

ENGLAND AND WALES / JUDGMENT

Khan v Trident Safeguards Ltd. & Ors

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Neutral Citation Number: [2004] EWCA Civ 624 Case No: A1/2003/1136-1138 IN THE SUPREME COURT OF JUDICATURE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL Royal Courts of Justice Strand, London, WC2A 2LL Date: 19/05/2004 Appellant Respondent Before: LORD JUSTICE BUXTON LADY JUSTICE ARDEN DBE and LORD JUSTICE WALL

- ----- Between: Arfan Khan
- and - Trident Safeguards Ltd & Ors
- -----
- ----- Mr Arfan Khan (In Person) Mr D Preston (instructed by Brooke North) for the Respondent Hearing date : 6 April 2004
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Judgment

Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors Lord Justice Wall:

Introduction:

2. 3. 4. 5. 6. 7. We have before us three appeals by Mr. Arfan Khan from decisions of the Employment Appeal Tribunal (EAT) given on 25 February 2003 in a constitution chaired by HH Judge McMullen QC. They all raise the same point. Mr. Khan was adjudged bankrupt on his own petition by order of Mr. Registrar Baister sitting in Bankruptcy in the High Court of Justice at 13.52 on 16 December 2002. Did he, therefore have the status after that date to prosecute appeals to the EAT from decisions of the Employment Tribunal (ET) that his former employer, Trident Safeguards Limited (Trident) had not (1) racially discriminated against him; (2) victimised him and / or (3) unfairly dismissed him? The EAT decided that, because he had been adjudged bankrupt, Mr. Khan did not have the status to prosecute any of his three appeals. It therefore dismissed them. However, it gave him permission to appeal in all three cases. It did so principally because, on 5 December 2002 it had reached a similar decision, and given permission to appeal to this court in a case called Grady v HM Prison Service (EAT/67/02ST) (Grady). Miss Grady had brought proceedings for unfair dismissal, breach of contract, wrongful dismissal and disability discrimination against her former

employer. These had been struck out by an ET in a decision promulgated on 14 November 2001. Miss Grady had then been adjudicated bankrupt on 31 January 2002, and remained bankrupt when her appeal was heard by the EAT. Miss Grady's appeal was heard in this court on 1 April 2003 in a constitution comprising Thorpe and Sedley LJ and Richards J. The reserved judgment of the Court, [2003] EWCA Civ 527, allowing the appeal, was delivered by Sedley LJ on 11 April 2003, and is reported at [2003] 3 All ER 745. It will be immediately apparent from this chronology that when the EAT granted permission to appeal in the three cases before us, the decision of this court in Grady was awaited. In giving its judgment dismissing the appeals, the EAT naturally relied on its reasoning in Grady, buttressed, however, by the fact that on 29 August 2002, in a case called *Ellison v Petrie Tucker & Partners Ltd* [2002] EAT / 0795/01, a differently constituted EAT, chaired by HH Judge Read QC, had reached a similar conclusion in a case involving unfair dismissal, a request for a review and an order for costs. Counsel for Trident, Mr. David Preston, accepted in argument that the effect of this court's decision in Grady was that the EAT has jurisdiction to entertain Mr. Khan's appeal against the ET's decision that he had not been unfairly dismissed by Trident. The concession was, I think, rightly made. That appeal, accordingly, must be allowed, and remitted to the EAT to be determined in the usual way. Mr Preston argues, however, that different considerations apply to the appeals relating to race discrimination and victimisation. Before examining the decision of this court in Grady, and the earlier cases on the status of bankrupts to initiate or continue proceedings it is, in my judgment, Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* 8. 9. 10. 11. necessary, despite Mr. Preston's concession in relation to the appeal on unfair dismissal, to analyse with some care the nature and status of each of the appeals which is before us in order to identify the relief which Mr. Khan was seeking in the ET, the legal and factual basis upon which he sought it and the basis upon which he seeks to appeal the ET's decision in each case. I propose to do so by identifying the appeals, quite simply, as the first, the second and the third appeal. All three appeals stem from Mr. Khan's employment by Trident, which is a company providing security guards for a broad range of organisations including banks, universities and art galleries. Mr. Khan began employment with Trident as a security officer on 11 June 1999. After September 1999, he worked almost exclusively at a student hall of residence in London (159 Dover Street) where Trident was contracted to provide security officers. Between February and August 2000, Mr. Khan issued six originating applications (known as Form IT1s) in the ET in which he complained of direct discrimination and victimisation under the Race Relations Act 1976 (RRA 1976). The Respondents to those proceedings were Trident and four of its senior employees. It appears these applications were consolidated in about early June 2000. The claims were heard by the London South ET over six days (27-30 November 2000, 27-28 June 2001) with a seventh day (29 June 2001) in chambers. In an unanimous decision, promulgated on 1 October 2001 (and running to some 114 paragraphs over 22 pages of single spaced A4), all Mr. Khan's claims were dismissed. It is of importance to note that on 8 June 2000 and on 17 November 2000, a regional Chairman, Mr. R Peters, gave detailed interlocutory directions in the proceedings prior to the hearing starting on 27 November 2000. Those directions, inter alia, carefully

defined the issues in the case. It is apparent from the decision of the ET promulgated on 1 October 2001 that Mr. Khan appealed one or both of the orders of 8 June 2000 and 17 November 2000, although we do not know on what basis. All we know is that the appeal was dismissed by the EAT sometime before the ET resumed its hearing on 27 June 2001.

12. Mr. Khan filed a lengthy notice of appeal against the 1 October 2001 decision running to some 38 pages. This included a number of complaints about the conduct of the ET Chair, Ms C Hyde. In accordance with EAT practice, Ms Hyde and the members sitting with her were invited to respond to Mr. Khan's complaints. All three did so - Ms Hyde at some length on 10 May 2002. 13. The complaints which Mr. Khan makes, are extreme, even by the standards of the disappointed litigant in person. Apart from describing Ms Hyde as "nothing more than respondents lackey, a crooked and bent judiciary" he accuses her of race discrimination against him (on the basis that both she and counsel for Trident were black). But perhaps his most extreme allegation is that the Tribunal re-wrote the decision after 11 September 2001 in order to find against Mr. Khan whom, as a Muslim of Pakistani origin, they saw as a member of the group responsible for the terrible events of that day. Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* 14. Those who chair ETs and their lay members all have to have broad backs, and frequently have to deal with litigants in person who accuse them of bias and race discrimination. This allegation, however, reflects on Mr. Khan, not on Ms Hyde or her colleagues. The only word I can use to describe it (apart from saying that it is wholly unsupported by the passage in the notice of appeal in which it appears) is irrational. It certainly could not, in my judgment, form the basis of a ground of appeal.
15. Mr. Khan's appeal was listed by way of preliminary hearing before a constitution of the EAT chaired by Mrs Recorder Cox QC on 24 June 2002. A preliminary hearing in the EAT is a without notice sifting procedure in which an appellant has to satisfy the EAT that there is an arguable point of law for the EAT to consider at a full hearing. It appears from the EAT's judgment that only one of the six originating applications (2301012 / 2000) was before it. The case seems to have been in a thoroughly ill-prepared state. The EAT was lacking many documents.
16. Mr. Khan had the advantage of representation by a member of the Employment Law Appeal Advice Service (ELAAS). Having heard from ELAAS, the EAT adjourned the preliminary hearing of the appeal and directed the production of Ms Hyde's notes of the hearing before the ET. It also made orders for the production of documentation likely to assist it at the adjourned hearing. 17. Nothing appears to have happened since, apart from (1) a polite and well reasoned request, dated 16 December 2002 from Ms Hyde to the EAT, apologising for the delay and asking it to reconsider its direction that she produce her notes; (2) a letter from the Registrar dated 9 January 2003 to Mr. Khan and to Trident directing them to explain which parts of the notes are deemed necessary and (3) a Fax from Mr. Khan to the Registrar dated 23 January 2003, making a legitimate complaint about the delay, insisting that all of the Chair's notes are required and making further irrational and intemperate complaints

