

FortyTwo Talks:
Pepkolaj v Barrett Steel Ltd 2026 EAT 14
Nick Singer & Stefan Liberadzki

Nick Singer: Hello and welcome to the *FortyTwo Talks* podcast, the podcast which takes a deep dive in the legal world, led by the experienced members of 42BR Barristers.

I'm Nick Singer, an employment barrister here at 42BR Barristers, and with me today is fellow employment barrister, Stefan Liberadzki.

Have I got that right?

Stefan Liberadzki: Perfect, usually the first question a judge asks me.

Nick Singer: Before we dive in, a quick bit of housekeeping.

Nothing we discuss on this podcast is actual legal advice and it's just for general information. If you have a specific legal issue, you should always consult a professional directly to look at your individual circumstances.

With that out of the way, let's get into the episode.

How are you doing today?

Stefan Liberadzki: I'm great, Nick, it's a lovely day to be talking about ET1s with you.

Nick Singer: It's always a lovely day to be talking about ET1s and all things employment law.

It's actually my first time on the podcast, and I was thinking all the best podcasts have a catchphrase, so maybe it's time to introduce one. If anyone out there has any suggestions, please send them in, no guarantees, of course, but I think that'll be a positive development.

Stefan Liberadzki: We haven't got any prizes, I'm afraid, but we'll give anyone a shout-out who can send in a good idea.

Nick Singer: Maybe we can get a budget for that.

Anyway, so today we're going to talk about an EAT case that I was in, it is *Pepkolaj v Barrett Steel Ltd* 2026 EAT 14.

Stefan Liberadzki: We do like us barristers to talk about cases we've been in, don't we, especially EAT cases.

Nick Singer: Absolutely.

Unfortunately, there's a Court of Appeal case, which is even more important, which I wasn't in, so we're going to have to talk about that as well.

The case which you've probably all heard of, *Moustache v Chelsea and Westminster Hospital NHS Foundation Trust* [2025] EWCA Civ 185 and as I say, *Pepkalaj* was really an application of that case.

Now, I'm going to give a brief overview of the case of *Pepkalaj*, and *Moustache*, and then we're going to have a conversation about the practical implications of those cases.

Stefan Liberadzki: Yes, we'll talk a bit later won't we about what it means especially for respondent lawyers dealing with unclear claims from litigants in person.

But starting with *Mr. Pepkolaj's* case, Nick, what actually happened there?

Nick Singer: So *Mr. Pepkolaj* was dismissed from *Barrett Steel Ltd* due to being unable to work due to a wrist injury, and he brought a claim ostensibly of unfair dismissal, and that claim of unfair dismissal was dismissed due to being out of time.

And he appealed to the EAT on the basis that the ET should have identified a possible Section 15 disability discrimination claim.

Stefan Liberadzki: Section 15, so that's discrimination arising from disability, isn't it?

And I guess that would have helped him because his claim was out of time, but the test for extending time for discrimination claim, just an equitable test, is a lot looser than for an unfair dismissal claim.

So, he might have had a better chance basically of going through.

Nick Singer: Exactly.

And interestingly, when his appeal was allowed through the sift, the *Moustache* case, the Court of Appeal case we described, had actually been in the EAT but not yet in the Court of Appeal and the EAT in *Moustache* gave a surprisingly expansive view of how tribunals should deal with litigants in person and how much they should be given help by an ET judge.

So, the EAT during the sift phase when looking at *Mr. Pepkolaj's* appeal, looked at the EAT case of *Moustache* and thought, 'well, it's pretty wide, we'll allow it through the sift' even though even then it was a close run thing. But just to be clear, by the time my case, *Pepkolaj*, got to the EAT, the Court of Appeal had overturned the EAT version and brought it

back to what might be described as a slightly more orthodox, more restrictive view.

Stefan Liberadzki: Okay, so just to recap there for our listeners, and for me.

The EAT appeal in your case, *Pepkolaj*, it goes through the sift, which is where the appellant, the claimant, has to show they've got reasonable prospects in their appeal to go to a full hearing.

At that point, you've got the EAT's decision from *Moustache* already that says judges should be perhaps more generous to litigants in person.

But by the time your final hearing rolls around in *Pepkolaj*, the Court of Appeal has now ruled in *Moustache*, and they've set out a more traditional strict approach.

So that's, yes, going to make it harder for *Mr. Pepkolaj*.

Nick Singer: Spot on, it was a lot.

A lot had changed in the time between the sift and the final hearing, and you're quite right, it did make the appeal a bit harder.

Stefan Liberadzki: And of course, he was up against the famous Nick Singer on the other side, so it was never going to be easy for him, was it?

Nick Singer: Well, of course, I mean he was always going to lose, but you know, it made things a little bit easier.

