Appeal No. UKEATPA/0661/16/MM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 April 2017
Judgment handed down on 10 May 2017

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

J — APPELLANT

(1) K
(2) L — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEAL FROM REGISTRAR'S ORDER

APPEARANCES

For the Appellant	The Appellant in Person
For the Respondents	Written submissions

SUMMARY

PRACTICE AND PROCEDURE - Time for appealing

Rule 39(1) of the **Employment Appeal Tribunal Rules 1993** ("the Rules") is not relevant to the process of deciding whether an appeal has been lodged in time pursuant to Rule 37(1) of the **Rules** because the appeal process does not start until an appeal is properly instituted and Rule 39 only applies to a properly instituted appeal. Alternatively, where an appeal has been lodged out of time and the Registrar refuses to extend time that refusal will also operate automatically as a direction, pursuant to Rule 39, that Rule 39 does not validate the appeal.

Where it is alleged that a disability has prevented a proposed Appellant from complying with the time limit for the lodging of a properly instituted appeal at this Tribunal then specific medical evidence relevant to the proposed Appellant's condition explaining how the disability has prevented compliance with the Rule must be presented. Quotations from publications on the Internet about conditions generally, whilst of some assistance, will not be sufficient without additional specific medical evidence.

The proposed Appellant had failed by an hour to submit his proposed appeal in time and had fallen into the trap of attempting to submit too much material attached to one email. This difficulty is clearly referred to in simple terms in guidance material easily accessible and the fact that the proposed Appellant had failed to allow himself sufficient time to submit the material in the series of emails was not a basis for the exercise of discretion in his favour.

A **HIS HONOUR JUDGE HAND QC**

Introduction

B 1. On 12 December 2016 the Registrar of this Tribunal, pursuant to Rule 37(1) and (3) and Rule 20(2) of the **Employment Appeal Tribunal Rules 1993** ("the EAT Rules"), considered an application by J[1], who I shall call the Appellant, for an extension of the time in which to present his Notice of Appeal. She refused the application (see pages 46 and 47 of the appeal C bundle). By Rule 21(1) of the **EAT Rules** the Appellant has the right to appeal to a Judge against that ruling and he, having exercised that right, the matter has come before me today. The Appellant has appeared in person. The Respondents have not appeared but the Second D Respondent has submitted a written skeleton argument on behalf of both.

2. In **Muschett v Hounslow London Borough Council** [2009] ICR 424 HHJ McMullen said this:

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> **"The practice adopted in the Employment Appeal Tribunal is that the Registrar decides whether an appeal is in time. She has discretion under rule 35(5) of the Employment Appeal Tribunal Rules 1993 to dispense with any aspect of the Rules relating to documents and, under rule 37(1), to hear and grant an extension of time for doing any act. An appeal lies under rule 21 from a decision of the Registrar not to register an appeal. In effect, it is a fresh hearing before a judge. Sometimes there is live evidence, for instance when a party wants to explain facts and it is only fair that he or she does so on oath and that the other side is offered the** F **opportunity to cross-examine. …" (Paragraph 6)**

He was speaking there of the practice as it existed in 2007, when the **Muschett** appeal was heard, and as it had existed for some time before that. So what he was describing was then an G established practice and it has continued to be the practice ever since. I have followed it in this case, although because the Respondents did not appear and there was no cross-examination, it

H [1] The parties' names had been anonymised by replacing them with letters at other stages in this litigation and on the Appellant's application I agreed to do the same, notwithstanding the view expressed by Underhill LJ doubting that it was justified. The Appellant accepted that his condition of being HIV-positive had been well-publicised in some quarters as a result of his frequent litigation but nevertheless maintained that he was entitled to protection from further spreading of this information, which I accepted.

did not seem to me necessary to administer an oath and the Appellant gave his account of the history without that formality.

3. At an early stage in the hearing of the appeal the Appellant indicated that what he understood to be the estimated length of hearing of the appeal of one hour was inadequate. In turn, I said that I was able to sit for longer but hoped the appeal could be concluded by 4.30pm. In the event the hearing finished at about 5.20pm. By then, although I thought I understood why the Registrar described the filing of the appeal as being three days out of time I wished to clarify that, the Appellant needed to catch a train home and it was too late without inconveniencing the staff to give an oral judgment so I reserved judgment, indicating that if, after further investigation I thought further submissions were required then I would ask for them in writing.

The Facts

4. The Appellant is a teacher. In early 2015 he brought proceedings against both Respondents complaining of discrimination and victimisation contrary to the provisions of the **Equality Act 2010** ("EqA"). On 15 March 2015 that claim was struck out. Subsequently the Second Respondent applied for costs. The application was considered by an Employment Tribunal comprising Employment Judge Jones and Messrs Webb and Taylor, sitting at Leeds on 8 August 2016. By a Judgment and Written Reasons sent to the parties on 19 August 2016 costs of £20,000.00 were assessed by the Employment Tribunal, which ordered that sum to be paid by the Appellant to the Respondent. At some time in the afternoon of 19 August 2016 the Appellant received an electronic version of the Judgment and Written Reasons as an attachment to an email. During the course of the hearing before me he interrogated his mobile telephone and was able to ascertain that the email was shown as timed at 13:30 hours, although he thought

it possible that timing might have been an hour in arrears so that it was received at 14:30 hours. The only attachment to the email was the electronic version of the Judgment and Written Reasons. He was not sent any information in the email about appealing.

