidence? The new Practice Statement dated April 2012 deals with this very issue and in brief, the correct approach is to seek a review of the ET decision as the ET would in any event have to deal with this on a remission if the appeal succeeded. Para 8.2 PD 2008 deals with the test to be applied whether it is a review or an EAT. The criteria are as follows:

    8.2.1 the evidence could not have been obtained with reasonable diligence for use at the ET hearing.

    8.2.2 it is relevant and would probably have an important influence.

    8.2.3 it is apparently credible.

Remit or substitute?

60. The EAT is traditionally very cautious not to usurp the function of the ET. In cases where the case does not involve a point of statutory construction it will not substitute its view unless there is only one possible conclusion that can be reached by the ET. See Morgan v Electrolux Ltd [1991] ICR 369.

61. In my recent Court of Appeal case Welsh National Opera Company Ltd v Johnston, [2012] EWCA Civ 1406, although the EAT had allowed Mr Johnston's appeal against the Cardiff ET's finding that his dismissal had been fair, it had remitted the matter for a full rehearing on liability before a fresh panel concluding:

    "What is to be done? Mr Cheetham has accepted that if the matter is to go back it must go back for a complete re-hearing by a different Employment Tribunal. That is Mr Smith's alternative position; his first position is that we can substitute our own Judgment for that of the Employment Tribunal. We cannot accept that it would be a proper use of our powers to do that in the circumstances of this case. All that we have just said about why the Employment Tribunal might have decided things differently if there had been a correct construction of the contract of employment in this case militates against us being in a position to substitute our own Judgment for that of the Employment Tribunal."

62. The WNO sought leave to appeal to the CA and this was granted by Mummery LJ. The matter was heard by the CA at the end of May. In the lead judgment Maurice Kay LJ dismissed the WNO's appeal, awarded costs and despite the manifest caution of the EAT on the issue of a full remission, reached the following conclusion:

> *"It follows from what I have said that, in my judgment, the EAT was correct to identify a legal error in the judgment of the ET. I would dismiss WNO's appeal and remit the case to the ET. Because I consider that a finding of procedural unfairness is inevitable, I would remit solely for a remedies hearing".*

63. Despite that, having heard submissions, the CA sought to remit the matter for a remedies only hearing.

64. *Johnston* may therefore represent a further example of a liberalisation of approach recently adopted by the Court of Appeal in the case of *Buckland v Bournemouth University Education Corporation* [2010] ICR 908. This case supported the contention that the EAT should resolve the 'liability issue,' if the case does not require further evidence. This was in contrast to *Tilson v Alstom Transport* [2010] EWCA Civ 1308, [2011] IRLR 169 in which Elias LJ took a much more restrictive and traditional approach to the problem stating:

> *"It is only where the employment tribunal, properly directing itself in law, could reach only one legitimate conclusion that the EAT can substitute that decision for the one improperly reached by the employment tribunal."*

It is of note that *Buckland* was not cited in *Tilson*.

65. That being said it is clear from the judgment of Maurice Kay LJ that the *Tilson* approach was, on his reading of the matter, capable of direct application in *Johnston.* This contradicted the view of HHJ Hand QC in the EAT who plainly considered that there was still too much in issue to justify a substituted finding of unfair dismissal.

66. In the circumstances, the substituted finding of unfair dismissal will apply to the successful appellant who can demonstrate clear procedural and / or substantive unfairness.

Costs.

67. The perennial difficulty is securing costs, particularly when the losing appellant has got past the sift process. Rule 34 A states:

> *"Where it appears to the Appeal Tribunal that any proceedings brought by the paying party were* ***unnecessary, improper, vexatious or misconceived*** *or that there has been unreasonable delay or other unreasonable conduct in the bringing or conducting of proceedings by the paying party, the Appeal tribunal may make a costs order against the paying party".*

68. If a case has been sifted, the imperfections highlighted above should have been picked up. If matters are raised in a fresh notice of appeal under 3(8) or submissions are made at a 3(10) hearing that are not reflective of the true position or mislead / induce the granting of leave, then there is a good case for arguing that the costs of the full hearing should be paid on the grounds that those costs were caused by the unreasonable conduct of the paying party.

69. A refusal to accept a reasonable offer of settlement may also form grounds for a successful application for costs: see *Fowler v BSM* [2006] All ER D 93. Always consider putting in a *Calderbank* offer.

