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EAT procedural updates

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- Two recent judgments by HHJ Tayler have provided helpful clarification on the procedure to follow when bringing and responding to appeals in the EAT.
- In this article, the key procedural guidance from the cases of ***Deans v RBL Law Ltd et al* [2026] EAT 76** and ***Harkins v Marks & Spencer PLC* [2026] EAT 70** is summarised.

1. Appeals must raise errors of law, not 'dressed up' disputes of fact

In **Deans** HHJ Tayler reminds us '*it is not the role of the EAT to second guess the Employment Tribunal's fact finding*' (**78**), and the EAT only intervenes if there is an error of law. Such errors of law should be easy to identify in a few words and **EAT Practice Direction 3.8** is helpful in guiding appellants as to the approach required when drafting grounds of appeal.

2. Particular care must be taken with perversity appeals

In respect of a 'perversity' appeal the appellant must establish that the Employment Tribunal reached a decision which no reasonable tribunal, directing itself properly on the law, could have reached. **EAT Practice Direction 3.9** provides specific guidance on perversity appeals, including the need for appellants to expressly state that no reasonable Employment Tribunal could have reached the conclusion reached.

HHJ Tayler explains that perversity challenges *'generally should not be mixed in amongst challenges to matters such as the Employment Tribunal's directions on, and application, of the relevant legal principles'.* Further, care should be taken that perversity appeals are not in reality, challenges to findings of facts which are impermissible (**Deans, 33-34**).

3. **There are a multitude of factors that may be relevant when considering amendments to appeal ground**

EAT Practice Direction 8 deals with amendments to notice of appeals. The leading authority on amendment to grounds of appeal is the case o**f Khudados v Leggate and Others [2005] I.C.R. 1013, 79**. HHJ Tayler draws attention to specific parts of the guidance given by HHJ Serota QC, including that the '*appeal tribunal takes a strict view of anything, including proposed amendments, that might delay a final hearing'* (**Khudados, 82**), merits of the proposed amendments are relevant (**Khudados, 84**), applications for permission to amend a notice of appeal must be made as soon as the need for amendment is known (**Khudados,86a**), consideration should be given to whether or not allowing the amendment will cause prejudice to the other party (**Khudados, 86e**) and regard should be had to the public interest in ensuring the business of the appeal tribunal is conducted expeditiously (**Khudados, 86f**). HHJ Tayler emphasises that whilst **Khudados** sets out factors that are generally relevant, these are not *'hurdles'* that must be cleared before an amendment is permitted (**Deans, 42**).

HHJ Tayler highlights key points on amendment (**Deans, 43**), which are further summarised as follows;

1. Deciding an amendment involves the exercise of a **discretion**
2. The starting point is the **overriding objective**
3. The **nature** of the proposed amendment is of considerable importance (i.e. whether it is closely related to existing ground, or a wholly new ground, and how much extra time will need to be spent considering it).
4. If an amendment simply **clarifies** an existing ground, it may actually assist the Respondent and the EAT.
5. **Delay** may weigh heavily against permitting an amendment, and it will depend on prejudice caused by the delay.
6. **Prejudice** to the Respondent may be increased at particular points, such as when they have responded to the notice of appeal or taken significant steps to prepare for the hearing.
7. Delay is likely to be less of a factor where existing grounds are simply clarified.

8. The **merits** of the proposed amended grounds may be relevant

9. The proposed **amendment should be pleaded** so it fully complies with the EAT Practice Direction

10. A **full honest and acceptable explanation** is generally required, particularly if the amendment raises new points

In respect of the factor of delay, the EAT's significant backlogs were noted. This is therefore likely to be a considerable factor in the EAT's assessment of prejudice going forwards.

Where a litigant in person obtains pro bono assistance from ELAAS at a rule 3(10) or PH, a more generous approach is applied (**Readman v Devon Primary Care Trust UKEAT/0116/11/ZT and King v Royal Bank of Canada Europe Ltd [2012] IRLR 280 (EAT).)**

4. A Respondent's ability to participate in rule 3(10) hearings is very limited

Rule 3(10) hearings take place when a prospective appellant is unhappy with the decision in a rule 3(7) letter that grounds of appeal should not proceed as they are not arguable. They are usually brief (generally listed for one hour) and usually only the appellant attends.

EAT Practice Direction 5.4.2 states that (at a rule 3(10) hearing) the other party to the appeal may be given the opportunity to make brief submissions on any particular issue by the Judge if it is in accordance with the overriding objective. HHJ Tayler explains that this allows a Judge to request assistance about a specific issue, rather than providing the respondent with the right to make submissions (**Harkins, 8**).

He emphasises that it is very unlikely a respondent will be asked to contribute, and if a respondent attempts to argue matters of substance, this is likely to make the appeal arguable (**Harkins, 9**);

> *"In very limited circumstances the respondent might ask to be heard. Any request to be heard should be carefully limited to* ***knock out points*** *that demonstrate that a ground is unarguable because, for example, there is a* ***fundamental error*** *in a ground of appeal, that can be demonstrated to be such* ***without any need to look***

> ***at detailed documentation** or to ask the Employment Tribunal about what happened*' (**Harkins, 10).**

Therefore, '*save in exceptional circumstances a respondent should not seek to make any submissions in respect of a Rule 3(10) applicatio*n' **(Harkins, 14**). HHJ Tayler notes that at sift stage if it were thought that the respondent would assist, a preliminary hearing would have to be fixed which invited brief written submissions from the respondent in respect of the 'no reasonable grounds' question. He also notes that respondents are occasionally permitted to attend preliminary hearings and make oral submissions, which would be provided for in the order fixing the preliminary hearing.

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29 May 2026

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