5. The Registrar was under the impression that he had received a copy of a standard letter, which accompanies a hard copy of any Judgment and Reasons that should be sent to the parties as a matter of routine. This letter gives information about any proposed appeal and also provides details of an address on the Internet where a copy of a booklet entitled "*The Judgment*" can be found and downloaded. The Appellant told me at one point in our discussion that he had never had a hard copy of the Judgment and Written Reasons and he had certainly not had any booklet. It seemed to me that he modified that slightly later in our discussion by saying that such was his difficulty with his memory that he had no recollection of having received anything other than an electronic copy of the Judgment and Written Reasons. He did remark, however, that such was the untidiness of his house "*Steptoe*" would have difficulty living there. I understand it to be the practice of the Employment Tribunal to send out to the parties a hard copy of the Judgment and Written Reasons, together with a covering letter, but it does not seem to me that I can say on the evidence available to me that probably happened in this case and I will proceed on the basis that the Appellant did not receive a hardcopy of the decision or the covering letter.

6. The Appellant filed a Notice of Appeal against the Judgment and Written Reasons. The Notice was stamped as received at this Tribunal on 3 October 2016. The time limited for appealing expired at 4.00pm on 30 September 2016 and so the Registrar described the appeal as having "*been lodged 3 days out of time*". In one sense, that is an entirely accurate way of putting it. 30 September 2016 was a Friday, the office of this Tribunal is closed over the

weekend and, therefore not surprisingly, the Notice of Appeal is date stamped as received on 3 October 2016, which is the first working day it was open but the third day after it should have been filed.

7. The reality is somewhat less stark, however, as the Registrar recognised in her Reasons. The Appellant told me that he had started to send the Notice of Appeal and accompanying documents as one electronic file sometime before 16.00 hours in the afternoon of 30 September 2016. The Appellant's recollection on timings that day varied. At one point he said that he had started to attempt transmission about 90 minutes before 4.00pm. He also said that he had started to send the material at lunchtime and he mentioned both 2.45pm and 3.45pm as times by which the transmission would have been complete if there had not been a problem with the file size. This problem was that the single file containing scanned images of all the documents necessary for a properly instituted appeal was too large to be received at the inbox of this Tribunal. He had then split up the file into several files so that the size of the electronic files was reduced and then sent them in a series of emails.

8. According to the Registrar's Reasons the transmission was not completed until 17:00 hours[2], at which time the appeal might have been properly instituted but for the fact that the office had closed and so the appeal could not be accepted as properly instituted until the following working day, which was Monday 3 October 2016. The reality, therefore, is that the appeal was an hour late. After the hearing had been adjourned I asked for some further detail from the administration of this Tribunal. An email from the Appellant was received by the email server of this Tribunal at 15:55 hours on 30 September 2016. Although it indicated that appeal documents were attached no documents were attached. A further email was received

[2] The Appellant's submissions were based on a receipt by this Tribunal at 5.30pm.

from the Appellant at 16:47 hours. This indicated that there had been problems in sending all the documents by email and that it would be necessary to split up the documents and send them by separate email. The series of documents were then attached to a series of emails, the last of which was transmitted at 16:59 hours and received at 17:00 hours. I did say to the Appellant when I adjourned the hearing that if I discovered any material that I thought required further submissions I would resume the hearing. But it seems to me that the above is largely in accord with what the Appellant has said and I see no reason for any further hearing.

9. I asked the Appellant to give an explanation as to how it happened that he had not submitted all his appeal documents by 16:00 hours on 30 September 2016. Throughout the hearing he emphasised his disabilities. He describes these as being HIV-positive and as depression, anxiety and stress and suicidal tendencies. These are at the forefront of his skeleton arguments. They are three in number, the last having been received by me during the afternoon of 4 April 2017 with the timing of its receipt as an email attachment being 15:30 hours. At the start of the hearing the Appellant referred to the existence of another updated skeleton argument but he did not press me to consider it.

10. In the third skeleton argument he makes clear that he suffers from a constellation of medical conditions, referring the reader to various Internet materials. He has been HIV-positive for a number of years and at paragraph 1A of this skeleton argument he provides an Internet link, which I was not able to follow completely to the relevant page but which took me to the United States Department of Veterans Affairs website. With some persistence I was able to reach an online manual/PDF file, one section of which was devoted to depression arising in the context of a diagnosis of being HIV-positive. I have no difficulty in accepting that a diagnosis of being HIV-positive and the necessary treatment and lifestyle adjustment consequent upon

A that diagnosis may well have an adverse effect on the mental health of many people. At paragraph 1A of his skeleton argument the Appellant has reproduced a list from the website of symptoms and needs that should be regarded as indicators for referral to a mental health care provider. The rest of paragraph 1A of the skeleton argument has been copied from a list in the next section of the online manual, which is entitled "*Background*".