70. Note also that the award of costs is discretionary and will therefore be hard to challenge on appeal see *Afolayan v MRCS Ltd.* [2011] UKEAT 0406/10/2308.

71. The means of the paying party may be taken into account (r 34 A (3). Note also if you are feeling buoyant about a potential costs application, come prepared to have them summarily assessed by the EAT r 34B (1). This is a little considered aspect of the costs process. The alternative is for the EAT to order that cost be subject to a detailed assessment.

Spotting appeal points typical cases.

Substitution cases.

72. There has been a significant amount of litigation over this issue since 2009 and there have been numerous Court of Appeal and EAT judgements seeking to 'back' the fact finding and decision making function of the ETs. It is clear that the Appellate Courts are concerned that the EAT is getting 'bogged down' in the review decisions of ETs particularly in *Burchell* type conduct dismissals. The common argument made by appellants is that the ET has asked itself the wrong question in determining liability; namely not whether the dismissal was within a range of reasonable responses but whether perhaps unwittingly the ET has asked itself: "what would we have done had we been the employer."

73. Despite the Court of Appeal's criticisms of those who seek to challenge the ET's findings by being "overly pernickety" and of those who fail to consider the judgment "in the round" (see *Fuller v London Borough of Brent* [2011] IRLR 414), there is really no other way of challenging the finding on this basis without reference to the kind of words that demonstrate that the tribunal may have "slipped into a substitution mindset" (as per Mummery LJ) in *London Ambulance Service v Small* [2009] IRLR 563.

74. HHJ Richardson (one of the EAT's Rule 3(10) judges) alluded to the need to set out the "tell-tale" sentences such as "we consider", "we were of the view", "we believe the employer was wrong" etc in the notice of appeal. Ironically if one adopts the Court of Appeal's approach and one looks at the case 'in the round', it may be possible to argue that the magnitude of the criticisms made by the ET taken as a whole evidences a 'counsel of perfection' and therefore it had a substitutionary mind set. This very point is set to be put to the test in November in *Powys Local Health Board v Agar and Hughes.*

Construction arguments.

75. One of the great hurdles in an appeal is persuading the EAT that there has been an error of law. This hurdle is relatively low if one of your grounds of appeal relates to the tribunal's error in constructing a contractual term whether it be in reference to the application of a collectively agreed term, the correct interpretation of a contractual staff procedure such as a disciplinary procedure or true meaning of a binding policy or procedure. Construction errors are errors of law.

Misdirection.

76. There are a myriad of potential mistakes that the ET can make, to try to avoid conflating this with perversity as the "P" word will harm your chances of getting past the sift. Set out the legal test in a step by step fashion, demonstrate that you have made the correct submissions and identify the ET's departure from the test.

Inadequacy of reasons.

77. To a large degree *Meek* has become less important following the introduction of r30(6) of the ET Rules 2004 which provides as follows:

    Written reasons for a judgment shall include:

    (a) The issues which the tribunal or EJ has identified as being relevant to the claim.

    (b) If some identified issues were not determined, what those issues were and why they were not determined.

    (c) Findings of fact relevant to the issues which have been determined.

    (d) A concise statement of the applicable law.

(e) How the relevant findings of fact and applicable law have been applied in order to determine the issues; and

(f) Where the judgment includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum have been calculated or a description of the manner in which it has been calculated.

78. Historically a tribunal's failure to follow each of the matters set out was considered to be a very good starting point in determining whether there has been an error of law. Although in *Balfour Beatty Power Networks v Wilcox* [2007] IRLR 63, the EAT held that they were a guide and not a straightjacket. Subsequently however in *Greenwood v NWF Retail Ltd* [2011] ICR 896, the EAT held that failure to adhere to r 30(6) was of itself an error of law.

Conclusion.

79. The EAT statistics for 2010 to 2011 show that of the 2048 appeals brought in that time 279 were rejected as being out of time, 959 were dismissed as having no reasonable prospects, 23 were struck out, 317 were withdrawn, 60 were disposed of at PHR's and 363 were disposed of at full hearings. Leaving a total of 2001 disposals. The sheer volume of cases rejected on the sift is staggering, it demonstrates the need to make the most of your case on paper and use the tools available to you if you are to succeed in getting past this key aspect of the process.

Nick Smith
Guildhall Chambers
August 2012