about Ms Hyde. Inter alia he says: "After six months the chairman probably has come to the conclusion that no matter how much she fabricates or manipulates the notes it is still not to her heart's contents, accordingly she needs pointers to which parts she should pay more attention. I see her letter in that light and spirit. How can the EAT claim to act as independent and impartial if it makes substantial contribution to this despicable behaviour of the Chairman, who has even after six months not made available her notes but in fact has endeavoured to stifle appellant's appeal." 18. The EAT's pragmatic order of 25 February 2003 setting the first appeal down to be heard immediately as an "Inter partes preliminary hearing" and then dismissing it was not based on any knowledge of what the appeal was about. That is plain from the following comment by HH Judge McMullen: "We know nothing of this case but accept from (Counsel for Trident) that it is a case of direct discrimination and victimisation under (RRA 1976). Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors (Counsel)'s clients are anxious that they be not vexed further in the EAT by way of (Mr. Khan's) actions whilst he is bankrupt. We see force in that, since two of his cases may now be on their way to the Court of Appeal. The practical approach which we have adopted in the previous case should be adopted in this case." 19. Irrespective of Mr. Khan's status to prosecute the first appeal, I regard its current state as highly unsatisfactory. Ignoring for the moment Mr. Khan's irrational beliefs about Ms Hyde and the ET members, and his assertion that she would fabricate or manipulate her notes, the fact remains that the events which give rise to the appeal occurred in 1999 and 2000, and that Mr. Khan's as yet unresolved appeal is from a decision of the ET promulgated on 1 October 2001. Such a time- scale is not acceptable. The issues in the first appeal 20. 21. In application 2301012 / 2000, as summarised by Mr. Peters in the first schedule to the order made on 8 June 2000, Mr. Khan's complaint was that Trident had racially discriminated against him by paying him less than three colleagues who did the same job but were of a different race and ethnic origin. Mr. Khan is of Pakistani origin: two of the comparators were white, and one was black. He also alleged that he had been victimised by Trident since raising the allegation with its managing director. Trident's defence, which was accepted by the ET, was that two of the three employees in question were being paid at an incorrect rate due to an administrative error, which had since been corrected. They had previously worked on sites which attracted a higher global hourly payment, and this had not been corrected when they moved sites. Trident denied the third employee was being paid at a different rate.

22. Mr. Peters summarises the next two complaints (2302339/00 and 2302340 /00, the respondents to which were Trident and Mr. R Shaw) in the following terms: The Applicant makes two complaints of unlawful direct race discrimination and unlawful discrimination by way of victimisation. In the latter complaint the protected act is that the Applicant claimed race discrimination as to unequal pay. The act of alleged discrimination is being telephoned by Mr. Shaw requiring the Applicant to attend work after the Applicant had previously telephoned work to say that he would be unable to attend because he was unwell. The Applicant's comparator is Mr. Ciaron Robertson (white Scottish). The case is resisted on its facts and in particular that there is no record of a telephone call from the Applicant

saying that he was unable to attend because he was unwell. Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors

23. Mr. Peters then summarises two further complaints (2302341/00 and 2302344/00) as follows: The Applicant makes complaints of unlawful race discrimination and unlawful discrimination by way of victimisation. The protected act is again because the Applicant had raised an issue of unequal pay. The act of alleged discrimination is that on 28 January 2000 allegations were made against the Applicant of theft by Mr. King. The Applicant names four comparators who were also employed by (Trident) at the same work place whom he says were not accused of theft (names given) The Respondents (Trident and Mr. King) resist the complaint on the facts in particular denying the Applicant was accused of theft as set out in the Notice of Appearance. 24. 25. 26. Finally, Mr. Peters sets out at some length particulars of Mr. Khan's claim of victimisation. This appears to centre around an incident on 1 January 2000 in which Mr. Khan was assaulted by a fellow employee. He complains that his assailant was taken home immediately in a company car, whilst he was left injured at the site of the assault. He complains further that no action was taken against his assailant. In my judgment, it is apparent from Mr. Peters' summary that what Mr. Khan was claiming from the ET was monetary compensation for race discrimination and victimisation. In the first IT1 (the only originating application apparently before Mrs. Cox QC and her members in the EAT at the preliminary hearing of the appeal) the race discrimination he was alleging was based precisely on the claim that he was being paid less than colleagues of different race or ethnic backgrounds. It is clear from the painstaking extended reasons of the ET in the reasons promulgated on 1 October 2001 that it accepted Trident's version on the facts. Their findings of fact run from paragraphs 34 to 99 of the decision. Since this appeal goes primarily to jurisdiction, it is unnecessary for me to analyse those findings or the directions of law which the Tribunal gave itself. It is, however, only fair to the ET to point out that paragraphs 102 to 114 of the judgment are spent setting out the ET's conclusions in what strikes me as an entirely rational fashion. The Second Appeal (EAT reference: 1413/01: Court of Appeal reference 2003/1137) 27. This was the substantive appeal before the EAT on 25 February 2003. It has its origins in a Form IT1 issued by Mr. Khan on 1 March 2001 alleging unlawful Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors direct race discrimination and victimisation. In addition to Trident, it named three other respondents. They were North British Housing (NBH) the Housing Association which operated 159 Great Dover Street, where Mr. Khan was employed; Mr. Paul Noke; and Ms Juliet Rodgers, who were employees of NBH. The allegation made by Mr. Khan against NBH, Mr. Noke and Ms Rodgers was that, pursuant to RRA section 33, they had aided Trident to commit the acts of unlawful discrimination alleged. 28. On 11 July 2001 there was a hearing before an ET Chairman, Mr. Peters, who had, of course, given directions in the preliminary stages of the hearing before the ET which formed the subject of the first appeal. Once again, Mr. Peters helpfully identified the issues. The alleged act of discrimination was requiring Mr. Khan to work 16 hours per day alternating between five and four days a week. Mr. Khan alleged that his comparators, of black African ethnic origin only worked 14 hours a day,

three days on and three days off.