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11. Paragraph 1B of the skeleton argument should take the reader to an online article on a website called "*Medscape*". Unfortunately in order to have access to the article one has to be a registered member of the web site and I was not prepared to take the time to register. I assume the extract from the medical journal set out at paragraph 1B is to be found in an article somewhere on the "*Medscape*" website and I am happy to accept, having spent three hours in the hearing with the Appellant, that he displays many of the symptoms and characteristics of anger and poor control that are set out in the extract, although, not being medically qualified, I am not able to say what is the origin, extent or consequences of this aspect of his current personality. But I do accept that paragraph 1B is of value in describing some of the Appellant's present characteristics. The list in paragraph 1A, however, is to my mind unacceptable as evidence of his medical conditions, being completely general and in no way directed towards him in particular. The most that might be inferred from it is that, given his personal characteristics, one might expect that he would have been treated by a mental health care provider but it tells me nothing of what diagnosis might have been made, what treatment he might have received and what impact his condition makes on day to day functions.

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12. In paragraph 1C of the skeleton argument there are similar extracts from another website, namely "*aidsmap.com*". Under the heading "*Anxiety*" the Appellant has reproduced extracts from an online booklet entitled "*Mental Health Problems*". He has emboldened and

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underlined various parts of the extract presumably in order to emphasise that he has these characteristics. Under the heading "*Depression*" he has extracted some but not all of the paragraphs that appear in the online manual. Under the heading "*Post-traumatic stress disorder*" he has extracted all of the paragraphs that appear in the online manual and chosen to emphasise, by emboldening and underlining, various aspects of the condition. In particular he has emphasised difficulties in concentration and being easily distracted.

13. When I suggested to the Appellant during the course of the hearing and in particular in the course of discussing one of the authorities that he drew to my attention, **Rogers v Whaddon House Ltd and others** UKEATPA/0919/15/DM, where medical reports had been introduced in evidence, that there was no patient specific medical evidence to support his contention he had been unable to comply with the time limit because of his various medical conditions the Appellant suggested that I was "*the black heart of society*". This was one of a number of remarks that he made to me suggestive of anger and lack of control and I accept that he has been significantly affected by his diagnosis of being HIV-positive. Also he made numerous references during the hearing to his mental ill health, one of which was that "*fourteen years of psychiatrists will back up that I am as nutty as a fruitcake*".

14. It seems to me that he has misunderstood the distinction between his asserting that he suffers from a variety of conditions and medical evidence showing what those conditions might be and what their impact might have been upon his functioning day to day. He has confused his assertions that conditions affect him and dictate his behaviour with objective medical evidence proving that is the case. Apart from his subjective frequent reiteration of the adverse impact of his illnesses and his selective recitation of material from the Internet, which I find to have little value, there has been no independent evidence about his medical condition and I do not accept

what is, in effect, his own "self-certification" as being a very reliable indication of how he was functioning in the period between 19 August 2015 and 30 September 2015. When I indicated during the course of argument that there was no specific medical evidence directed to his conditions the Appellant asked me to adjourn the proceedings in order for such evidence to be brought before me. I took the view that there had been ample time for him to present such evidence and refused to adjourn.

15. In saying that the Internet material was of little value I do not mean to suggest that it is not a valuable source as a matter of generality. But forensic medical evidence is not a matter of generality. It cannot be, so to speak, "off the peg", it must be "bespoke" and fit the individual case. In my judgment the material produced by the Appellant may inform generally as to what might be expected in a population of those suffering from disabilities described in the material but it does not amount to evidence as to how the Appellant was affected by his disabilities and in particular it does not explain in medical terms why he was unable to lodge his appeal within the time limited for doing so. I turn now to his account of what his difficulties were.

16. In addition to referring to his skeleton argument the Appellant gave an account of the period as being one of competing and concurrent activity. He referred to having "set about" the process of lodging an appeal and "cracking on" with it and I accept his account of having discussed the issue with a friend and taking the advice given that he should try and obtain legal representation. He says that he telephoned various people and agencies and was referred to solicitors in Manchester, who told him after about a week that he could not pass the threshold test for civil legal aid. I also accept that he approached the Bar Pro Bono Unit, the Citizens Advice Bureau and his MP.

17. At the same time he apparently wrote to the Employment Tribunal in Leeds seeking notes made by members of the Employment Tribunal. He told me that Employment Judge Jones had refused to supply notes but that refusal came towards the end of September, in other words the time when the period limited for lodging an appeal was fast expiring. He sought to get access to the notes by invoking provisions of the **Data Protection Act 1998** and he asked the police to exercise powers under the **Fraud Act 2006** in order that he might see the notes. Likewise he made an attempt to obtain the notes of the hearing conducted by Employment Judge Cox at which his claim had been struck out. This also appears to have been in the last week or so before the time limited for appealing expired. When I asked the Appellant whether this might be regarded as his own choice as to what activities to prioritise I understood his position to be that his mental state was such that he could not be treated as being capable of prioritising activities.

