Appeal No. UKEAT/0039/14/DA
UKEAT/0040/14/DA
UKEATPA/0082/14/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 August 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MS J TAYLOR APPELLANT

UNIVERSITY HOSPITALS BIRMINGHAM NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING
APPEAL FROM REGISTRAR'S ORDER

APPEARANCES

For the Appellant	MR JOE SYKES (Representative) Employment Law Centres 107 Fleet Street London EC4A 2AB
For the Respondent	MISS NADIA MOTRAGHI (of Counsel) Instructed by: Messrs Bevan Brittan LLP Interchange Place Edmund Street Birmingham B3 2TA

SUMMARY

VICTIMISATION DISCRIMINATION - Whistleblowing

PRACTICE AND PROCEDURE

Striking-out/dismissal

Imposition of deposit

The Employment Judge struck out all but one aspect of the Claimant's claim of public interest disclosure detriment. In respect of the sixth alleged public interest disclosure the reasons given were wrong in law; moreover it could not be said that the Claimant's claim in respect of the sixth public interest disclosure had no reasonable prospects of success. The appeal against the striking out order was accordingly allowed.

The Employment Judge also made a deposit order in respect of the fifth alleged public interest disclosure. When the Claimant did not pay this deposit order apparently believing that it would not be enforced pending appeal another Employment Judge gave a Judgment striking out not merely the claim relating to the fifth disclosure but (erroneously) the whole claim. Later the Employment Judge erroneously refused to review his Judgment (as he had power to do – see **Sodexho Ltd v Gibbons** [2005] ICR 1647).

The order striking out the whole of the claim was apparently made on the erroneous basis that the deposit order was the only remaining "live" claim. The Judgment had to be set aside as a consequence of the appeal against the striking out order being allowed. The matter would be remitted with a view to a fresh deposit order being made. This would also give the Claimant to apply afresh for a review.

UKEAT/0039/14/DA
UKEAT/0040/14/DA
UKEATPA/0082/14/DA

HIS HONOUR JUDGE DAVID RICHARDSON

1. Miss Julie Taylor ("the Claimant") has brought proceedings against University Hospitals Birmingham NHS Trust ("the Respondent") complaining of public interest detriment. Today I have before me three appeals arising out of those proceedings. I will briefly describe the nature of the three appeals.

2. The first appeal, UKEAT/0039/14, concerns part of a Judgment of Employment Judge Goodier, dated 25 July 2012. The Claimant's claim was based on seven putative public interest disclosures. By this Judgment he ordered a deposit of £500 to be paid in respect of the fifth public interest disclosure and he struck out all the remaining disclosures. The appeal was originally on very wide grounds. However, the only aspect which has been permitted to proceed to a Full Hearing relates to the sixth public interest disclosure.

3. The second appeal, UKEAT/0040/14, concerns a Judgment of Employment Judge Findlay dated 23 October 2012. The Claimant had not paid a deposit in respect of the fifth public interest disclosure. Employment Judge Findlay noticed this failure. The Judgment, however, struck out the whole claim, not just the fifth public interest disclosure. The Claimant applied for a review. It was not dealt with by the Employment Tribunal. The Claimant appealed, saying that the appeal was against the failure to review.

4. The third appeal, UKEATPA/0082/14, concerns the eventual refusal of Employment Judge Findlay, expressed in a letter dated 18 March 2013, to review the Judgment dated 23 October 2012. Employment Judge Findlay said there were no grounds for a review because he

was obliged to strike out the claim since the deposit had not been paid. The appeal against this decision was, however, not instituted until January 2014. It is, therefore, out of time. By order sealed on 9 May 2014 the Registrar refused an extension of time. The Claimant appeals against that refusal. On 20 June 2014 I informed the parties that, if the extension of time was granted, I would be prepared to dispense with formalities and hear the full appeal today.

5. At the outset of the hearing today, I decided that it would be most profitable to hear argument about the first appeal and deliver a Judgment on the first appeal before hearing the second and third appeals. This is the course which has been taken. I will therefore deal with the first appeal now, leaving out of account for the moment any consequences there may be for the first appeal on orders subsequent to the order dated 25 July 2012.

