

Employment Tribunals Procedure: a party may apply for a transcript of a hearing subject to conditions

By [Sarah Bowen](#)
3PB Barristers

Kumar v MES Environmental Limited [2022] EAT 60¹

1. The EAT (HHJ Auerbach) has held that a party may, as applies in other courts and tribunals where the proceedings are recorded, apply for a transcript, subject to paying the applicable fee and complying with the associated established protocols.
2. Paragraph references in this article are to those in the EAT's judgment.

Procedural background

3. Mr. Kumar brought claims of direct race discrimination and victimisation arising from an unsuccessful job application. The factual basis of the complaints is not particularly remarkable or relevant to the appellate decision in this case which focuses on procedure.
4. A final merits hearing took place between 24 and 27 February 2020, before a full panel in Birmingham ET. An oral decision dismissing both claims was given at the end of the hearing. Mr. Kumar was not present at the hearing, but his Counsel requested written reasons, which were subsequently provided on 21 May 2020.
5. Two days after the final merits hearing, Mr. Kumar applied for a transcript of the hearing on a completed form EX107². EJ Hughes refused the application on the basis that the claimant was “*not entitled to a transcript of the hearing*” and later confirmed there was no legal right to a transcript of ET proceedings.

¹ [Mr R Kumar v MES Environmental Ltd 2022 EAT 60.pdf \(publishing.service.gov.uk\)](#)

² [Form EX107: Order a transcript of court or tribunal proceedings - GOV.UK \(www.gov.uk\)](#)

6. Mr. Kumar also made a subject access request to obtain the panel's notes and the audio recording of the hearing. The Ministry of Justice refused this and in relation to the audio recording, referred to the exemption in schedule 2, Part 1(5) of the Data Protection Act 2018 namely, where the information is available by another legal route. The MOJ's response also stated:

“Any party or member of the press or public who wishes to read a transcript of the whole or any part of an audio recording made at a hearing by HMCTS may do so by completing form EX107 and sending it to the regional office of Employment Tribunal region where the case was heard.”

7. It referred to the need to pay a fee or complete a separate form for the transcript to be provided at public expense.
8. Mr. Kumar appealed to the EAT.

Are ET proceedings recorded?

9. In my experience, this is still a relatively rare occurrence nationwide in respect of ET hearings. However, I have personally had experience of some cases being recorded in Wales, Scotland and London. It seems to be increasing in frequency.
10. The EAT sought observations from the EJ or the tribunal in relation to Mr. Kumar's proceedings. Regional Employment Judge Findlay consulted the President of Employment Tribunals in England and Wales who confirmed hearings are still not routinely recorded. This is because of lack of the facility to do so (apart from Wales which was spearheading a pilot and recording matters conducted via CVP).

What do the ET and EAT rules say about recordings?

11. The Employment Tribunal Rules of Procedure 2013³ (the 2013 Rules) are silent on this. HHJ Auerbach has expressed that they are out of date and need updating to include the issue of transcripts. Therefore, it seems very likely that we will see the 2013 Rules (and possibly the EAT Rules/guidance) updated to include this.

³ [The Employment Tribunals Rules of Procedure 2013: \(as subsequently amended up to 6th October 2021\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/103111/et-2013-rules.pdf) ([publishing.service.gov.uk](https://www.publishing.service.gov.uk))

12. The current EAT Practice Direction 2018 (updated 19 September 2019)⁴ proceeds, in relation to matters such as requests for a judge's notes and agreement of notes of evidence, on the implied assumption that no other or better record will be available see PD8 – Evidence before the Employment Tribunal.
13. This is also the reason behind the principle that the judge's note is the official record of the proceedings, and why it is regarded as part of the judge's responsibility to take a careful note of the evidence and the proceedings.
14. This was recently acknowledged in the *obiter* observation of Choudhury P in **Heal v University of Oxford [2020] ICR 1294** at 49(d):

“The Tribunal’s notes of evidence will continue to be the conclusive record of the hearing before it, certainly whilst it remains the position that Employment Tribunal proceedings are not routinely the subject of official digital recording. The fact that a Tribunal has consented to a recording being made by a party, and the undisputed content of that recording appears to conflict with the Tribunal’s written notes of evidence, would not mean that the recording automatically takes precedence. Whether or not it should take precedence in respect of any issue will be a matter for the Tribunal to determine having regard to all the circumstances.”

15. By comparison, in the High Court or County Court, CPR 39.9 provides:

39.9

(1) At any hearing, whether in the High Court (or the County Court), the proceedings will be tape recorded or digitally recorded unless the judge directs otherwise.

(2) No party or member of the public may use unofficial recording equipment in any court or judge's room without the permission of the court. (To do so without permission constitutes a contempt of court under section 9 of the Contempt of Court Act 1981(1).)