29. Mr. Peters summarised the complaint of discrimination by way of victimisation in the following way: the protected acts were the various ET proceedings commenced in February 2000, and the alleged act of discrimination was the change in hours of employment which took place in December 2000. The applicant had previously worked twelve hours per day but was required to work sixteen hours per day at 159 Great Dover Street. Mr. Peters summarised Trident's defence as being that there was no difference in treatment: all guards (apart from the guard who only worked at weekend) were required to work 14 hours per day and the different shift pattern changed for all guards on the site after the applicant had left the site. Secondly, Trident's case was that the change in hours had nothing to do with the Tribunal proceedings but were related to a re-tendering exercise imposed by NBH.
30. Mr. Peters records the defences of NBH, Mr. Noke and Ms Rodgers as being, in effect, that Mr. Khan's complaints had nothing to do with them. NBH had merely specified the hours they required guards at the premises: they had no knowledge of the proceedings, and in any event, changes in hours were a matter for the applicant and Trident. 31. 32. The hearing took place over 5 days at the London South ET (6,7,8,12 and 13 February 2002) and the reserved decision was promulgated on 13 March 2002. In view of the allegations of bias against Mr. Peters which Mr. Khan makes in the notice of appeal, it is worthwhile pointing out that it emerged during the course of the hearing that the complaint was in fact out of time - it had not been brought within the three month period required by section 68 of RRA 1976. Despite this, the Tribunal exercised its discretion to hear the application. In a careful judgment running to some 26 pages the ET rejected Mr. Khan's case. It found in particular that a letter to Mr. Khan stating that his shifts would start at 1600 hours rather than 1800 hours (thereby apparently lengthening his shift by two hours) was a simple typographical error. It found that there was no case against NBH, Mr. Noke and Ms Rodgers. 33. There was then an application for costs against Mr. Khan. For reasons which are not clear, Mr. Khan was not present on 13 February 2002 when the ET announced Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* its decision, and the application for costs was heard in his absence. The discretion of ETs to award costs is not unfettered, and it is highly unusual for an order for costs to be made. ETs pride themselves on being an open forum (there is no fee for instituting proceedings) to which impecunious or economically disadvantaged litigants should have access to prosecute arguable cases without the fear that they will be penalised in costs by their employers if they lose. Accordingly, rule 14 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations (the ET Rules, 2001) provides that: "Where, in the opinion of the tribunal, a party has in bringing the proceedings or a party or a party's representative has in conducting the proceedings, acted vexatiously, or otherwise unreasonably, or the bringing or conducting of the proceedings by a party has been misconceived, the tribunal shall consider making, and if it so decides, may make (orders for costs) " disruptively, abusively, 34. The maximum lump sum which the ET can award for costs is £10,000. It can also, however, order a detailed assessment of a party's costs. In the instant case, the ET dismissed all Mr. Khan's claims, and

ordered Mr. Khan to pay costs of £10,000 to Trident and the whole of the costs of NBH, Mr. Noke and Ms Rodgers, to be assessed by way of detailed assessment on an indemnity basis if not agreed. As Mr. Khan had not been present when the application was made, implementation of the order was deferred to enable Mr Khan to make a written application with reasons as to why such awards of costs should not be made. Mr. Khan does not appear to have done so.

35. Mr. Khan filed a notice of appeal. At a preliminary hearing before the EAT in a constitution chaired by Judge Serota QC on 25 September 2002 the EAT dismissed all Mr. Khan's grounds bar one. Mr. Khan did not address them on the order for costs and allegations of bias and misconduct which he had made against Mr. Peters had been previously struck out by the EAT after Mr. Khan had failed to provide an affidavit supporting them. 36. Judge Serota and his colleagues on 25 September 2002 plainly supported the manner in which Mr. Peters conducted the hearing, notably in the way in which he dealt with a late and prolix witness statement served by Mr. Khan shortly before the hearing, much of which was irrelevant. The EAT pointed out that the ET had not acceded to an application made during the course of the hearing to strike out Mr. Khan's claim for failing to serve an appropriate statement. The EAT found that Mr. Khan had been given every assistance to present relevant evidence. The EAT rejected arguments that the hearing was unfair and that the ET's finding were perverse. It also rejected his complaint about the London South Tribunal as venue, on the ground that he should have made this complaint at the time. 37. The one issue on which the EAT discerned an arguable point of law was the proposition that the order made by Mr. Peters on 18 July 2001 was not a case management order made pursuant to rule 4 of Schedule 1 to the ET Rules 2001, but was a Pre-Hearing Review held pursuant to rule 7. The consequence, if this is Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* correct, is that Mr. Peters should not have presided over the final hearing. I will return to this point at the end of this judgment. The Third Appeal: EAT reference 1413/01: Court of Appeal reference 2003/1138 38. As this is the appeal which it is common ground must be allowed in any event I can take it quite shortly. Trident terminated Mr. Khan's employment on 23 March 2002 on the ground that there had been a complete breakdown in the implied term of mutual trust and confidence in the contract of employment between Trident and Mr. Khan. Trident's procedures provided for an internal appeal which confirmed the decision.
39. Mr. Khan issued a Form IT1 on 19 June 2002 claiming unfair dismissal and victimisation under RRA 1996. He sought reinstatement and re-engagement. Trident's IT3 denied that the dismissal was either unfair or an act of victimisation. 40. The application was heard by the ET at London Central on 9 October 2002 in a constitution chaired by Mrs. E. M. Prevezer. The extended reasons were promulgated to the parties on 3 December 2002. Mr. Khan's claim was dismissed, and he was ordered to pay Trident's costs in the sum of £7,800. On 25 February 2003 the EAT dismissed Mr. Khan's appeal on the jurisdiction issue. The circumstances in which Mr. Khan was adjudicated bankrupt 41. On 12 August 2002 Trident served a statutory demand on Mr. Khan, having obtained a judgment in the Lambeth County Court for its costs in the proceedings chaired by Mr. Peters. It rather looks, however, as if

Mr. Khan decided, as he puts it in his written submission to us, to "take charge of the situation" by filing a bankruptcy petition himself on 16 December 2002, less than a fortnight after the extended reasons of the London Central ET were promulgated on 3 December

2002. We have not seen either the petition or the Statement of Affairs. Mr. Khan is described in the order as unemployed. The insolvency legislation and the relevant case law 42. Although by virtue of section 306(1) of the Insolvency Act 1986 (the Act of 1986) Mr. Khan's estate now vests in the Official Receiver; and although by virtue of section 283(1)(a) of the Act of 1986 his estate comprises all property belonging to or vested in him on 16 December 2002; and although by virtue of section 436 of the Act of 1986 his property includes his three originating applications against Trident, the question, on the authorities, is whether or not those three choses in action are, to use the time-honoured words of Earl J in *Beckham v Drake* (1849) 2 H. L. CAS 579, 604 cases in which "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body mind or character, and without reference to his rights of property". 43. In accordance with the view of this court in *Grady*, I approach this question on the basis that there can be no distinction between the claim and the appeal. As Sedley LJ put it in *Grady* [2003] 3 All ER 745 at 749, paragraph [20]: Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* "The appeal, brought as of right, was a continuation of the claim once it had failed at first instance. Either both fall or neither falls within the material meaning of a thing in action." 44. Speaking for myself, of all the authorities contained within the bundles provided for us, I found most helpful the decision of this court in *Ord v Upton* [2000] Ch 352 in which Aldous LJ, giving the leading judgment, analysis the previous case law. Mr. Ord was adjudicated bankrupt in 1995. The bankruptcy was not discharged until December 1997. In February 1997 Mr. Ord issued a writ against a doctor who had been treating him for back pain in 1991. His action was in negligence and the damages he claimed fell under two heads; (a) loss of earnings; and (b) general damages for pain and suffering. His trustee in bankruptcy, Mr. Upton, claimed entitlement to the damages for financial loss up to the date of the discharge of the bankruptcy order. Mr. Ord contended that no part of the cause of action or the damages vested in his estate on bankruptcy. That dispute was referred to the Chancery Division for resolution. 45. The judge (HH Judge Behrens sitting as a Judge of the Chancery Division) decided - see [2000] Ch 352, 358 - that Mr. Ord's cause of action: does constitute property part of which is vested in the trustee and part of which is vested in Mr. Ord, as follows: 1.1 the claim for loss of earnings in respect of the period up to the date of Mr. Ord's discharge from bankruptcy (15 December 1997) vests in the trustee; and 1.2 the claim for pain and suffering, loss of amenity, loss of mobility and all losses after the date of discharge, continue to vest in Mr. Ord. 2. Any liability pursuant to the Social Security (Recovery of Benefit) Act 1997 for recoupment of the incapacity benefit should be discharged from the part vested in the trustee; any liability for the recoupment of the mobility component of the disability living allowance should be discharged out of the part vested in Mr. Ord. 46. After a citation of the well-known passage in the judgment of Hoffman LJ in *Heath v Tang* [1993] 1 WLR 1421 at 1423 under the heading "the Bankrupt as