The Background Facts

6. The Claimant was employed by the Respondent as an operator in a department known as "Locate", which deals with administration of the Respondent's internal bank staff. On 31 May 2011 she received an e-mail from another employee, Miss Gwinnett, who was just about to leave the Respondent's employment. The e-mail complained of the Claimant's constant fault-picking and suggested that she had "forgotten how to be nice, respectful and part of the team". The e-mail was not only sent to the Claimant. It was circulated to the rest of the team. It is not difficult to see that this must have been a very wounding letter for the Claimant to receive.

7. The Claimant complained about the matter. She raised it as a grievance. She wrote follow-up letters seeking to have the matter addressed. On 21 June she wrote the following e-mail, which was the fifth public interest disclosure in respect of which a deposit was ordered:

"It is now a week since you responded to my email. Nearly a month since the offensive email was sent by a Trust employee on Trust email.

A reasonable time has elapsed and I ask the question 'Where is the duty of care?'

I am left stressed, humiliated and feeling that no-one cares. I have not received the support in resolving this terrifying episode and still on-going.

Please can you respond in 5 days or I will take outside advice."

8. On 11 July 2011 a grievance meeting took place. The Claimant was dissatisfied with the outcome. Eventually she wrote the e-mail which is the sixth disclosure with which this appeal is concerned. It is dated 16 August. The letter stated as follows:

"Hi Taahira

Thank you for your copy of a letter regarding my Grievance Meeting held on 11/7/11 following an Offensive Email which was sent to me by Susan Gwinnett on 29/5/11. I would like to state I have not received the original letter by post as you promised and have no record of a problem receiving my post.

I do not find your letter a true reflection of the meeting as you stated inaccurate and missing important details.

1. **It was a Grievance Meeting following my official complaint.**
2. **You failed to mention my listed requests to resolve the situation.**
3. **HR failed to carry out an official investigation according to Trust Policies. Ms Gwinnett should have been contacted to make a statement. You did not state whether anyone in Locate had been asked the question, if they had contributed to the email.**
4. **You failed to take prompt action to address the email abuse, according to the Trust Policies and exercise duty of care for me.**
5. **Due to Management wanting to take no action, another team member was happy to made remarks about me (several following the email). Also I received unfair treatment from Management within the same week who is friends with Ms Gwinnett on facebook and others in the office.**
6. **Why was a Grievance Meeting – Letter not sent to everyone that was present in the meeting, including my Union Representative.**
7. **You were concerned about Ms Gwinnett claiming constructive dismissal against the Trust, but what about me and my duty of care, which the Trust is responsible for.**

In conclusion I do not consider the matter closed or resolved, I was the victim and abused deliberately and why have you placed your letter in my File and taken no action to Ms Gwinnett and nothing in her file. It appears that Ms Gwinnett has been given duty of care, but I have not yet again. Why have I been treated unfairly and differently.

I continue to have anxiety attacks and wonder when, she will be invited back in the office and abuse me again with her facebook friends in the Management team.

I take it that you will no longer be dealing with this grievance and I am now at the next stage?

Regards

Julie."

The Striking-out Judgment and Reasons

9. A Pre-Hearing Review was ordered to see whether there were no reasonable prospects of success in the Claimant's contentions, in which case they might be struck out, or little reasonable prospect of success in them, in which case there might be a deposit order. The hearing took place on 31 May 2012. The Claimant evidently gave evidence. The Employment Judge heard submissions from both sides and reserved Judgment.

10. The Employment Judge's Written Reasons contain a statement of the underlying facts, a detailed description of the law, a summary of the parties' submissions and conclusions relating to each putative disclosure. In respect of the sixth he said the following:

> **"24.1 In her witness statement Ms Taylor said that this PD was a complaint about breach of the obligation as to trust and confidence.**
>
> **24.2 Mr Pirani submitted that it contains no information about a breach of the implied term, or her health and safety, and did not do more than list a series of alleged omissions from the minutes and explain why Ms Taylor was dissatisfied with the outcome of her grievance. Further, she says in her statement at paragraph 56 that she made this PD 'in good faith relying on the Trust's grievance procedures to resolve my complaints at the next stage'. I accept the submission of Mr Pirani that this is inconsistent with her believing that there had at this point been a breach of the trust and confidence term.**
>
> **24.3 I understood Mr Sykes to argue that this PD also related to duties of UHB in respect of her health and safety. It makes a statement about health ('I continue to have anxiety attacks') but does so in a context which suggests that she anticipates a possible breach of duty in the future, should Ms Gwinnett 'be invited back in the office'. Such a fear is not enough to make the future event 'likely': see** *Kraus v Penna***.**
>
> **24.4 In respect of this PD I accept the submissions of Mr Pirani. For the reason explained at 24.3, I did not find those of Mr Sykes persuasive. The PD is not a protected public interest disclosure, and the claim based upon it has no reasonable prospect of success and must be struck out."**