18. The Appellant reminded me he was also contending with the conclusion reached by His Honour Judge Peter Clark sitting in this Tribunal on 15 July 2016 that his appeal against the striking out of his claims not only disclosed no reasonable grounds for bringing such an appeal but also that it was totally without merit pursuant to Rule 3(7) and (7ZA). The Appellant launched a further appeal to the Court of Appeal. He should have done this within 21 days of 18 July 2016, which is the seal date of the Order made by HHJ Peter Clark and I have seen nothing to suggest that he was late in submitting that appeal. All of this, therefore, must have been accomplished before he received the Judgment and Written Reasons awarding costs against him and it did not compete for his time during the relevant six weeks. It illustrates, however, that then he was able to comply with time limits. I realise of course that his case is that later his health deteriorated.

19. He also sought a review of the Order made by HHJ Peter Clark and shortly after having received the costs Judgment and Written Reasons he also received an Order from this Tribunal refusing his application for a review. Not much of these activities can have occurred in the period between 19 August 2016 and 30 September 2016 so it was neither a distraction nor did it compete for the Appellant's time in the relevant period. The most that can be said is that consideration of the refusal of review must have been during the relevant period and also that it must been disappointing news for him.

20. Another matter which sprang into life in the relevant period resulted from long-running correspondence between the Appellant and the President of Employment Tribunals for England and Wales, Judge Brian Doyle. This had been going on since June 2015 and the Appellant told me that this had resulted in something like 27 letters having passed between them. I have no difficulty in accepting that. The subject matter of the controversy was the conduct of Employment Judge Cox, about which the Appellant was complaining. In early September 2016 Judge Doyle announced that he was going to investigate the matter, thus adding further to the problems with which the Appellant had to contend. It is right to say that in the first email received at 15:55 hours on 30 September 2016 the Appellant was complaining about the conduct of Judge Doyle.

21. These problems, the fear of losing his house as a result of the costs Order, depression, anxiety and stress and his condition of being HIV-positive all preoccupied the Appellant in the relevant period. The Appellant says he got himself into "*a state*" about the appeal against costs. As a result he was not able to address the appeal against the award of costs in an orderly and rational fashion. This partly accounted for his confusion as to the time limit and what he

described as "*his mental health issues and all the things going wrong in my life*" led to what he called a "*complete melt down*" about 36 to 48 hours before 30 September 2016.

22. He had at some stage, however, given some consideration to the time limit. The Appellant said that although he had not received a hard copy of the Judgment and Written Reasons or any covering letter directing him towards information on the Internet he had looked at the information available as to appealing to this Tribunal. He was neither precise nor consistent about when this might have been. At one point I understood him to say that matters became clear to him on Friday 30 September 2016 but later he suggested that he had looked at the material before then. He said that he had been utterly confused when he had looked at the **Practice Direction (EAT - Procedure) 2013**, a copy of which he had been able to get access to via the Internet.

23. The only mention of a time of day by which material had to be lodged at this Tribunal that he could find was in paragraph 5.6 under the heading "*Time For Instituting Appeals*", which deals with extensions of time for appealing but it does so in the context of an appeal from an Order of the Registrar. Therefore, although he described the material he had looked at as being confusing, he was confident in assuming that the time limit in an appeal against the decision of an Employment Tribunal would expire at midnight on the last day of the time limited for appealing, something which he understood to be the default position where nothing was expressed to the contrary.

24. He accepted, however, that he had seen paragraph 1.8.1 (both paragraphs are set out below at paragraphs 31 and 32 of this Judgment) but he assumed that did not apply because he was in a "*blind panic*" and he was simply overwhelmed by all the matters with which he had to

deal in the relevant period. When he woke up on 30 September 2016 he still thought he had until midnight to submit his appeal and the accompanying papers but he added that in the end he took both views, by which I understood him to mean that ultimately he accepted the possibility that the appeal had to be filed by 4.00pm, although retaining the view that it was equally possible it had to be filed by midnight. So I understood the position to be that on 30 September he was aiming for 4.00pm but believed it may not be fatal if he did not meet that deadline. As mentioned above at paragraph 7 of this Judgment, he said that he had started to attempt to submit the necessary material in the afternoon of that day, although there is no record at this Tribunal of any attempt earlier than 15:55 hours.