plaintiff” which I need not set out, Aldous LJ analyses Mr. Ord's cause of action. He says ([2000] Ch 352 at 361): In modern parlance, Mr. Ord's claim is a single cause of action. However, I cannot accept (Mr. Ord's) submission that the cause of action is personal. It is a claim for damages for injury to his body and mind and also his capacity to earn and therefore be considered as a "hybrid" claim, in part personal and in part relating to property. I have come to the conclusion that such an action vested in the trustee. It would only have remained with Mr. Ord if it fell within an exception established by the authorities to be excluded from the definition of property now found in section 436 of the Act of 1986. To do so it must relate only Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors to a cause of action personal to the bankrupt. All causes of action which seek to recover property vest in the trustee whether or not they contain other heads of damage to which the bankrupt is entitled. The authorities to which I now turn lead to that conclusion. 47. After an extensive review of the authorities, Aldous LJ concludes with the following paragraph ([200] Ch 352 at 371): “The authorities are only consistent with the conclusion that the trustee is entitled to the damages for past and future loss of earning and is not entitled to the damages for pain and suffering. As there is a single cause of action, it vested in the trustee. There is in my view nothing in that conclusion which imposes practical difficulties with which the law cannot deal. The trustee as constructive trustee would have to account to the bankrupt for the property, which he obtained inadvertently or by arrangement in an action, which vested in him for the benefit of the creditors. The idea that the cause of action should vest in the bankrupt would not be acceptable and compulsory joinder of both could lead to difficulties when the claim for loss of earnings was small compared with the potential costs of the litigation. In such a case the trustee, if the cause of action vested in him, would have to consider carefully his duty to the bankrupt and would probably, if requested, assign the cause of action to him. 48. This court in Grady distinguished Ord v Upton on the basis on the unique nature of the claim for unfair dismissal. In paragraph 25 ([2003] 3 All ER 745 at 751) of this court's judgment, Sedley LJ said: In our judgment a claim for re-instatement consequent on an unfair dismissal, and indeed a significant element of the compensation which can be awarded in lieu of these, is not a thing in action of the kind which forms part of the bankrupt's estate, even though the eventual fund (if an award is made) may be. It is a claim of a unique kind, which offers the restoration to the claimant of something which only the claimant can do. To vest it in the trustee in bankruptcy would be of no appreciate benefit to the creditors except to the extent that it might produce a money settlement (which would represent not a concession but a liquidation of the bankrupt's claim to her job). For the rest, the creditors will probably be better served if the bankrupt can get her job back or a similar job in its place, and that is something the trustee cannot do in her stead. Mr. Johnson rightly does not fall back on the circular proposition that in that case the trustee can always re-assign the claim to the bankrupt. Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors Was counsel for Miss Grady right to accept that her claims for disability discrimination under the Disability Discrimination Act 1995 (DDA 1995) vested in her trustee and could not be pursued by her? 49. Counsel for Miss Grady accepted in this

court ([2003] 3 All ER 745 at 748h-j) that her claims for wrongful dismissal and disability discrimination under DDA 1995, being in substance money claims, had vested by operation of law in her trustee in bankruptcy and could not be pursued except by the trustee or by means of re-assignment to her. It is in my judgment necessary therefore to look at the substance of a claim for disability discrimination and the remedies available in relation to it, both to understand why the concession was made and to compare a claim for disability discrimination with a claim for race discrimination and victimisation. 50. Sections 4 and 5 of DDA 1995 make it unlawful for an employer to discriminate against a disabled person. Under section 5(1) a employer discriminates against a disabled person if – (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and (b) he cannot show that the treatment in question is justified. 51. Under DDA 1995 section 5(2) an employer also discriminates against a disabled person if – (a) (b) he fails to comply with a section 6 duty imposed on him in relation to the disabled person; and he cannot show that his failure to comply with that duty is satisfied. 52. Section 6 applies where any arrangements made by or on behalf of an employee; or any physical feature of premises occupied by the employer place the disabled person at a substantial disadvantage in comparison with persons who are not disabled. In these circumstances it is the duty of the employer to take "such steps as it is reasonable, in all the circumstances of the case, for him to have to take to prevent the arrangements or feature having that effect." 53. The remedies provided by section 8(2) to (5) of DDA 1995 are as follows: "(2) Where an employment tribunal finds that a complaint presented to it under this section is well-founded, it shall take such of the following steps as it considers just and equitable - Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors

- (a) making a declaration as to the rights of the complainant and the respondent in relation to the matters to which the complaint relates; ordering the respondent to pay compensation (b) to the complainant recommending that the respondent take, (c) within a specified period, action appearing to the tribunal to be reasonable, in all the circumstances of the case, for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the complaint relates. (3) Where the tribunal orders compensation under sub- section 2(b), the amount of the compensation shall be calculated by applying the principles applicable to the calculation of damages in claims in tort.... For the avoidance of doubt it is hereby declared (4) that compensation in respect of discrimination in a way which is unlawful under the Part may include compensation for injury to feelings whether or not it includes compensation under any other head (my emphasis). If the respondent to a complaint fails, without (5) reasonable justification, to comply with a recommendation made by an employment tribunal under subsection 2(c) the tribunal may, if it thinks it just and equitable to do so - increase the amount of (a) compensation required to be paid to the complainant in respect of the complaint, where an order was made under subsection 2(b); or make an order under subsection 2(b) 54. 55. In the light of these provisions, counsel for Miss Grady was, in my judgment, right to accept that her claim under DDA 1995 was in

substance a money claim and had thus vested in her trustee. Although part of the remedy is a declaration, and the ET has power to make a recommendation that the employer take remedial steps, it has no power to enforce the recommendation: it simply increases the award of damages, or makes an award if it has not done so previously. It is also significant, in my judgment, that whilst DDA 1995 section 8(4) gives the tribunal the power to include compensation for injuries to feelings, compensation is calculated on the basis of damages in tort. This, to my mind, makes it clear that as in *Ord v Upton*, the claim is hybrid. Claims for race discrimination and victimisation Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* 56. In my judgment, similar considerations apply to claims for race discrimination and victimisation. Indeed the similarities in the structure and language of the legislation are clear. Under section 1 RRA 1976 a person discriminates against another for the purposes of the Act if – on racial grounds he treats that other less (a) favourably than he treats or would treat other persons; or (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial ground as that other but -