The Statutory Provisions

11. At this point it is convenient to have in mind the key statutory provisions:

> **"47B(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he has made a protected disclosure.**
>
> **43A In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance of any of sections 43C to 43H.**

> **43B In this part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:...**
>
> **(a) that a criminal offence has been committed, is being committed or is likely to be committed.**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **(c) that a miscarriage of justice has occurred or is likely to occur,**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
>
> **(e) that the environment has been, is being or is likely to be damaged, or**
>
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed."**
>
> **43C A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith --**
>
> **(a) To his employer..."**

Submissions

12. Mr Sykes, on behalf of the Claimant, placed considerable reliance on remarks by Langstaff J, the President, at the rule 3(10) Hearing:

> **"23 As to the sixth, the Judge accepted submissions that the sixth complaint set out at paragraph 12.4 contained no information about a breach of the implied term or her health and safety and did no more than list a series of alleged omissions from the minutes and explain dissatisfaction with the outcome of the grievance. I think that this is arguable, as being nonetheless an error of law by the Judge. The matter is one of construction of the letter upon its face. At point 3 at the bottom of page 7 of the Judgment, the Claimant was alleging that HR had failed to carry out investigation according to trust policies. That leads to the possibility – I say no more – that they might be contractual and therefore create an obligation to which the employer was subject. Allegation No 4 puts the failure to take prompt action to address email abuse within the context of the exercise of a duty of care – it is perhaps to be inferred, for health and safety - a matter possibly repeated again by paragraph 7 and by the use of the words 'victim' and 'abused deliberately' in the third from last full paragraph of the e-mail. These suggest to me that it is just possible that this was a disclosure which could be described as qualifying, providing information as well as making allegation. It could be her, in effect, saying, 'I complained to you, my employer. You took no action and I suffered.'"**

13. Mr Sykes' submissions may be summarised as follows. The letter plainly contained information (see **Cavendish Munro Professional Risks Management v Geduld** [2010] IRLR 38). A breach of contract is a breach of obligation for the purposes of section 43B(1) (see **Parkins v Sodexho** [2002] IRLR 110, **Fincham v HM Prison Service** EAT/0925/01/RN).

The Claimant put her case as a breach of the implied term of trust and confidence, and the letter, read as a whole, was capable of supporting a reasonable belief that there had been, was or was likely to be such a breach. The Employment Judge appears to have decided against the Claimant because of statement that she was "relying on the Trust's grievance procedures to resolve my complaint at the next stage", but this was not inconsistent with believing that there had been a breach of the implied term of trust and confidence. The letter also indicated that her health was being endangered. The Employment Judge did not address the key question whether the Claimant had a reasonable belief in the matters in question. It is well-established that, even if she is wrong, her belief may be reasonable so long as she held a reasonable belief that there was a breach of contractual obligation or a matter relating to the endangering of health. It did not matter whether she could identify it in the way a lawyer would identify it. The requirement of the legislation were satisfied. The Employment Judge's reasoning was flawed, and it could not be said that the claim had no reasonable prospects of success in respect of the sixth disclosure.

14. Miss Motraghi, on behalf of the Respondent, makes the following submissions. She submits that the e-mail did not amount to the disclosure of information on the **Cavendish Munro** principles. Although there was some information in the letter, it did not relate to any of the particular matters identified in section 43B. Miss Motraghi took me in some detail through the sub-paragraphs in order to show me that the conduct of which the Claimant complained did not necessarily amount to breaches of procedure. She pointed out that it was not established that the e-mail procedure or the grievance procedure were contractual. She accepted that the Employment Judge's point concerning the Claimant's good faith in the grievance procedure was not easy to sustain on its own. But she submitted that in substance the Employment Judge

asked and answered the correct questions about the letter and that his interpretation of it as regards health and safety was not perverse. Overall, she submitted that there was no error of law by the Employment Judge in striking out the claim.