The law as to the time within which an appeal must be filed

25. By Rule 3(3)(a)(i) of the **Employment Appeal Tribunal Rules 1993** ("the Rules") "[*t*]*he period within which an appeal … may be instituted is … 42 days from the date on which the written reasons were sent to the parties*". By Rule 37(1) of the **Rules** time may be extended and by Rule 37(1A):

> **"Where an act is required to be done on or before a particular day it shall be done by 4pm on that day."**

26. A particular section of the **Rules** relied upon by the Appellant is Rule 39(1), which reads:

> **"Failure to comply with any requirements of these Rules shall not invalidate any proceedings unless the Appeal Tribunal otherwise directs."**

Information about the appeal process and time limits

27. In her Reasons the Registrar referred to "*The Judgment*" booklet. This is the booklet "*T426*", a link to which is provided in the letter from the Employment Tribunal, which should accompany the hard copy of the Judgment and Reasons of the Employment Tribunal sent to the

parties. Page 4 of the booklet clearly refers to the 4.00pm deadline in the following terms and with the following emphasis:

> **"Where the judgment contains written reasons you must appeal within 42 days of the date on which the judgment was sent to you.**
>
> **…**
>
> **For example, if this date was a Wednesday, the EAT must receive your appeal *no later than 4pm on the Wednesday 42 days (six weeks) later*. You must get your appeal to the Employment Appeal Tribunal (not the employment tribunal office) in plenty of time *before* the end of the 42 day period, particularly if you choose to send your notice of appeal by post as you must allow for postal delays."**

28. The Appellant says he did not receive it and I have accepted that (see above at paragraph 5 of this Judgment). But as the Registrar also points out using a search term such as "*appeal from the employment tribunal*" will produce results, which include a link to the pages of this Tribunal now residing on the website www.gov.uk. By following the internal link "*How to appeal*", which appears on the page to which the search result link sends the reader a second page opens, which page contains further links to the "*the notice of appeal form*", "*the full practice direction*" and the document entitled "*appeal guidance*".

29. It also contains the following on the page itself:

> **"<u>Deadline for appealing</u>**
>
> **You must appeal within 42 days of the date that either:**
>
> - **the decision was sent to you**
> - **the reasons were sent to you (but only if the Employment Tribunal didn't provide reasons at the hearing or you asked for the reasons within 14 days of the decision being sent to you)**
>
> **Your appeal must arrive by 4pm on the final day.**
>
> **You can ask for an appeal to be considered even if it's late, but extensions are rarely given, and you must have a good reason."**

Using the search term "*appealing to the employment appeal tribunal*" produces the same search result.

30. Clicking on the full practice direction link opens a further page with a further link which downloads a pdf of the **Practice Direction (Employment Appeal Tribunal Procedure) 2013**. The Appellant accepts that he had seen this document. Indeed he referred to paragraph 5.6 as having provided confusing information.

31. Paragraph 5.6 reads as follows:

> **"5.6. Any application for an extension of time for appealing must be made as an interim application to the Registrar, who will normally determine the application after inviting and considering written representations from each side. An interim appeal lies from the Registrar's decision to a judge. Such an appeal must be notified to the EAT within 5 working days of the date when the Registrar's decision was sent to the parties: this means that where, for example, the Registrar's decision is sent to the parties on a Wednesday, any appeal against it must be received no later than 4pm on the following Wednesday [See para. 1.8.1 above]."**

The Appellant said this is the only reference to the time by which the appeal must be filed and the last day of the time limited for appealing. I pointed out the cross-reference to paragraph 1.8.1 but the Appellant said that he had not noticed that or regarded it as being significant.

32. Paragraph 1.8.1 reads as follows:

> **"1.8.1. For the purpose of serving a valid Notice of Appeal under Rule 3 and para. 3 below, when an Employment Tribunal decision is sent to parties on a Wednesday, that day does not count when calculating time limits, and the Notice of Appeal must arrive at the EAT before, or by 4.00pm on, the Wednesday 6 weeks (i.e. 42 days) later."**

33. Clicking on the full practice direction link opens a further page with two further links to two documents in pdf format; the first is form T440, which is the booklet entitled "*I want to Appeal to the Employment Appeal Tribunal*"; the second is form T444 which is a pro forma Notice of Appeal. If one opens the form T440 booklet the following appears on the second page:

> **"If you use email, the size of any one email, including attachments, should not exceed 10MB. If you attach scanned documents you should check that they do not exceed that size. If they do, you may need to rescan them at lower quality and/or send them in more than one email. Attachments must be in a format which can be read by Word 2003, Adobe Reader 11 or Windows Picture and Fax Viewer (e.g. .doc, .rtf, .pdf or .jpg). The EAT cannot accept files in OpenDocument format (e.g. .odt). Files may be zipped in a format which can be unzipped by**

> **Windows Explorer XP (SP3). All documents lodged electronically must be sent to the EAT as attachments to emails. A document is not validly lodged by sending us a link to its location."**

This warns of the limitations of the hardware and software in use at this Tribunal. Those who wish to submit electronically must accept these limitations until other resources become available. The last sentence may well have been added after the judgment of a division of this Tribunal presided over by His Honour Judge McMullen QC in **Desmond v Cheshire West and Chester Council HQ** UKEATPA/0007/12/DM, a decision relied upon by the Appellant to which I will return later.