- (i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and (ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and (iii) which is to the detriment of that other because he cannot comply with it. 57. Victimisation is defined in section 2 RRA as less favourable treatment where the person victimised has: (a) (b) (c) (d) brought proceedings against the discriminator or any other person liable under this Act; or given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act; or otherwise done anything under or by reference to this Act in relation to the discriminator or any other person; or alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act, or by reason that the discriminator knows that the person victimised intends to do any of those things, or suspects that the person victimised has done, or intends to do, any of them. 58. The remedies provided on a complaint to an ET being well founded are set out in section 56: Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* “(1) Where an Employment Tribunal finds that a complaint presented to it is well founded, the tribunal shall make such of the following as it considers just an equitable - (a) an order declaring that the rights of the complainant and the respondent in relation to the act to which the complainant relates; (b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered to pay by a county court.... to pay to the complainant if the complaint had fallen to be dealt with under section 57 (c) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates. 59. The reference to section 57 is to claims

brought outside the employment field, and the section provides that, as in cases of disability discrimination, damages in respect of an unlawful act of discrimination may include compensation for injury to feelings, whether or not they include compensation under any other head. Conclusion on the jurisdiction point 60. I have come to the conclusion that Mr. Khan's claims relating to race discrimination and victimisation are "hybrid" within *Ord v Upton* and, accordingly, vest in the Official Receiver. Although the nature and amount of compensation which Mr. Khan was seeking in these two applications and both unclear, and although the claims in the ET never progressed to the compensation stage, it is to my mind reasonably clear that Mr. Khan was asserting (inter alia) that he was being discriminated against on the grounds that he was being made to work longer hours for less pay than his comparators. That seems to me, in substance, a money claim even though, had the claims been established, it would have been open to the ET to have awarded him both his lost earnings and compensation for injury to his feelings. 61. In this context therefore, I do not see any distinction in principle between claims for disability discrimination and claims for race discrimination and victimisation. Were the matter left to me, therefore, I would therefore dismiss the first and the second appeals on the jurisdiction point.

62. Mr. Khan referred us to the decision of the House of Lords in *Mulkerrins v Price Waterhouse Coopers (a firm)* [2003] UKHL 41, 1 WLR 1937 in which a claim for damages brought by a bankrupt against a firm of accountants for negligence in failing to achieve an individual voluntary arrangement (IVA) for her, as a Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* consequence of which she had been adjudged bankrupt, was held to vest in her, rather than in the trustee, notwithstanding its "hybrid" nature. However, I do not think that this case assists Mr. Khan. This is because, in my judgment, it turns on what Lord Walker of Gestingthorpe described in his speech at paragraph 26 as its "very unusual facts", notably a decision by a district judge in the Reading County Court that as between the claimant and her trustee in bankruptcy the trustee had no interest in chose in action represented by the claim. 63. After a review of the authorities, beginning with *Beckham v Drake* (supra), *Wilson v United Counties Bank Ltd* [1920] AC 102 *Ord v Upton* (supra) and Grady Lord Walker comments: The Official Receiver, who was given leave to intervene in this appeal, has, (both in his petition for leave and in his printed case) placed before your Lordships some thoughtful and well-researched submissions, including a helpful survey of Commonwealth and United States authorities. He has drawn attention to the apparently anomalous results which can flow from accidents of timing of different stages in the prosecution of a right of action, and to the practical problems which may arise from a trustee in bankruptcy prosecuting a hybrid right of action, partly on behalf of the creditors and partly on behalf of the bankrupt himself. But in the event, your Lordships did not find it necessary, and did not consider it appropriate to hear all argument on these points. This is because the very unusual facts of the present appeal permit it to be disposed of on much narrower grounds, and make it an unsuitable case for exploration of the wider issues. 64. In my judgment, as applied to the facts of the instant case, Aldous LJ's analysis in *Ord v Upton* is unaffected by the decision in *Mulkerrins v Price Waterhouse Coopers* (a

firm). In any event, as Arden LJ points out in her judgment, it is binding on this court. Wider Issues 65. As Buxton and Arden LJJ (whose judgments I have had the opportunity of reading in draft) take a different view on Mr. Khan's capacity to prosecute the first and the second appeals, the result will be that all three appeals will be allowed. In these circumstances, I propose to explain, quite shortly, why I am unable to share their view. In so doing, I am conscious that all three appeals will now fall to be dealt with by the EAT on any points of law which they disclose. Nothing which follows, therefore, should in any way be perceived as seeking to influence the manner in which the EAT goes about its task in hearing and disposing of them. 66. Speaking for myself, and whilst acknowledging that Arden LJ has infinitely more experience and knowledge of bankruptcy law and practice than myself, I am, I have to say, reluctant as a general proposition to permit litigants who are Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors bankrupt to select and litigate those parts of hybrid claims which have vested in their trustees, but which can be said to be "personal" to them. This must particularly be so, I think, in the case of a litigant whose bankruptcy has been precipitated by an unpaid bill for costs held by a tribunal to have been incurred as a consequence of his unreasonable conduct of the very litigation he wishes to pursue. This is not, of course, to say that a bankrupt litigant should be denied access to justice. Aldous LJ makes it clear in the final paragraph of his judgment in Ord v Upton which I have cited in paragraph 47 above, that there will be cases where the cause of action has vested in the trustee in bankruptcy and where the trustee will need to consider carefully whether or not to assign it back to the bankrupt. In the instant case, we know that the Official Receiver has stated that he does not intend to prosecute either of the two race discrimination / victimisation claims. The question which then arises is whether or not the ET or the EAT, faced with a bankrupt applicant / appellant in a race discrimination or victimisation claim should either enquire into the position of the Trustee, alternatively adjourn the proceedings to give the applicant / appellant time either to persuade the trustee to assign the cause of action to him or to apply in the Chancery Division for an order compelling the trustee do so. It is thus clear that the vesting of a bankrupt's cause of action in the trustee is by no means the end of the litigation road for the bankrupt. It is equally clear that the law imposes a filter. In a hybrid claim such as the present, the options are those set out in the previous paragraph. In those cases where the bankrupt's property is involved, the intervention of the bankruptcy thus provides a sensible filtering mechanism. In no sense can it be said that access to the court or a hearing is being denied. This, in my judgment, makes it unnecessary to consider any of the arguments Mr. Khan advances in the instant appeals in relation to Article 6 of the European Convention on Human Rights, which, in my judgment, is not engaged on the facts of this case. At the same time, however, it seems to me that this court should be cautious in allowing the sensible filter imposed by the estate vesting in the trustee to be by-passed save in clear cases, of which, in the employment field, this court has found an application for unfair dismissal to be one. Inevitably, however, the question of an assignment of the cause of action to the bankrupt brings into play the merits of the bankrupt's case, and a consideration of what his case is about. I freely acknowledge that there may well be cases in which the ET or the EAT will have carefully to consider the