Discussion and Conclusions

15. It is important to keep in mind that the question for the Employment Judge as regards striking out was whether there were no reasonable prospects of success in the claim (see Rule 18(7)(b) of the **Employment Tribunal Rules 2004** then in force). I would observe that this is not normally an exercise which requires the giving of evidence; and that Employment Judges should be astute to prevent such hearings becoming mini-hearings where evidence is taken and evaluated. It was an exceptional feature of this particular Pre-Hearing Review that the Employment Judge heard some evidence from the Claimant, but I observe that the Written Reasons do not contain any particular evaluation of her honesty or the process of reasoning which she adopted.

16. The first question for the Employment Judge was whether the email disclosed information. There is a distinction between a bare allegation and a disclosure of information, explained in what has become a classic passage in **Cavendish Munro**:

> **"24. Further, the ordinary meaning of giving 'information' is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating 'information' would be 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information."**

17. To my mind there is no doubt that the e-mail contained information. Information can of course be information as to an omission as well as information as to something positive. "The wards have not been cleaned" is information. The e-mail is full of such information. There had

been no official investigation. The ex-employee had not been contacted. No-one else in the department had been asked about their involvement. No action had been taken to address the e-mail abuse. In consequence another team member had made several remarks about her. She had been deliberately abused, and no action had been taken. She was continuing to have anxiety attacks. These are more than mere allegations. They are disclosures of information. The overall effect of the letter is to allege that the Respondent has, in various respects, failed to address what was for the Claimant a serious abuse of the Respondent's e-mail.

18. The next question for the Employment Judge was whether the Claimant reasonably believed that the information tended to show that the Respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject. The only clear reasoning in the Employment Judge's reasons on this question is that the Employment Judge considered it inconsistent with the Claimant relying on the grievance procedure to resolve her complaints. His reasoning appears to be that she could not have believed that there was a serious breach of contract because she continued to have faith in the possibility that the next stage of the grievance procedure would put it right.

19. This reasoning is plainly incorrect. An employee who believes that an employer has committed a serious breach of contract, even a fundamental breach, may choose to pursue it through an internal process to put it right. There may come a time when the employee is held to have affirmed the contract of employment, but even that does not mean that the employee held no reasonable belief in the breach. Accordingly the central reason given by the Employment Judge for his conclusion cannot stand.

20. The Employment Judge also had to consider whether the Claimant reasonably believed that the information tended to show that her health had been, was being or was likely to be endangered. The Employment Judge read the words as meaning in context that she "anticipated a possible breach of duty in future" if the ex-employee returned to the office. The Claimant, however, said that she was suffering at the time of the letter from a series of anxiety attacks. The question for the Employment Judge was whether she reasonably believed that the information which she set out in her e-mail relating to the failure of the Respondent in numerous respects to address her concerns was endangering her health or likely to do so. The Employment Judge, to my mind, never really addressed this question.

21. There are, therefore, errors of law in this part of the Employment Judge's reasoning. The question then arises, what would the result have been if the Employment Judge had applied the law correctly. The Employment Appeal Tribunal is limited in its power to substitute its own conclusion. It can do so only if, on a proper appreciation of the law, only one result is reasonably possible (see **Jafri v Lincoln College** [2014] IRLR 544).

22. I have reached the conclusion that only one result was reasonably possible as regards striking out. It is important to appreciate the question for the Employment Judge was whether the Claimant had no reasonable prospect of success in establishing that the sixth disclosure was a protected disclosure. To my mind, it cannot be said that she had no reasonable prospect of success on this issue. The e-mail is consistent with her believing that the Respondent was in breach of contract (see the references to "a duty of care which the Trust is responsible for" and to a failure to take prompt action to address e-mail abuse and "exercise due care for me"). She compares her position to that of the ex-employee, noting that there had been concern about a

claim for constructive dismissal by such an employee. It is not necessary that the employee should be able to identify the contractual term in way a lawyer would identify it so long as she reasonably believes there has been a breach of contractual obligation. The e-mail is also consistent with her holding a reasonable belief that her health was being endangered. The e-mail was made to her employer. To my mind whether she held the requisite reasonable belief and whether the disclosure was in good faith are not issues to be resolved on a striking-out application. It follows that the striking-out order will be set aside and it will not be open to an Employment Tribunal to reinstate it.