You know, five-nil drubbing rather than a sort of tightly fought two-nil.

We can't have any more football analogies, can we? I think one is plenty, although we haven't had a joke about *Moustache* yet.

Stefan Liberadzki: We'll have to figure out how to shoehorn that one in later.

Nick Singer: Yes, we'll definitely get there and anyway we've got sidetracked.

But going back to the appeal, what *Mr. Pepkolaj* was basically saying in his appeal is what the employment judge should have done, instead of just looking at it narrowly and saying, 'this is an unfair dismissal claim, and therefore the reasonable practicability test applies' the judge should have also said, 'well, maybe he brought a Section 15 claim' and sort of gone down that route and looked at the just and equitable test, even though there were a number of things missing, which you would have expected.

So, for example, he hadn't ticked the box for discrimination, he'd said he wasn't disabled, and he'd also not asked for a recommendation. So, he'd asked for other remedies but not a recommendation, which is one that is available for discrimination.

Stefan Liberadzki: Where he said he wasn't disabled, that's that other box on the ET1 where it asks a claimant, 'do you have a disability that might need adjustments at the hearing?'

So, it's not strictly about the claim itself, but it was an indication he didn't say he was disabled, I see. And so then I suppose he would have been saying, 'well, look, I've written in my ET1 that I had a wrist injury and that I was having to have time off for it, and I was dismissed for capability because I was absent from work for too long, and it should have been clear enough for the ET to work out from that, that I was also bringing this disability discrimination claim.'

Nick Singer: Yes exactly, and that's ultimately what the EAT was doing. The EAT had to look at the ET and just try and figure out whether the ET got it wrong, this split into two stages.

Firstly, objectively was a Section 15 claim pleaded, but also more broadly, you know whether in the circumstances it was appropriate to assist a litigant in person, even if the claim had not been pleaded and they're two broad principles.

Stefan Liberadzki: So, number one, reading the claim form properly and objectively, is that claim actually in there or not?

But number two, how much should the judge have helped him to possibly identify a claim he might not have actually made?

Nick Singer: Indeed.

And that is where the ET or the EAT applies *Moustache*, because *Moustache* looked at this in quite a lot of detail and I'm not going to go into it chapter and verse because it's complicated, there are lots of nuances to it.

I do urge everyone to go and read the case *Moustache*, it's well-written. It's very clear.

But broadly speaking, these are the principles:

You always start with an objective analysis of the statements of case, and you've got to look at those statements of case in their proper context.

So, as we were saying earlier, as you were mentioning the disability box hadn't been ticked, it wasn't part of the substantive claim. But you've got to look at the whole claim form, and if someone doesn't tick they have a disability it may not be determinative, but it might be a

clue. More importantly, perhaps the box not being ticked that it's a disability claim, that's a very important clue.

And what the tribunal judge should be doing is looking at the statements of case, ordinarily looking at the statements of case, you're not supposed to search through related documents like witness statements to look for a claim that wasn't pleaded, you're looking at the statements of case. Clarifying a claim that already emerges from the ET1 is legitimate, constructing a new claim for a party or prompting an amendment for their benefit is a different matter, and that's absolutely at the heart of it.

Stefan Liberadzki: I guess that might be a tricky line to draw in practice, isn't it? Sort of what is clarifying a claim that's maybe not very clear versus what is prompting a new claim or constructing a new claim.

Nick Singer: And if there were only two barristers who could help everyone navigate that issue.

But just to lay a marker down, you're absolutely right. It is difficult, and the first stage, and often that you'll see this phrase in the case or a lot, 'does a claim shout out from the claim form?'

If a claim shouts out from the claim form, and we'll look at this in a bit more detail, then that's probably something a judge is going to help a litigant in person clarify but as I say, crucial, that's different from creating a claim for them or prompting them to make an amendment to help them, because as the Court of Appeal said in *Moustache*, you know, it's an adversarial system still at its core, it's not an inquisitorial system and that's the starting point.

Stefan Liberadzki: I see.

So, this test of shouting out from the claim form, that might be where, let's say, the claimant hasn't used the legal label, but they've described a set of facts or allegations that just obviously are a particular type of claim, and the EAT was saying that in *Mr. Pepkolaj's* case, it wasn't completely obvious from what he'd written that he was bringing a disability claim, he might have been, but it wasn't shouting out.

Nick Singer: Exactly and ultimately, how much help you give to a litigant in person in the round depends on the facts of the case and the Court of Appeal have left that to the good sense of employment judges. The case that they cite, and there's a test in there, it's *Drysdale v The Department of Transport (The Maritime and Coastguard Agency)* [2014] EWCA Civ 1083.