potential injustice to a litigant who is being prevented from pursuing his rightful claim by virtue of the fact that his hybrid claim has vested in an unreasonable or intransigent trustee. I am quite satisfied, however, that the first and second appeals before us do not come into that category. As to the first appeal, Mr. Khan plainly lost on the facts. His allegations of bias and corruption against Ms Hyde and the members of the tribunal in the first appeal simply do not bear examination. His only point in the second appeal is that the Chairman who conducted the proceedings had previously conducted a pre-trial 67. 68. 69. 70. 71. 72. Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors review under rule 7 of the ET Rules 2001 and was thus disqualified from sitting. We have not, of course, heard argument on this point, although because the document was not in our papers, we sent for the order made by Mr. Peters on 18 July 2001. Having read it, I would, speaking for myself, take a great deal of persuading that this was anything other than a sensible order for case management directions made under rule 4 of the ET Rules 2001. It was certainly not an order made under rule 7(4), (5) or (6) and I cannot see anything in it which would invoke rule 7(9). 73. 74. It must, I think, be remembered that appeals to the EAT lie only on questions of law: - see Employment Tribunals Act 1996, section 21(1). Race discrimination and victimisation claims require the application of the relevant provisions of RRA 1976 and the principles derived from certain well known authorities to the facts of the particular case. That is what has happened here. In order for the EAT to interfere with findings of fact made by the ET, an appellant has to show that those findings were perverse. I, of course, agree with every word in the passage of the judgment of the criminal division of this court in R v Saunders (2000) 1 Cr. App 458 cited by Arden LJ in paragraph 85 of her judgment, and with the speech of Lord Steyn in Anywanu v South Bank Student Union [2001] 1 WLR 638, 647, paragraph 24. The latter was a race discrimination case, in which the ET had struck out the applicants' claims. Dealing with the decision to strike out, Lord Steyn said: - Discrimination cases are generally fact sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.

75. Mr. Khan's claims were not struck out. To the contrary, his first application was heard over a period of six days, and his second over a period of five. Not only were his applications not struck out; in the order made by Mr. Peters on 18 July 2001 which forms the basis of Mr. Khan's case in the second appeal, the Chairman refused applications by NBH, Mr. Noke and Ms Rodgers to be dismissed from the proceedings - an order which was plainly in Mr. Khan's favour. Equally, the EAT, in the constitution chaired by Judge Serota on 25 September 2002, heard and rejected Mr. Khan's submission that the ET's findings of fact were perverse. 76. I do not, of course, resile from my acceptance of the proposition set out in paragraph 43 above that in considering the jurisdiction point no distinction should be drawn between the claim and the appeal. But when considering the quite different exercise as to whether or not a bankrupt litigant should be permitted to sever the personal elements of an otherwise hybrid claim, the court must, I think, look at realities. The question here is whether or not

Mr. Khan should be permitted to pursue the two appeals which I have analysed, and whether or not those appeals contain points of law which are capable of being argued. In my judgment, *R v Saunders* is simply not in point, and Lord Steyn's concerns in *Anywanu* have been met by the hearings in the ET and the findings of the ET on the second appeal. Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* 77. 78. In short, whilst I am satisfied that both the first and the second appeal fall to be dismissed for want of jurisdiction, the merits cross-check which this court conducted in paragraph [4] of *Grady* results, in my judgment, in the clear conclusion that it would in no sense be unjust to Mr. Khan to dismiss the first and second appeals on the basis of Aldous LJ's analysis in *Ord v Upton*. In my judgment, therefore, the EAT was correct in holding, as it did, that race discrimination and victimisation fall into the same category as disability discrimination, and that, on bankruptcy, all three of those causes of action vest in the trustee. Were the matter left to me, therefore, I would dismiss the first two appeals and allow the third, which should be remitted to the EAT for hearing. Lady Justice Arden : Appeal No. 2003/1138 (EAT reference 1413/01) 79. Following the decision of the Court in *Grady v Prison Service* [2003] 3All ER 745, this appeal must be allowed in so far as the EAT dismissed Mr Khan's claim for unfair dismissal. I refer below to the claim in these proceedings based on victimisation for the purposes of the Race Relations Act 1976. Appeals No. 2003/1136 and 2003/1137 (EAT references 1413/01 and 0458/02 80. The sole issue on these appeals is whether the EAT was right in law in holding that Mr Khan, who became bankrupt on 16 December 2002, could no longer continue to prosecute these proceedings. In each case the proceedings were for race discrimination and victimisation. Put another way, the question is whether those causes of action vested in Mr Khan's trustee in bankruptcy on the making of the bankruptcy order against him. 81. The Insolvency Act 1986 provides in material part:- "306(1) The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee. ... 283(1) Subject as follows, a bankrupt's estate for the purposes of any of this Group of Parts comprises:

- (a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy; and ... Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* In this Act, except where the context otherwise requires ... 'property' includes ... things in action ..." 82. Notwithstanding these provisions, it is well-established that "personal" causes of action do not form part of the bankrupt's estate or vest in his trustee. These include cases where: "the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property." (per Erle LJ in *Beckham v Drake* (1849) 2 HL Cas 579 at 603-4). 83. 84. 85. 86. 87. The foregoing is not a comprehensive list of "personal" causes of action. In *Ord v Upton* [2000] Ch.352, the bankrupt sought to bring proceedings in negligence for damages suffered by him as a result of medical treatment. He claimed damages for loss of earnings and for pain and suffering. This court held the cause of action was "hybrid" since it included both a personal claim and a claim to the bankrupt's property (his earning capacity). It also held that the whole cause of action vested in the trustee.