(3) Any party or person may require a transcript or transcripts of the recording of any hearing to be supplied to them, upon payment of the charges authorised by any scheme in force for the making of the recording or the transcript.

(Paragraph 6(2) of Practice Direction 52C (Appeals to the Court of Appeal) deals with the provision of transcripts for use in the Court of Appeal at public expense.)

(4) Where the person requiring the transcript or transcripts is not a party to the proceedings and the hearing or any part of it was held in private under rule 39(2), paragraph (3) of this rule does not apply unless the court so orders.

(5) At any hearing, whether in public or in private, the judge may give appropriate directions to assist a party, in particular one who is or has been or may become unrepresented, for the compilation and sharing of any note or other informal record of the proceedings made by another party or by the court.

⁴ [Practice Direction \(Employment Appeal Tribunal – Procedure\) 2018 | Courts and Tribunals Judiciary](#)

The EAT's decision

16. The EAT allowed the appeal concluding that where HMCTS audio-records a hearing, a party may, as applies in other courts and tribunals where proceedings are so recorded, apply for a transcript, subject to paying the applicable fee and complying with the associated established protocols.

Important observations in the EAT's reasoning for practitioners

17. Practitioners will need to take note not just of the principle that an application can be made but of other important elements of this decision including limitations of the scope of an application for a transcript.

18. HHJ Auerbach has observed that appeals to the EAT lie only on a point of law and, for the purposes of most appeals, reference is only needed to the ET's written decision and relevant materials that may have been before it (paragraph 27).

19. It is in broadly two types of cases the EAT accepts that some further recourse to a record of what happened or was said during the hearing itself might be relevant to an arguable ground of appeal and necessary in order to fairly determine it. This is broadly where there is:

(a) an arguable allegation of a procedural irregularity; and/or

(b) an arguable basis for alleging perversity (in the legal sense) (paragraph 28).

20. In such cases, Part 8 of the EAT's practice direction provides that a party may apply for a copy of part of the EJ's notes of evidence or permits an agreed note of evidence to be put before the EAT, so far as necessary to the fair disposal of the appeal.

21. The current iteration of the ET and EAT rules are based on the premise that the judge's note is the official record of the proceedings (paragraph 30). The fact that ET proceedings have not historically been recorded is why there is no reference to obtaining recordings in the ET and EAT rules/Practice Direction opposed to reflecting any position that there is no entitlement to obtain one (paragraph 33). HHJ Auerbach has observed that:

"It would be better if the position were expressly addressed in the rules or in a practice direction. It appears that they have yet to catch up with the changing and evolving practice in this regard, which is not altogether surprising. But the absence of any such rule or

practice direction at present, does not signify that it is not possible for such an application to be made.” (paragraph 33)

22. A party in principle, subject to paying and complying with the appropriate protocols may apply for a transcript where a hearing is recorded by HMCTS. However, this does not mean that they also have a right to insist on the material being placed before the EAT for the purposes of adjudicating an appeal. The party must apply to the EAT for permission to introduce some “part” of the transcript, and it must be necessary for the fair disposal of an arguable ground of appeal (paragraph 35-6).
23. This entitlement to a transcript only applies to requests for proceedings other than any part of the proceedings in which an ET gives oral reasons for a decision. Where there is an oral decision there is no right to a transcript of that part of the hearing. This is because where a court or tribunal gives an oral decision, and a written decision then follows, the written decision is not required to be a pure verbatim transcript of the reasons that were given orally and is the final and definitive record of the reasons for the decision (paragraph 37-41).
24. This decision is not intended to entitle parties to a copy of the audio-recording itself (and only a transcript) (paragraph 42).

Comment

25. So, in short, it is clear that an application for a transcript can be made by a party as long as they adhere to the appropriate process and within the caveats outlined by HHJ Auerbach. However, this decision does not give rise to any entitlement to a copy of a visual or audio recording in itself.
26. Furthermore, this is not a green light for a party to place a cumbersome, unnecessary and lengthy transcript before the EAT just because it is available. The reinforcement and emphasis that a party needs (a) express permission from the EAT to introduce a transcript on an appeal; (b) as is usually this will be limited to what is “necessary” for the fair disposal of an arguable ground of appeal; (c) this generally only applies in perversity or procedural irregularity appeals, should serve to proportionately control this type of evidence. That said, for any practitioners who have had to wrangle of agreed note of the evidence before the Tribunal, it is likely to be an exceptionally useful tool for appeals in the right and appropriate cases!

27. Case report:

[Mr R Kumar v MES Environmental Ltd 2022 EAT 60.pdf](#)
[\(publishing.service.gov.uk\)](#)

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Sarah Bowen

Barrister
3PB Barristers

0121 289 4333
sarah.bowen@3pb.co.uk

3pb.co.uk