Authorities on time limits and extension of time

34. The Appellant's case is that, in the circumstances of this case, discretion should have been exercised by the Registrar, and should be exercised by me in the Appellant's favour by extending the time. In the case of **Sian v Abbey National plc** [2004] ICR 55; [2004] IRLR 185 the then President, Burton J said this about the discretion to extend time:

> **"19. I turn then to the exercise of the discretion. This discretion is to be exercised sparingly. …"**

35. The leading authorities on the issue as to whether an appeal has been validly instituted were considered in the comprehensive judgment of HHJ McMullen QC in **Muschett**, which I referred to above. The cases referred to there were **Kanapathiar v Harrow London Borough Council** [2003] IRLR 571; **United Arab Emirates v Abdelghafar** [1995] ICR 65; **Aziz v Bethnal Green City Challenge Co Ltd** [2000] IRLR 111; **Woodward v Abbey National plc (No 2)** [2005] ICR 1702 and **Steeds v Peverel Management Services Ltd** [2001] EWCA Civ 419 (at paragraphs 38 to 40 - a personal injury case but applied to the context of an Employment Tribunal in **Chohan v Derby Law Centre** [2004] IRLR 685). To these can now be added **Muschett** itself and the judgments of the Court of Appeal in **Jurkowska v HLMAD**

Ltd [2008] ICR 841, which was decided after **Muschett** but, for some reason, reported before it, and in **O'Cathail v Transport for London** [2012] IRLR 1011.

36. The following principles emerge from these cases (most of these principles are set out by HHJ McMullen at paragraph 5 of the judgment in **Muschett** (see pages 427 and 428)):

(i) both the public interest and the interests of the parties are best served by there being certainty as to, and finality of, legal proceedings;

(ii) generally speaking no distinction is to be drawn between the unrepresented litigant and those who enjoy representation;

(iii) this Tribunal is stricter in the approach to time limits relating to an appeal than other courts and tribunals might be in relation to time limits at first instance where there is yet to be a hearing of the case; I would add to that my own view that the fact there has been a strike out, as opposed to a merits hearing would not ordinarily lead to any less strict an approach;

(iv) consequently the adherence to the 42-day time limit is fundamental and compliance with it essential (**Woodward** paragraphs 3 and 4); and

(v) it will only be relaxed in rare and exceptional cases, for there is no excuse, even in the case of an unrepresented party, for ignorance of the time limits (**Abdelghafar**, at p. 71) and litigants, whether represented or not, must not expect the procedure to be re-written so as to accommodate their own negligence, incompetence or idleness (**Jurkowska** paragraph 19);

(vi) nor, since the **Practise Statement of 2005** made the position abundantly clear, is it likely there will be any acceptable excuse for failure within the time limit to assemble and submit the stipulated suite of documents, which should accompany an appeal, or for failure to explain their absence;

(vii) any application for an extension of time is an indulgence requested from this Tribunal and it is unlikely to be granted because of ignorance of the need to comply with time limits or of the need to submit the stipulated documents;

(viii) consequently before extending time this Tribunal must be satisfied that it has received a full, honest and acceptable explanation of the reasons for the delay (**Abdelghafar**, pp. 70, 71);

(ix) this Tribunal will have regard to the length of delay, although the crucial issue is the excuse for delay, not whether the delay is long or short (**O'Cathail**, paragraph 36), and any evidence of procedural abuse or intentional default is likely to result in the indulgence being refused (**Abdelghafar**, at p. 71);

(x) an excuse may not be sufficient unless it explains why a Notice of Appeal and the requisite accompanying documents were not lodged during the entirety of the period of the time limited for appealing because those who submit or attempt to submit appeals towards or at the end of the 42 day period run the risk that something may go wrong and there may not be time to correct it (**O'Cathail**, paragraph 26);

(xi) consequently, the whole period will need to be examined before any indulgence can be granted;

(xii) this does not mean the ability to lodge the correct documents at any time during the 42 days will necessarily be fatal to granting the indulgence because an analytic approach should be taken to that period and the questions to be asked are (**Abdelghafar** at p. 72)

(1) what is the explanation for the default?

(2) does it provide a good excuse for the default?

(3) are there circumstances which justify the exceptional step of granting an extension of time?

(xiii) prejudice may be a factor, to be considered along with other factors;

(xiv) the merit of the proposed appeal may be a consideration; in **Aziz** Butler-Sloss LJ said this at paragraph 17

> **"17. … Merits may be relevant and there will be cases where it would be right to extend time because the merits of the case require it. That is well within the general propositions expressed by Mummery J that the merits of the appeal may be relevant. Morison J did look at the merits and I have myself looked at the notice of appeal which does not disclose on the face of it, I have to say, any clear propositions of law in which it is suggested that the employment tribunal erred. There are a number of criticisms of their approach to the evidence and I would, for my part, find it very difficult to say that those can be translated into points of law. I do not myself think, therefore that there are strong merits in this case, but in any event I see no fault in the way in which this case was dealt with. …"**

and Sir Christopher Staughton added at paragraph 23:

> **"23. I would only add this in relation to the merits. Mummery J said at p.246 of the *United Arab Emirates* case, in a passage which my Lady has read, that the merits are usually of little weight and they should not be investigated in detail. I agree with that. But I would however say that, if it is *plain* that the appeal has no prospect of success, that must be a matter which should be taken into account. There can be no point in giving an extension of time for an appeal which is bound to fail. I have had great difficulty in seeing any point of law in this proposed appeal and the jurisdiction of the Employment Appeal Tribunal is confined to hearing appeals on points of law. So that too would, in my judgment, very probably have been a proper ground for refusing the application for leave to appeal to the Employment Appeal Tribunal."**

(xv) if a legal adviser has been at fault that might be a consideration to be considered along with others (**Chohan** paragraph 16).