Stefan Liberadzki: Yes, so the EAT is saying here they can't sort of dictate minutely how every employment judge deals with litigants in person, how much they help them, there's going to be a range of approaches and styles, it depends on your judge, I think all lawyers know that, again we'll again talk about that a bit later.

But actually, moving on from that and how we draft the response, so you and I, Nick, often represent respondents and take instructions from their solicitors and often the first difficult issue that can come up is how you draft the response to a claim that isn't very clearly pleaded, and you're not quite sure what they're claiming.

Now, the sort of number one tip I always would give is that you only actually have to answer the claims that have actually been made in the claim form. So, where the claim is actually ticked a particular box, or if they've not ticked the box, they have said explicitly, 'I'm bringing a...' let's say, a race discrimination claim, or victimisation or whatever it is.

Now, often you will see that they have named one or more of these types of legal claims but they've not given many details, not sufficient

details of why they're making that claim. In that situation, it's perfectly fine to say 'they brought this claim, they need to give further particulars, you can put in a general denial and say as much as you're able to say in response to what they said', and then you can reserve the right to amend it later once you've got the proper particulars.

Nick Singer: And perhaps you could give an example of how this would work in practice.

Stefan Liberadzki: Yes, so drawing this from a few cases I've seen, it's not word for word but I have seen ET1s like this.

A claimant's ticked the race discrimination box, and then they've written in the information something like, 'my manager discriminated against me by isolating and excluding me' and nothing more than that, they've not given any specifics of how they were isolated or excluded.

Now, they have brought the claim, you can't say they've not brought a claim of race discrimination. You have to then take your client's instructions as far as you're able to, presumably, the manager is going to say 'no, I didn't isolate or exclude this person.'

You can then put in a general denial, but say further particulars are needed of, for example, how and when and what did they do to isolate and exclude this person, and reserve the right to amend later.

Nick Singer: And what if it's not clear what legal claims they've brought at all?

Stefan Liberadzki: Yes, so we see this as well don't we, Nick, that someone really just puts in their story in the ET1, just a narrative of events, and they haven't said at all what claims they're bringing because they may not understand what claims they might have.

Now, sometimes it can be clear enough even if they've not used the labels, the correct legal heading, you do have to use a bit of common sense and make allowances for unrepresented litigants' lack of knowledge.

Can you think of an example of that, Nick?

Nick Singer: Yes. I mean, imagine if a claimant had written something like, 'I put in a grievance against my manager for racially harassing me. When he found out, he retaliated by cancelling my bonus for the year.'

And I think that to any employment lawyer and any employment judge, this is obviously a victimisation claim, even if the claimant hasn't used the word, and I think the response should say, 'the respondent understands the claimant to be making a victimisation claim on the basis of X, Y, and Z, and this is denied with the reasons'.

Stefan Liberadzki: Yes, so going back to that phrase from the case law, the victimisation claim just shouts out from what they've written because they clearly described a protected act of making a grievance about race discrimination, race harassment, and then retaliation for doing that.

But in *Pepkolaj*, your case, the respondent would've been correct to just answer the unfair dismissal claim and not any disability discrimination claim because, as we said, he's talked about his wrist injury at work, he's talked about being dismissed for his resulting absence but he's not ticked the disability discrimination box or said anything about being disabled, and he's in fact ticked elsewhere on the form that he's not disabled.

And of course, not all illnesses or injuries are necessarily disabilities.

Nick Singer: Indeed, and that's what His Honour Judge Taylor in the EAT in *Pepkolaj* said, exactly that.

Stefan Liberadzki: Yes, it might not be long-term enough, you might have a wrist injury that lasts a few months and then you get better.

But with drafting the response, generally less is usually more. If the claim is unclear, as we say, you'll nearly always get a chance to amend the response later on once you've hopefully got the clarification and the details you need to properly answer what the claimant is saying.

Nick Singer: So, this is quite a tricky and knotty issue, but bearing in mind the test in *Drysdale*, mentioned before, how much are respondent lawyers expected to help unrepresented claimants to clarify their claim?

Stefan Liberadzki: Yes well, of course, there's the duty in the overriding objective, and that applies not just to judges, but to parties and their representatives who are expected to help the tribunal to further the overriding objective and cooperate generally with each other and the tribunal and it says that dealing with cases fairly and justly includes ensuring parties are on an equal footing.

So, there is some duty there on respondent lawyers, but what that means in practice can vary. The practice varies by regions of tribunals, but often a tribunal will order a represented respondent to draft a list of issues, or do a first draft at least, and seek to agree it with the claimant before the preliminary hearing.

And when you've been ordered to do that, the idea is to identify what legal heads of claim have actually been brought, you'll have answered those as far as you're able to in the response and then highlight where the claimant needs to give further particulars of any claim.