However, the trustee would hold any damages for pain and suffering as a constructive trustee for the bankrupt. In the recent case of *Mulkerins v Pricewaterhouse Coopers*[2003] 1 WLR 1937, the House of Lords left open the question whether *Ord v Upton* was correctly decided. It is, however, binding on this court. In *Grady*, where the claim was for unfair dismissal, this Court in effect distinguished *Ord v Upton*. Sedley LJ, giving the judgment of the court, pointed out that the remedies for unfair dismissal were reinstatement, re-engagement and compensation. If the complainant sought the two former remedies, the tribunal had to consider them in that order. Compensation would be recoverable only if there was no order for reinstatement or re-engagement. Wall LJ has already set out paragraph 25 of the judgment of Sedley LJ, and so I need not repeat it. It is clear from that passage that Sedley LJ recognised that if compensation was awarded it might form part of the bankrupt's estate. He did not, however, hold that in consequence the claim was a "hybrid" one which therefore vested in the trustee. The principal basis for the distinction in *Grady's* case was that the substance of the claim was for personal relief, a point highlighted by the order in which the tribunal was required to consider the appropriate form of remedy. As Wall LJ points out in paragraph 58 of his judgment, those features do not obtain in race discrimination proceedings. The primary relief is a declaration as to the rights of the parties, and also an order for compensation, which may include but is not limited to compensation for injury to feelings. Accordingly, I agree that in this case *Ord v Upton* cannot be distinguished and that in principle a claim for race discrimination is a "hybrid" one for the purposes of that decision. Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* 88. However, in my judgment, the critical question is not what relief Mr Khan could in theory seek but what relief he is in fact seeking. His present claim would clearly encompass a claim for a declaration and for compensation for injured feelings only. In my judgment, Mr Khan should in principle be permitted to limit his claim for relief to those items. If he does so, the claim ceases, in my judgment, to be a "hybrid" one. As to the grant of permission to amend the claims, I do not consider it relevant that Mr Khan became bankrupt on his own petition. Moreover, if his appeals are unmeritorious, they should be disposed of on that basis and not on an issue of standing which can be resolved by amendment. The trustee is not prejudiced as he has already made it clear that he does not wish to pursue these claims and any future orders as to costs made against Mr Khan would not be provable in his present bankruptcy. There is, as Buxton LJ has said, a public interest in claims of this kind being fully examined. Buxton LJ has referred to the speech of Lord Steyn in *Anyanwu v South Bank Student Union* [2001] 1 WLR 638[24]. I would also refer to *R v Saunders* (2000) 1 Cr. App 458, in which the criminal division of this court also made some important observations about racism. Although this was in the context of sentencing for racially motivated offences, its observations were about racism generally and thus relevant also to a case where a court is considering a civil claim for race discrimination. This court said: "One of the most important lessons of this century, as it nears its end, is that racism must not be allowed to flourish. The message must be received and understood, in every corner of our society, in our streets and prisons, in the services, in the workplace, on public transport, in our hospitals, public houses and clubs, that racism is evil. It cannot co-

exist with fairness and justice. It is incompatible with democratic civilization. The courts must do all they can, in accordance with Parliament's recently expressed intention, to convey that message clearly ..." 89. I would, however, make it a condition of the grant of leave that Mr Khan complies with any outstanding orders of the Employment Appeal Tribunal with respect to documents within 21 days of the date of the order of this court. In appeal A1/2003/1136, the Employment Appeal Tribunal made an order on 24 June 2002 (Mrs Recorder Cox QC, with Mr J C Shrigley and Mr G H Wright MBE) inter alia that "all the originating applications and notices of appearance and any further particulars served in respect of those applications should be part of the bundle for the resumed preliminary hearing, together with any relevant or admissible documents which the appellant himself wishes to ask the Employment Appeal Tribunal to consider ... [and] ... the Employment Appeal interlocutory orders of 1 June and 15 November 2000 and any recent decisions accompanying those orders should also be part of the Tribunal's bundle." (judgment, paragraph 5). Likewise in appeal A1/2003/1137, the Tribunal made an order in the following terms: "The respondents do be informed by the appellant of any additional documents to be included in the court bundle no later than 23 October 2002 and thereafter the respondents do lodge no later than 6th day of November 2002." Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors

90. We have not been informed whether these orders have been complied with. Accordingly, the conditions imposed by this court should be expressed to be to the extent that the orders of the Tribunals to which I have referred have not been fully complied with. If Mr Khan wishes to make any application for an extension of the 21 day period, he must do so to the Employment Appeal Tribunal. I would also impose a condition that Mr Khan files with the Employment Appeal Tribunal and serves on the respondents within 21 days the form of application (ITI) duly amended to show that the relief claimed is limited to a declaration and compensation for his injured feelings. 91. 92. 93. So far as I could see, these are the only conditions which this court can usefully impose but if counsel for Trident considers that there are other conditions which can be properly imposed by this court he can draw that matter to the attention of the court when this judgment is handed down. It is likewise unnecessary for me to deal with the question of whether the orders under appeal violated article 6 of the European Convention on Human Rights. I would, however, add that, if I had reached a different conclusion on the question whether Mr Khan had standing in his race discrimination claims, I would have held that it was open to him to seek an order from the bankruptcy court that the trustee assign the causes of action to him: see *Smith & Williamson v Sims Pipes*, 17 March 2000, Court of Appeal, unreported. (It is difficult to see how the trustee could resist that claim on being granted any appropriate indemnity, but this is a provisional view as the trustee is not a party to this appeal). Mr Khan has not taken the step of making an application to the bankruptcy court, and his failure to do so would be a relevant consideration in determining whether any violation of article 6 had occurred. As respects the victimisation claim in Appeal No. 2003/1138, I would be content to allow the appeal against the Employment Appeal Tribunal's dismissal of this part of his claim provided

that Mr Khan agrees to limit his claim to a claim for a declaration and compensation for his injured feelings. The order should be conditional upon his filing with the Employment Appeal Tribunal and serving on the respondents within 21 days the form of application (ITI) duly amended to show that the relief claimed is limited to a declaration and compensation for his injured feelings. 94. Accordingly, I would allow the appeals on the basis set out above. Lord Justice Buxton: 95. I agree that these appeals should be allowed in the terms proposed by my Lady. Since the court is divided, I venture to add some words of my own. In so doing I gratefully adopt the account of the tangled history of these matters that is set out by Wall LJ. That account is, if I may say so, particularly necessary because the point of some potential difficulty to which this appeal gives rise depends on a close analysis of the nature of the process that the bankrupt wishes to pursue. Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors 96. 97. 98. It will be convenient first to deal shortly, as does my Lord in his §§ 38-40, with the appeal in respect of unfair dismissal. As my Lord has set out, in Grady v Prison Service [2003] 3 All ER 745[24] this court held that a claim for unfair dismissal did not vest in the trustee in bankruptcy, because it is a claim that is primarily directed at the restoration of a contractual relationship in which the claimant's skill and labour are the essential commodity; and, at §25, that the claim was of a unique kind which offers the restoration to the claimant of something which only the claimant can do. Any financial remedy thus appears to have been seen as merely a substitute for or corollary of the principal remedy of reinstatement, and accordingly not raising the issue of whether the claim might be hybrid under the analysis of this court in Ord v Upton [2000] Ch 352. As a matter of authority, therefore, the unfair dismissal claim in appeal A1/2003/1138 cannot be stayed, and must be remitted to the EAT for the continuation of the appeal in that court. The reasoning in Grady however applies only to unfair dismissal, and to what was seen by this court as the unique nature of such a claim. The other complaints made by Mr Khan, of race discrimination and victimisation, must be considered under the general law relating to bankruptcy that Grady leaves untouched. That law, which has been formulated in the context of orthodox causes of action at common law, is not easy to apply to the jurisprudentially somewhat different claims under the Race Relations Act. The remedies available in respect of a claim for racial discrimination, including victimisation, are, by section 56 of the Race Relations Act 1976, an order declaring the rights of the complainant; an order for compensation (including, by section 57(4), for injury to feelings); and a recommendation for remedial action on the part of the respondent. Such claims have at least the following significant characteristics: i) ii) iii) The action does not lie in tort, but is a discrete statutory procedure: see Mangera v Ministry of Defence [2003] EWCA Civ 801 [23]-[24]. Although formulated as a claim to uphold individual rights, as will be seen from the remedies provided the procedure has a distinct element of discipline or at least guidance directed at the employer: even though, as my Lord points out in his §54, the sanction for failure by the employer to obey such guidance is not a public law remedy of enforcement, but only the private law remedy of payment of damages to the claimant. However, in line with the public interest in the determination of such issues referred to in (ii) above, it has been recognised that claims under the Race Relations Act should be fully investigated, and

