

**“You are what you EAT”:  
successfully identifying and resisting  
Grounds of Appeal**

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# Agenda

- Introduction
- Identifying Grounds of Appeal
- Issues for Respondents
- Procedural Issues
- Worked examples

# Identifying Grounds of Appeal



# Error of law

- Do the grounds raise a **question of law**?
- If so, do the grounds raise potential **errors** in relation to that/those legal question(s)?
- Was any such error **material** to the outcome?
- Does it relate to a **live issue** between the parties (ie is it academic?)

# Error of law

What is a question of law?

- **Misdirection/misapplication** of legislation/case law
- **Perversity:** facts; exercise of discretion; conclusion
- **Reasoning:** failure to make findings; resolve issues; give reasons
- **Procedural irregularity:** bias; unfair hearing; delay; composition; inattention

# Misdirection/misapplication

- The “easy” one!
- Has the Tribunal incorrectly stated what the law is?
  - Eg ***Babula v Waltham Forest***: Requiring a criminal offence to have been committed, rather than a reasonable belief
- Has the Tribunal applied the wrong test (perhaps despite having correctly stated what the test is)?
  - Eg applying “but for” test of causation for direct discrimination

# Inadequate Reasoning



# Inadequate Reasoning

- Duty to Give Reasons - Rule 62 ET Rules 2013
- The minimum requirements for a Judgment –Rule 62(5) ET Rules 2013
- Meek compliance (***Meek v City of Birmingham District Council*** [1987] IRLR 250- [17-21], see also ***Dray Simpson v Cantor Fitzgerald Europe*** [2021] IRLR 238 [29-31])
- If there are reasons that it would be desirable to have had in the Judgment, which are not there, the absence of such will not necessarily be an error of law, see ***English v Emery Reinbold & Strict Ltd*** [2003] IRLR 710.



# Inadequate Reasoning (2)

- Adequacy, not perfection is required, the ET is not sitting an examination. see ***Sullivan v Bury Street Capital Ltd*** [2022] IRLR 159, per Singh LJ [42].
- ***DPP Law Ltd v Greenberg*** [2021] IRLR 1016, [57-58]:
  - No fussy reading or pernickety critique of ET Judgment;
  - ET not required to identify all the evidence relied upon in reaching its factual conclusions;
  - Simple, clear and concise reasoning is encouraged.
- EAT must be able to identify the basis for the drawing of inferences by ET, or the decision not to draw inferences (in otherwise clear cases, e.g. ***Anya v University of Oxford*** [2001] ICR 847, [10])
- Conclusions are *not* reasons (e.g. ***Hartel v Al-Ghazali Multi-Cultural Centre and another*** UKEAT/0064/07, [8-9])
- If an issue has been raised for determination, it can be an error of law for the ET to simply fail to decide it (without saying why), see ***Anya v University of Oxford***.

A stylized lightbulb icon in shades of green and teal, positioned on the left side of a yellow horizontal band. The lightbulb is partially cut off by the left edge of the frame. Several short, horizontal teal dashes radiate from the right side of the bulb, suggesting light or an idea.

# **PERVERTSITY**

# What is required?

***Crofton v Yeboah*** [2002] IRLR 634, [93] per Mummery LJ

*'an **overwhelming case** is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper application of the law, would have reached.'*

# A high threshold



# Broadly 3 categories of perversity appeal



No evidence to support a finding that was made.



No reasonable ET would have made the finding on the balance of the evidence, even though there was some evidence in support of its finding.



The decision is contrary to established industrial relations practice.

# Evidence needed

Proving a negative: “no evidence” for a finding or conclusion?

- Inaccurate record of what witness said
- Inaccurate record of what was put in cross-examination
- Unchallenged witness evidence going in opposite direction
- Clear documentary evidence to contrary

# Evidence needed

## Application required!

- EAT PD 8.10; use form at Annex 2
- Will need to supply extracts of the evidence
- **Good notes of cross-examination essential!**
- If hearing recorded: may be ordered to get a transcript
- If not recorded: will be ordered to agree a note
- In absence of agreement, apply for Judge's notes

# Procedural irregularity



# Procedural irregularity

## Bias

- ***Porter v Magill [2002] 2 AC 357 (HL)***
  - Would fair-minded observer conclude real possibility?
- Procedural requirements: EAT PD 3.10
  - Full particulars required in grounds
  - Statement of Truth
- Directions may be made re transcript: EAT PD 7.10
- Risk of costs if unsuccessful

# Procedural irregularity

## Examples

- Expression of views in extreme or unbalanced terms
- Personal friendship/animosity with member of public involved
- Personal interest
- Closed mind/pre-judging
- Excessive intervention