23. At this point, however, there is a difficulty. The Employment Judge was also seised with consideration of a deposit order question. He said that if he had not made a striking-out order he would have made a deposit order. There was no distinct reasoning on this separate test which applies to a deposit order. To my mind, the errors of law in the Employment Judge's consideration of a striking-out order inevitably infect his conclusion that he would have made a deposit order. However, on the quite separate question, whether there was "little reasonable prospect of success", I do not think I can conscientiously reach a conclusion following the **Jafri** approach.

24. The striking-out order will be set aside. It will be declared that there were reasonable prospects of establishing a protected disclosure. Any question of making a deposit order will be remitted.

After further argument, the Judge continued

25. I now turn to deal with the consequences of the first appeal and with the second and third appeals. The Judgment which I now give will be added to the Judgment which I gave this morning, none of which I will now repeat.

The subsequent striking-out and application for review

26. Rule 20(4) of the **Employment Tribunal Rules 2004** provides as follows:

> **"If a party against whom an order has been made does not pay the amount specified in the order to the Secretary either: —**
>
> **(a) within the period of 21 days of the day on which the document recording the making of the order is sent to him; or**
>
> **(b) within such further period, not exceeding 14 days, as the employment judge may allow in the light of representations made by that party within the period of 21 days;**
>
> **an employment judge shall strike out the claim or response of that party or, as the case may be, the part of it to which the order relates."**

27. This rule is apparently highly prescriptive in nature. It is not difficult to see that its consequences could be draconian. It has, however, been put in proper context by the decision of the Employment Appeal Tribunal in **Sodexho Ltd v Gibbons** [2005] ICR 1647. There may be an extension of time for payment of the deposit beyond the five-week period and there can be a review of the Judgment striking out the claim (see paragraph 78 for a summary of the position).

28. In this case the deposit order was an order requiring the Claimant to pay a deposit of £500 as a condition of being permitted to continue to take part in the proceedings relating to the fifth disclosure. The Claimant did not pay the deposit, evidently relying on the fact that she was then appealing the deposit order. There was, however, no application for an extension of time pending appeal.

29. On 23 October 2013 Employment Judge Findlay, noting that the deposit had not been paid, struck the claim out. On 24 October 2013 the Claimant's representative immediately applied for a review. The point was taken that the order was wrongly drawn, not being limited to the fifth disclosure and that the striking-out order should not have been made since the underlying order was subject to appeal. By a further letter dated 25 November 2013 the Claimant's representative drew the attention of the Employment Judge to the power to review in the interests of justice and specifically to **Sodexho Ltd v Gibbons** to which I have referred.

30. It appears that this correspondence was not addressed by an Employment Judge for some time. Eventually, however, Employment Judge Findlay replied on 18 March 2013. He said:

> **"I refuse the claimant's application for a review dated the 24 October 2012. There are no grounds for a review of my Judgment dated 23 October 2012. Under rule 20(4) I was obliged to strike out the claim as the deposit had not been paid."**

31. It is, I think, common ground and certainly quite plain that there was an error in the Judgment dated 23 October. The Judgment should have recorded that the claim in respect of the fifth disclosure was struck out. That was the limit of the power under rule 20(4) given that the deposit order was made only in respect of the fifth disclosure. I think the Employment Judge must have struck the claim out as a whole because he thought the fifth disclosure was the only remaining live matter. He was, as it turns out, incorrect. Whatever the thinking behind it, the Judgment was wrong. There was no power to strike out the claim as a whole.

32. As I say, I believe that point to be common ground today, but Miss Motraghi submits that all I need to do in order to give effect to the true position is to substitute a Judgment limiting the strike-out to the issue concerning the fifth disclosure.

33. Mr Sykes has further argued today that the Employment Judge failed to appreciate that there was a power to review; alternatively he entirely failed to consider the application for a review. There was, he submits, ample power to do so (see **Sodexho v Gibbons**). The grounds for review put forward were not given any consideration at all. No reasons were at any stage given.

34. Miss Motraghi argues that the Employment Judge was not obliged to exercise the power to review and that his brief reasons were sufficient to meet the justice of the case: in particular he was not obliged to grant an extension of time pending appeal. There had been no application for any such extension.