The Appellant's Submissions

37. The Appellant's primary submission was that his appeal had been filed in time because it had been filed before midnight on 30 September 2017. He reached the conclusion by application of general principles relating to the expiration of time, which establish that the day ends at midnight. Consequently his appeal had been filed seven hours before the time limit had expired.

38. His alternative submission was that even if his appeal had been filed out of time because it had been filed after 4.00pm on 30 September 2016 then, by the operation of Rule 39(1) of the **Rules**, that could not invalidate his appeal. Consequently, the Registrar had been wrong to consider the appeal was not properly instituted because it had not been filed in time. Rule 39(1) provided automatically for the appeal to be valid, something which the Registrar (and a number of other judges in the authorities I have cited above) had overlooked.

39. In the further alternative, the Appellant submitted that if the appeal had been filed out of time and was not automatically validated by the operation of Rule 39(1) I should exercise my discretion by allowing the appeal to proceed because of the very considerable prejudice to the Appellant which arose by preventing him from contesting the costs Order on appeal, namely that enforcement of the Order might expose him to the risk of him losing his home. He had given an honest and reasonable exculpatory explanation for the delay which arose out of his disability and his difficulties as a litigant in person in understanding the operation of the time limit.

40. Moreover, there was obviously considerable merit in his case. The Employment Tribunal had not given the Appellant a fair hearing; the hearing had been too short and he had not been allowed to make the points he wished to make. The Employment Tribunal had neglected to take account of his limited means, of the adverse impact the costs award would have on him or of his vulnerability caused by disability. The Costs Schedule relied on at the hearing had been illegible, items in it had not been properly scrutinised, the Appellant was not given the opportunity to comment on any part of it and the fact that the Second Respondent was a public authority had been given illogical emphasis in the sense that ordering costs to be paid to a public authority which might have the result of another public authority having to expend

money on the Appellant in consequence of him losing his house and becoming homeless was unlikely to result in a net gain to the public purse.

41. Moreover, the Employment Tribunal had erred in law when, having reduced costs on a summary assessment from £28,000.00 to £23,000.00, the amount had then been arbitrarily further reduced to £20,000.00 and an award made under Rule 78(1)(a) instead of a detailed assessment having been undertaken under Rule 78(1)(b) of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**.

Discussion and Conclusion

42. I cannot accept the Appellant's primary contention that his appeal was lodged in time. His understanding that time expires at midnight appears to me to be based on a misunderstanding of the application of general rules as to the computation of time in certain commercials contexts ,such as the giving of notice in respect of leases. But Rule 37(1A) of the **Rules** (set out above at paragraph 25 of this Judgment) is mandatory in its terms and, being secondary legislation, has statutory force. Therefore, that is the Rule as to time, which Parliament has applied to all appeals from the Employment Tribunal to this Tribunal and other Rules that may apply in other contexts are irrelevant. The appeal had to be filed by 4.00pm on 30 September 2016.

43. Nor does Rule 39(1) (set out above at paragraph 26 of this Judgment) assist the Appellant as he suggests. Firstly, I do not think that Rule applies to the institution of an appeal. As a matter of interpretation in my view there are no "*proceedings*" until an appeal has been accepted as properly instituted. That interpretation eliminates any tension or contradiction between Rule 39(1) and Rule 37. Therefore the Rule only applies once proceedings have been

commenced. Secondly, if I am wrong as to that and there are "*proceedings*" when papers have been filed, even though they have been filed late or filed incomplete, then Rule 39(1) must be interpreted in a way to make it consistent with Rule 37 and that must be done by regarding the refusal to exercise discretion to extend time under the latter as this Tribunal "*otherwise*" giving a direction as to the invalidity of the "*proceedings*".

44. As to the exercise of the discretion to extend time I accept that it cannot be disposed of by simply repeating the authorities, which state that it must be exercised sparingly. I also accept that the Appellant is right to remind me that I must exercise my discretion judicially as an independent judicial officer and that the authorities represent guidance and should not be regarded as having the force of statute. What I do not accept, however, is that I am able to ignore what other divisions of this Tribunal and the Court of Appeal have said on the subject of the time limited for appealing and extensions of it. I need to consider the guidance offered and exercise my discretion by taking account of the factors and principles identified by earlier cases and apply them to the factual matrix of this appeal.