not subjected to summary process in cases that, on their facts, might fall at that hurdle if brought under other chapters of the law: see for instance the observations of Lord Steyn in *Anyanwu v South Bank Student Union* [2001] 1 WLR 638[24]. 99. So far as the position of bankrupt claimants in common law actions is concerned, in *Heath v Tang* [1993] 1 WLR 1421 at p 1423A this court adopted the test formulated by Erle J in *Beckham v Drake* (1849) 2 HL Cas 579 at 604, that there Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* are excluded from the property that passes to the trustee choses in action where “the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property”. Obvious examples of such claims were said to be actions for defamation and assault. However, even in a case of assault a claim for loss of past and future earnings is not personal, in the sense understood in *Heath v Tang*, but relates to the bankrupt’s property. Accordingly, the assertion in a particular action of a claim for such losses, in addition to the undoubtedly personal claim for pain and suffering, renders the single chose that the action constitutes hybrid. The chose in action thus vests in full, including its personal element, in the trustee: *Ord v Upton* [2000] Ch 352 at p361A. This principle accordingly requires close attention to the nature of the relief claimed in any given case. Where there is a money claim, but in the form of relief that is merely the expression in money terms of an undoubted personal claim, such as pain and suffering in assault or general damage in defamation, then the action remains a personal one. However, if a claim is added for a distinct pecuniary loss, such as the loss of earnings in *Ord v Upton*; or special damage in defamation; then the whole chose becomes hybrid, and the whole of it passes under the control of the trustee. Putting together as best I can these two unconnected chapters of the law I have, not without difficulty, reached the following conclusions. First, the “public” nature of the claim cannot assist the bankrupt. Parliament has chosen the, somewhat roundabout, method of asserting public values through the medium of private litigation. Accordingly, whether that litigation is pursued, and in what form, is the choice of the private litigant, under the rules applying to private litigation. When that litigant or would-be litigant is bankrupt, there is no obvious reason, if otherwise the chose in action would vest in his trustee, why the decision of the litigant to launch proceedings to discipline his employer should prevail over a contrary decision taken by his trustee. Second, so far as a claimant is concerned, a central aspect of his complaint; the reason why the conduct complained of is offensive; and the reason why special statutory provisions have been introduced in respect of such conduct; is, or at least logically should be, the damage to his mind, standing and personal rights that is inherent in any discriminatory conduct. In that respect, a complaint of discrimination comes very close to a complaint in respect of defamation, that this court saw in *Heath v Tang* as a paradigmatic example of a personal claim. 100. 101. 102. 103.

104. However, third, there is also available the possibility of compensation for purely financial loss, albeit loss caused by discriminatory conduct. And I respectfully agree with my Lord, in his §60, that such compensation is indeed sought by Mr Khan in the two applications still under active consideration in this appeal. That suffices to make those applications hybrid

under the rule in *Ord v Upton*, and, as they currently stand, to make it impossible to pursue any aspect of them without the sanction of Mr Khan's trustee. 105. Fourth, Mr Khan, if I understand him aright, seeks to keep his actions alive by withdrawing or disclaiming any desire on his part to seek any remedy that renders Judgment Approved by the court for handing down. *Khan v Trident Safeguards & Ors* his claim hybrid. In order to achieve that end he would, I think, have to limit himself to a claim for a declaration of discriminatory conduct under section 56(1)

- (a) and a claim for injury to feelings under section 57(4) of the 1976 Act. Both of those can be said with confidence, in the words of Erle J, not to have immediate reference to the bankrupt's rights of property. Neither of them claim, nor unlike an order under section 56(1) (c) might potentially lead to, monetary compensation of the sort that excluded the bankrupt's action in *Ord v Upton*. Nor, in circumstances where apparently the trustee is not interested in pursuing any part of Mr Khan's claim, would it be abusive for Mr Khan to abandon claims that at least in theory might enure for the benefit of his creditors. Nor can I see that it can be wrong in itself for a litigant to abandon his money claim if that frees the court to entertain a different claim which, it is agreed on all sides, would always have been open to him, bankrupt or not. Nor is that course precluded by the attitude taken to the disability discrimination claim in *Grady*, even if, as a concession, that in any way bound us: because it is clear that the applicant in that case wished to maintain her full money claim. Fifth, however, if Mr Khan were to take that step he would need the permission of the EAT to do so, permission that certainly would not be automatically forthcoming. The relevant considerations are in my view as follows. First, Mr Khan finds himself in this predicament because he chose to petition for bankruptcy. But, as the account in §41 above indicates, it was Trident who had originally put the process in motion. To that extent, therefore, the bankruptcy that they now rely on to exclude these proceedings cannot be laid entirely at Mr Khan's charge. Second, the claims envisaged as surviving were not in fact made in terms in either of Mr Khan's applications, which concentrated on his financial loss. But it was a necessary premise of those applications that discrimination had taken place, and I would not hold it against a litigant in person that that was not so alleged in terms. And in the course of investigating the claim as it was before it the ET necessarily addressed the root issue of discrimination. Third, as my Lord has set out in detail, the prospects of any of Mr Khan's complaints succeeding in front of the EAT are very much less than promising. I would normally be much persuaded by that latter factor when considering whether the indulgence that Mr Khan seeks should be granted to him. I am, however, strongly influenced in this chapter of the law by the approach to discrimination issues that has been authoritatively set out in the House of Lords, as referred to in § 98 (iii) above. As Lord Steyn put it, the proper determination of discrimination claims is always essential in our pluralistic society. In our case, of course, Mr Khan's claims have already been determined in great detail by the ET. He cannot claim not to have had his day in court. But to the extent that he otherwise has a right to complain to the EAT about the conduct of those hearings, I do not think that it would be right to shut him out just because he is a bankrupt whose trustee has no interest in pursuing

claims that Mr Khan does not now make. 106. 107. 108. 109. If the matter were left to me, therefore, I would remit appeals 2003/1136 and 1137 to the EAT with directions that the appeals should continue on the basis that the only relief available to Mr Khan should he be successful would be that set out in §105 above. Judgment Approved by the court for handing down. Khan v Trident Safeguards & Ors 110. This conclusion makes it unnecessary to consider Mr Khan's further complaint that it would be a breach of article 6 for him to be prevented from asserting what is essentially a statutory claim. That article is potentially engaged in a case of differential access to an appellate structure (see *Belgian Linguistics* (1968) 1 EHRR 252[8]), but the jurisprudence both of the European Commission and of this court has held that control of litigation on the part of bankrupts is not necessarily inconsistent with article 6 (see *M v UK* (1987) 52 DR 269 and *Krasner v Dennison* [2000] 3 All ER 234, both drawn to our attention by Mr Preston). At the same time, however, that jurisprudence stresses the importance of proportionality to the rules and remedies provided by the national state. Without, as I say, deciding the matter, I would find some difficulty in regarding as proportionate to the recognised and important object of control of the administration of the bankrupt's estate a rule that in practice shut the bankrupt out from complaining about an act of racial discrimination, the eradication of which is a common priority goal of all states subscribing to the Convention: as the Strasbourg Court emphasised in *Sander v UK* (2000) 31 EHRR 44[23].

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