Nick Singer: I expect that can be quite tricky in practice, I mean, perhaps you could give an example of how this would work in practice and some of the problems you might have.

Stefan Liberadzki: Yes, it can be thorny because you can end up with someone really seeking to expand their claim and bring in new allegations. So, let's say for example, they've just ticked disability discrimination, the box, but they've not made clear what type of disability discrimination they're alleging, there are potentially four or five types - there's direct, indirect, reasonable adjustments, discrimination arising from disability, and harassment as well.

Now, do you put all five types in the list of issues with all their legal tests and ingredients and then ask your claimant to fill those in with the details?

Or do you first ask them to clarify what type of discrimination are you actually claiming?

They may not know because they may not have had the legal advice they need to understand that. But the risk here is that a claimant can treat, and I've seen this quite often, a claimant can treat a blank template list of issues with all these potential claims as an invitation to really expand their claim by adding new factual allegations where they're trying to fit something under every heading, and then you get into issues of amendments which need permission, potentially a much bigger claim than you were originally looking at.

Now, one way to try and avoid this is to be a bit more proactive and fill in the blanks as far as you're able to, based on what you've read in the claim form.

So, you might read it and think, 'yes, this really looks like a Section 15 claim, discrimination arising' and you can say to the claimant, 'we think you're alleging discrimination arising from disability, specifically on the basis of these incidents' and list them in the list of issues that you've put in the claim form and by doing that, you can help define the

parameters of a claim and hopefully keep them on track and not give them that invitation to go off adding a whole load of new things.

Nick Singer: And I'd just add, even if you haven't been ordered to draft the list of issues, I think it can be useful to do it voluntarily.

Certainly, the preliminary hearing judge is going to appreciate it because you saved them some work, and it can help your client keep everything on track and reduce costs and at worst you know, perhaps even having it to be postponed off to another day, you know, can really help. It really just depends on the claimants and what they're claiming, sometimes it can be sort of so chaotic that nothing useful can be served by doing it, you're just ultimately guessing and maybe inadvertently constructing a claim for them, but I think broadly speaking, better to try and have something in place.

Stefan Liberadzki: And I suppose it's maybe a bit of a judgement call on who your claimant is and you know, what their claim is like and how they're expressing it, and do you think they're going to kind of cooperate with what your request is, or are they going to make things worse?

So, pivoting slightly or going forward a bit, you've maybe done that exercise with a list of issues or not, but you get to the preliminary hearing, what can you do if you get a judge who is maybe going too far and perhaps helping a claimant to identify and put in new claims that they've not actually made?

Nick Singer: Yes, it's such an incredibly tricky issue, going to depend on the facts of the case, going to depend on the judge, got to take it sort of, what's the heat of the hearing like, but I think the most important thing is, is going in prepared...

Stefan Liberadzki: Yes.

Nick Singer: ...Have in your mind what you think is pleaded or not. Now, that may well have been part of the exercise, as we've discussed, about going through the list of issues and drafting that, and if you're not in that position to at least in your head, be very, very clear, because remember, you know, is it pleaded and does it shout out from the claim form? That's okay to clarify it, but if there's a new claim or you're going to be in a situation where it's not pleaded and an amendment is being prompted, that's where you've got to be very, very careful. It is going to depend on the facts of the case, but as I say, going in prepared is important.

And I think it's important to have from *Moustache*, we've got a Court of Appeal authority that dealt with this issue recently. So have it on hand because you can politely point out to the judge that authority and, and make clear what the case law is, and sort of get everyone back on track and I think it's important to be trying to do that as early as possible because it may be impossible to stop it completely, you know, once a new claim has been suggested, you know, the cat's out of the bag.

But if you let it run out of control, it might be five, six, seven, or eight new claims, and you're an absolute mess.

Stefan Liberadzki: Yes so, you want to be on the lookout for if the judge starts straying into suggesting to the claimant, 'well, you could have made this claim. Do you want to add that claim?' That's when to bring out *Moustache* and say politely, 'this is crossing the line.'

Nick Singer: So that just about wraps it up, unless you have a *Moustache* joke, we still haven't been able to get any, it is Movember, isn't it? November time coming up, that's coming up. I saw an advert for that on the tube but apart from that I can't think of any, again, perhaps listeners, if you've got any *Moustache* jokes, please do send them in, that's a couple of bits of homework for you.

But otherwise, thank you for tuning in to *FortyTwo Talks*, we hope you've enjoyed the podcast.

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Wow, sound like a real podcaster there.

Stefan Liberadzki: We're professionals now.

Nick Singer: We are indeed professionals.

Thank you and goodbye.

Stefan Liberadzki: Thanks very much.

Bye-bye.