45. The further alternative case advanced by the Appellant is that he has provided a full, honest and acceptable explanation for the delay in filing the papers necessary for the proper institution of the appeal. This relies on a combination of a variety of competing calls on his time and an inability to cope with that pressure caused by mental health disability. Whilst I do not accept that all the matters he referred to related to the period between 19 August and 30 September (see paragraph above of this Judgment) I accept that he was preoccupied initially by exploring whether he could get legal or other assistance and later, as I find towards the end of the six weeks, he made efforts to obtain the notes of the relevant hearing and of the earlier

hearing, although if these were relevant at all, they were not of primary relevance to filing this appeal.

46. He also had to contend with correspondence with Judge Doyle and to a lesser extent with the consequences of the Rule 3(7) and (7ZA) rulings made by HHJ Clark. His ability to engage with these matters seems to me to indicate that his mental state, which he describes as a combination of depression, anxiety and stress was not disabling him from performing these tasks and he was able to appeal the rulings of HHJ Clark and to correspond with Judge Doyle. He says, however, that he was overwhelmed by all this and at a late stage he went into "*melt down*" and a "*blind panic*" ensued, which, coupled with confusion about at what hour the last of the 42 days of the time limited for appealing ended and compounded by his error of assembling too large a file resulted in him failing to meet the 4.00pm deadline.

47. The Appellant described himself as "*thick*" on more than one occasion during the hearing. On my assessment of him, that is far from the truth. Not only is he a mathematics graduate but he is highly articulate. His reading of paragraph 5.6 of the **Practice Direction** was entirely correct. That paragraph appears in the context of an Appeal from the Registrar but the argument he constructed out of it, namely that a 4.00pm deadline only applies to such an appeal and not to an appeal from the decision of an Employment Tribunal, completely ignores paragraph 1.8.1 of the **Practice Direction**, which in clear language makes it clear that there is a 4.00pm deadline in respect of such appeals. Yet he accepted that he had read it and I cannot understand how he reached the conclusion that some other rule applied to him. I am at a loss to know he could read one paragraph perfectly correctly and, in effect, ignore the other.

48. I have come to the conclusion that for whatever reason, and it may have been a wrong assignment of priorities, the Appellant left himself too little time to complete the task of submitting all the necessary papers electronically. I can find no evidence to support his contention that he had tried earlier in the afternoon of 30 September 2016 but I have reached the conclusion that is email timed at 15:55 hours was a conscious attempt to comply with the 16:00 hours deadline and I have reached the further conclusion that he was aware that was the deadline. I have no medical evidence to suggest that he was incapable of complying with deadlines and his ability to appeal in time against the rulings of HHJ Clark to my mind confirms that whatever his disabilities they do not prevent him from assembling material and complying with deadlines when he chooses to do so.

49. He is not the first proposed Appellant to have left it too late to submit electronically. I think there may have been a warning in 2012 as to the size limit on electronic documents and the fact that the barrister in **Desmond v Cheshire West and Chester Council HQ** UKEATPA/ 0007/12/DM was regarded as not being at fault by the division of this Tribunal dealing with the case is not a basis for concluding that all those who leave it too late, submit to large a file which is then rejected by the email server and then have to re-submit by a series of emails, the receipt of the last of which takes them into the next working day of this Tribunal, will have the same leniency extended to them. As I remarked above it seems to me very likely that the solution adopted in that case of placing a large amount of material onto another website, which is prepared to receive it and allow access to it, and forwarding and access link to this Tribunal is now clearly warned against in the documentation available to the public. I do not regard the evidence, which the Appellant has produced, as putting him into a category of somebody who cannot comply with the Rules of this Tribunal or understand the clearly written guidance, which is freely and easily available. On the contrary, it seems to me that he is well able to understand

A the Rules and the documents and in so far as he has suggested otherwise I do not accept his account.

B 50. I accept that the Appellant will suffer prejudice by having a costs Order made against him. An adverse costs Order will always be prejudicial but I can see that here it may have the potential to be particularly prejudicial to someone of limited means, who might be at risk of losing his home. Whether or not a costs Order should be made is, however, very much a matter C of discretion for the Employment Tribunal and, irrespective as to whether or not I might have made such an Order, nothing the Appellant has said by way of criticism of Employment Judge Jones and his Tribunal suggests to me there is an overwhelming case that he exercise his D discretion wrongly and that he ignored the adverse impact the costs Order might have upon the Appellant. Unless one can quite clearly see a very strong case on the merits, and that is certainly not the case here, I do not think that the merits of the proposed appeal can carry very much weight. E

51. Having considered all of the factors discussed above, I have reached the same conclusion as did the Registrar, namely that this appeal has not been properly instituted within F the time limited for doing so and that I should not exercise my discretion in favour of the Appellant by extending the time limited by Rule 3(3)(a)(i) of the **EAT Rules** so that the institution of this appeal on 11 March 2014 was in time. Therefore the appeal against the G Registrar's Order must be dismissed.

H