# Procedural irregularity

## Unfair hearing

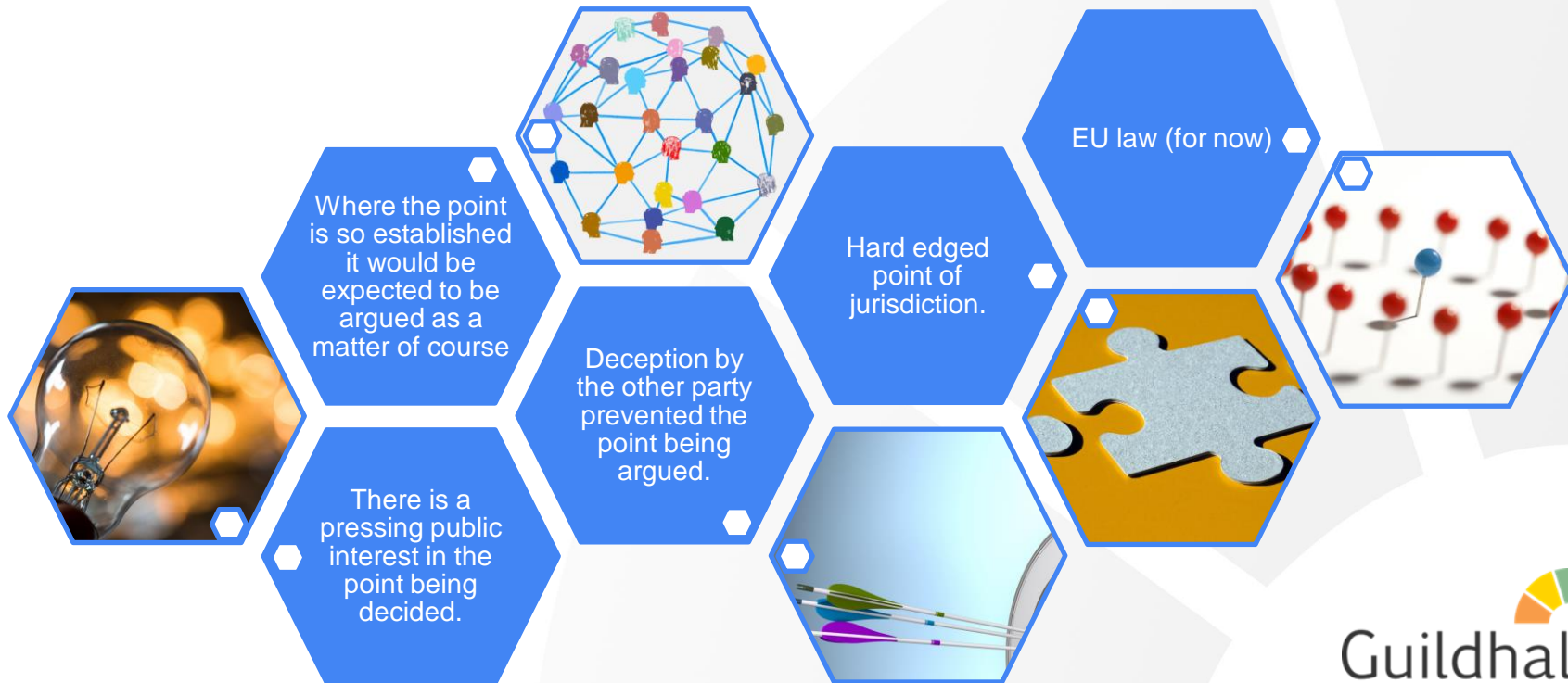
- Making findings/relying on legal points not canvassed with parties
- Deviating from list of issues
- Inattention: falling asleep!
- Delay: would need to be extreme to be successful ground on its own

# Issues for Respondents

# New points of law

- The general position is that new points are not allowed on appeal unless exceptional circumstances can be shown, see ***Kumchyk v Derby City Council*** [1978] ICR 116 at 1123B-F.
- Even more so if to do so would open up fresh issues of fact that would require more evidence to be heard, see ***Jones v Governing Body of Burdett Coutts School*** [1998] IRLR 521 at [19-20]
- Party should not be allowed to resile from a point that its advocate has decided to take (or not pursue), see ***Glennie v Independent Magazines (UK) Ltd*** [1999] IRLR 722 at [18] (although the position might be different if there is a LiP and to do otherwise would be to perpetuate a glaring injustice).
- Inexperience or competence of the advocate not a compelling reason, ***Kumchyk***.
- Will need to comply with para 8.13 of the **EAT PD 2023**.

# Circumstances in which a new point of law might be allowed



# Additional Reasons



# Burns / Barke reasons

- Limited power to ask the ET questions to clarify, supplement or amplify its reasoning. See ***Burns v Royal Mail Group*** [2004] ICR 1103 & ***Barke v SEETEC Business Technology Centre*** [2005] IRLR 633, in particular [29], [46-47].
- ET should answer the questions posed, nothing more, ***Woodhouse School v Webster*** [2009] ICR 818.
- Cannot be used as a final disposal of an appeal.
- See para 8.11.1 of the **EAT PD 2023**.
- Application on the form at Annex 2 to the **EAT PD 2023**.



# Cross Appeal

- Respondent to appeal needs to consider whether it needs to appeal as well
- Appeals are against Orders, not reasons
  - E.g. ET upholds unfair dismissal but not discrimination
    - C appeals discrim; R cross-appeals UD (could also be parallel appeals if both pursued independently)
  - ET finds C disabled but dismisses claim
    - C appeals; contingent cross-appeal on disability

# Procedural Issues

# Things to bear in mind...

- The new **EAT PD 2023**.
- Modified filing requirements- EAT Notice of Appeal plus:
  - (1) state the date of the judgment you are appealing against,
  - (2) provide a copy of the Judgment,
  - (3) also a copy of the Reasons if in a different document .

(paras 3.6 and 3.7 of the **EAT PD**)

- If alleging perversity, need to clearly set out particulars, see para 3.9 of the **EAT PD**.

# More things to bear in mind...

- 42 day time limit for lodging the appeal- note that the last day ends at 4pm.
- Make sure that you send your appeal to the EAT, **not** the ET
- Preference for E-filing, but 10MB maximum limit if sending by email. Not validly served if a link to a cloud service is sent.
- Bear in mind time lags and plan accordingly.
- New Application Form at Annex 2, see also para 7.3 of the **EAT PD 2023**.
- Remission- the same or different ET?

# Worked examples

# Questions?



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