35. I have reached the conclusion that the Employment Judge, in the very brief reasons which he gave five months after the application for review, either fundamentally forgot the extent of review permissible under **Sodexho v Gibbons** or entirely failed to address the points in question. He did not deal, even in the briefest of terms, with the substance of the application for review. In one respect, the application for a review had plainly been correct. The Judgment dated 23 October could not stand as it had been made. In another respect, whether the striking-out Judgment should be reviewed since there was an appeal under way, at the very least the Employment Judge ought to have considered the argument and given reasons. He did not do so.

36. I would add one point to what I have just said. In my judgment a litigant who wishes to have an extension of time for paying the deposit pending appeal ought to make an application to that effect. It is true that within the old **(2004) Rules**, rule 20(4) itself would not have allowed

for any such application. But, as **Sodexho** makes plain, the **2004 Rules** were wide enough for such an application to be made. It is the appropriate procedure to follow. Under the current **(2013) Rules**, no difficulty arises: there is no prescriptive rule equivalent to rule 20(4), and the general power to extend time under rule 5 would be applicable. An Employment Judge is not obliged to give an extension of time pending appeal, but should consider whether to exercise his discretion to do so. No great amount of reasoning is required.

37. There were, accordingly, errors of law in the striking-out Judgment and in the refusal to review.

38. At this stage, however, I have to note that the appeals are in a procedural tangle which I must explain. The Notice of Appeal in UKEAT/0040/14 was issued on 26 November 2012. By this stage there had been no reply to the application for a review on 24 October. The Notice of Appeal was not expressed in paragraph 3 to be against the Judgment itself. It was expressed to be in relation to a "letter" of the Employment Judge. But in fact, by the time the appeal was lodged, there had been no such letter. The appeals to have jumped the gun. The Grounds of Appeal referred to a failure to revoke or review or set aside the Judgment striking out the claim. They argued that the whole of the claim could not be struck out and, further, that the deposit order should not have been enforced at a time when an appeal was outstanding against it.

39. The potential problem with this Notice of Appeal is that there was at this time no actual decision by any Employment Judge refusing a review. As I have said, the letter dated 24 October does not appear to have been addressed for some months. The Notice of Appeal would

have been in time for an appeal against the Judgment itself, but it did not express itself as being an appeal against the Judgment.

40. Mr Sykes argues that the absence of a decision is not fatal to the second appeal. He points out that section 21 of the **Employment Tribunals Act 1996** confers a right of appeal "on any question on law arising from any decision of, or arising in, any proceedings". He submits that the failure of the Employment Tribunal to consider his application for a review was erroneous in law and it was not necessary to await a decision before appealing. There was, he submits, a continuing failure against which he could have appealed at any time because there was a "question of law...arising" in the proceedings.

41. To this submission Miss Motraghi answers that mere failure to answer correspondence by an Employment Tribunal or to address in good time an application does not in itself give rise to a question of law.

42. I agree with Miss Motraghi's submission. I can see that there may come a time when the Employment Tribunal's refusal to address an application might amount to a question of law, but in this case mere failure over a relatively short period by an Employment Tribunal to reply to correspondence does not give rise to any question of law. The Notice of Appeal, insofar as it relates to a failure to review, was simply premature.

43. When the Employment Judge eventually produced a decision on the application for review, some five months after it had been lodged, the Claimant's representative, Mr Sykes, did not see the need for appealing it separately. Eventually, at the rule 3(10) Hearing, which took

place before Langstaff P he made an application to amend his existing Notice of Appeal. But, as Langstaff P explained, the usual practice of the Employment Appeal Tribunal is to require a separate Notice of Appeal for a later decision. Accordingly the Claimant's application to amend the Notice of Appeal in UKEAT/0040/14 to appeal additionally against refusal of review was refused.

44. This led immediately to a new Notice of Appeal in UKEATPA/0082/14. However, the Notice of Appeal was many months after the decision in March. It was plainly out of time. The Claimant applied for an extension of time. The Registrar refused it. The Claimant appeals against that refusal. Mr Sykes' explanation is that, since his existing Notice of Appeal complained of the failure to deal with his application for a review, he did not see the need for a fresh Notice of Appeal. In any event, he argues that the circumstances are wholly exceptional and that an extension of time should be granted.

45. Miss Motraghi relies upon the well-known strict principles which the Employment Appeal Tribunal operates in such cases. She submits that this was a mistake by a legal representative, that the Appeal Tribunal frequently refuses extensions of time where mistakes of less significance than this one have been made, and that it would open the floodgates to extensions of time if I were to grant an extension of time in this case.

46. Standing back, the view which I take about this procedural tangle is the following. Firstly, I take the view that the order striking out the whole of the claim must have been made erroneously because the Employment Judge thought the fifth disclosure was the only live matter in the case. In other words the striking-out out of the whole claim on 23 October, as

opposed to merely the claim in respect of the fifth disclosure, was really regarded as consequential on the earlier Judgment in July. Now that I have, in a material respect, allowed the appeal against the earlier Judgment in July, it can be seen that the Judgment striking out the whole claim in October cannot be right. I will set it aside, as a consequential order, so as to give effect to the result of the first appeal in UKEAT/0039/14.

47. This leaves the question whether I should substitute a different form of Judgment striking out the claim only in respect of the fifth disclosure. I have a power to do so under section 35 of the **Employment Tribunals Act 1996**, but I may equally remit the matter to the Employment Tribunal. I have reached the conclusion that the correct course in this case is to set aside the Judgment dated 23 October, leaving it to the Employment Tribunal to apply section 20(4) afresh when the matter is remitted. In so doing, I take into account that the Employment Tribunal was promptly asked to review its Judgment but did not do so. If I were to exercise the power to substitute a different Judgment, I consider that it would be unfair and unjust to do so without making provision for a review to be heard. The review would, in any event, be for the Employment Tribunal to address. It is just and convenient to remit the whole process to the Employment Tribunal.

48. This, of course, leaves it open to the Employment Tribunal to make a fresh order under rule 20(4) striking out the claim in respect of the fifth disclosure on the ground that the deposit has not been paid. But the Employment Tribunal should be willing to entertain an application for time for payment to be extended or, if judgment is entered, for there to be a review. It will be a matter for the Employment Tribunal to exercise its discretion in accordance with the overriding objective in these respects. The matter is not all one way. If the Claimant genuinely

believed that the deposit did not need to be tendered pending appeal, and since the claim is in any event proceeding as regards the sixth disclosure, an Employment Tribunal might consider it right to extend time or to revoke any Judgment if it is entered.

49. Since I am setting aside the Judgment dated 23 October as a consequential order in dealing with the first appeal, it must follow that the second and third appeals cease to be necessary. The Judgment underlying them has already disappeared. In these circumstances the appeals will be dismissed as having no further utility.

50. I make it plain however that, if the position had been different and I were wrong to set aside the Judgment dated 23 October, I would have dismissed the second appeal in any event on the basis that it gave rise to no question of law. I would, however, have granted an extension of time for appealing in respect of the third appeal. I will briefly explain why.

51. The principles upon which the Appeal Tribunal operates in granting an extension of time are well settled. They are to be found in **UAE v Abdelghafar and Anr** [1995] ICR 65, approved by the Court of Appeal in **Aziz v Bethnal Green City Challenge Co** [2000] IRLR 111, further explained and discussed in **Jurkowska v HLMAD Ltd** [2008] IRLR 430, especially at paragraphs 16-20 and 63-65. The Appeal Tribunal will not readily grant an extension. It will consider the explanation which is given for the default, expecting that a full and honest explanation will be given. It will consider whether the explanation amounts to a good excuse. In the ordinary run of cases it will expect the explanation to amount to a good excuse and will refuse the application if it does not. It will, however, take into account all the

circumstances in deciding whether there is something which justifies the Appeal Tribunal in relaxing the normally strict rule that the appeal must be lodged in time.

52. I regard this as a wholly exceptional case. The second appeal was, in effect, anticipatory. It complained of broadly the same matters as those which would eventually relevant to the third appeal, but it did so before waiting for the actual (long delayed) decision of the Employment Judge. When the decision of the Employment Judge came, it was in the tersest of terms and added nothing. It is a wholly exceptional feature of this case that there was an extant appeal raising, in truth, the key issues for consideration. This feature, together with the fact that the underlying decision is one which plainly was erroneous in law for the reasons I have given, takes the case far outside the usual run of cases which the Appeal Tribunal has to deal with, and I would have regarded it as just to grant an extension if it had been necessary to do so.