Appeal No. UKEATPA/1150/19/VP
UKEATPA/1151/19/VP

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 24 March 2021
Judgment handed down

Before

THE HONOURABLE MR JUSTICE BOURNE

(SITTING ALONE)

MR STEVE GRIFFITHS AND MRS MELANIE GRIFFITHS — APPELLANTS

MS ILKAY CETIN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEALS AGAINST REGISTRAR'S DECISIONS UNDER RULE 20

APPEARANCES

For the Appellants	MR STEVE GRIFFITHS AND MRS MELANIE GRIFFITHS (Appellants in Person)
For the Respondent	MS ILKAY CETIN (Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE

The Tribunal refused to grant extensions of time:

(1) by one day for a party's notification under Rule 3(10) of the EAT Rules 1993 of dissatisfaction with a decision under Rule 3(7), where there was no clear and acceptable explanation for the delay; and

(2) by 219 days for the lodging of a Notice of Appeal, where on analysis the Appellant could have appealed in time and the real reason for the delay was a change of mind.

THE HONOURABLE MR JUSTICE BOURNE

Introduction

1. This is my decision on two appeals against decisions by the Registrar, refusing extensions of time. The Registrar's decisions were made under Rule 20 of the **EAT Rules 1993** and the appeals are brought under rule 21. These are dealt with by way of rehearing, so I have considered the applications for extensions of time afresh. The parties are here referred to as Appellants and Respondent as they are here in the EAT. The Respondent was the Claimant in the ET.

2. The case arises from a period during which the Respondent worked as a nanny for the Appellants, looking after their young children. The Respondent brought an ET claim which made various allegations against the Appellants. At the final liability hearing in November 2018 the only claim which was pursued was of a failure to pay her the national minimum wage ("NMW"). The Respondents relied on the "Family Exception" which applies in cases where a worker is treated as a family member. The judgment of EJ Walker was sent to the parties on 13 March 2019. The EJ ruled that the exception did not apply because the Appellants had not discharged the burden of proving that the Respondent was treated as a family member. There was agreement as to the amount which had been underpaid, applying the judgment. The Respondent was awarded £296.90.

3. The parties applied for costs orders against each other. Following a further hearing on 8 August 2019, EJ Walker's costs judgment was sent to the parties on 18 October 2019. The EJ made no finding of unreasonable conduct against the Respondent and did not order her to pay any costs but held that the Second Appellant had behaved unreasonably by applying for

references in the Respondent's name in order to obtain information about her. There was an order for £507, representing 13 hours of preparation time.

4. Despite her success, the Respondent applied for reconsideration of the costs judgment. Her application was sent to the parties on 18 October 2019. I am told that information supporting it was sent and came to the attention of the Appellants on 31 October 2019.

5. On 29 November 2019, the Appellants filed a Notice of Appeal against both judgments. The appeal against the costs decision ("the costs appeal") was in time, but the appeal against the liability decision ("the liability appeal") was out of time by 219 days.

6. Despite the use of a single Notice, this has been treated as two appeals, and the time issues in each appeal raise some different questions. It is therefore necessary to consider them separately.

The costs appeal

7. On 28 July 2020 the Appellants were informed of a "sift" decision on the costs appeal by Choudhury P, who ruled under rule 3(7) of the **EAT Rules 1993** that the Notice disclosed no reasonable grounds for bringing the appeal and directed that no further steps be taken on it.

8. Rule 3(10) of the **EAT Rules 1993** provides that an Appellant may express "dissatisfaction in writing" within 28 days of notification of a rule 3(7) decision, in which case the matter will be heard before a judge.

A 9. By application of paragraph 1.8.2 of the EAT Practice Direction, that 28-day time limit expired at 4 p.m. on 25 August 2020, and a document received after 4 p.m. is deemed to be lodged on the next working day.

B 10. The Appellants sent a written notification of their dissatisfaction to the EAT by email. The email which has been produced in evidence, by them, was timed at 23.12 on 25 August 2020, some 7 hours and 12 minutes after the deadline. The email stated: "We would be grateful C if you could acknowledge safe receipt as there has been issues with internet all day today, presumingly owing to the significant weather disruptions. One of the attachments will not load, we will try to send in a separate email." This was followed by a further email timed at 23.36, D enclosing an attachment and stating that its size had been reduced.

11. The notification was effectively one day late. The EAT Registrar treated the late notice E as containing an implied application to extend time by one day. The Registrar's order, stamped on 28 September 2020, refused the application. In the attached reasons, the Registrar said:

> **"I am not satisfied that the explanation for delay amounts to an exceptional circumstance, such that I should extend time. The Appellants were sent a copy extract of rule 3 with the Rule 3(7) notice on 28 July 2020 and were aware of the time limit. There is no requirement to send further grounds or attachments. Rule 3(10) simply required the Appellants to "express dissatisfaction in writing". Having left expressing their dissatisfaction until the final day, they risked not being able to rectify any technical issue in time. The Appellants state that they had F had issues "with (sic) internet all day today", which they surmise is due to the weather conditions. No further information on this is provided. There is no explanation as to why, earlier in the day on 25 August, when they had issues with the internet, the Appellants did not make any attempts to access the internet or file their application via other means."**

G 12. The Appellants lodged their appeal against this decision on Sunday 4 October 2020. Their grounds were set out in a 2-page document. This said, in particular:

> **"To clarify, we sent the application by the required deadline but requested receipt be acknowledged because we had experienced issues with the internet during the day. We tried to ring the tribunal several times during opening hours to confirm safe receipt but there was no answer …**
>
> H **So, to clarify, we sent the application under rule 3(1) by the required deadline. We received no automated confirmation from the tribunal that it had been received. We acknowledge that – as communicated – we had experienced issues with the internet during the day but ultimately do not know whether the issue comes from our server or the tribunal's …**

> **… we do not know why there seems to be a delay of a few hours between the time we sent the correspondence to the tribunal and the time it received it but can only presume it was due to technical problems. The person we spoke to confirmed that we should have received an automated email acknowledging our application, but we did not."**

13. The grounds also complain generally about a lack of support at the EAT and a failure to answer telephone calls. They point out that the Respondent was granted a postponement of a hearing and extensions of three case management deadlines by the ET. They refer to breaches of Article 6 of the GDPR, to which I shall return. They point out that the EAT Rules do not specify that applications must be lodged by 4 pm as opposed to midnight, which is the required time in the ET. The 4 p.m. requirement is found in the EAT Practice Direction, as I have said.

14. That last point goes nowhere (although it might be desirable for EAT communications to refer to the 4 pm deadline), because Mrs Griffiths (who undertook the advocacy at this hearing) accepted that she knew that the deadline was not midnight but was in the afternoon, perhaps 4 p.m. or 5 p.m.

15. The EAT's time limits are enforced very strictly, and more strictly than those in some other forums. The approach is the same for a rule 3(10) notification as for a Notice of Appeal against an ET decision: see **Morrison v Hillcrest Care Ltd** [2005] EWCA Civ 1378.

16. Applications to extend time can be entertained under rule 37 of the EAT Rules. Guidance on the approach to be taken upon such applications was given in **United Arab Emirates v Abdelghafar** [1995] ICR 65 and has been refined in more recent cases. The principles can be summarised as follows:

1. Given the interest in finality of litigation, especially at appeal stage, compliance with time limits is fundamental.
2. Extensions will be granted only in rare and exceptional cases.

3. In general, it makes no difference whether the litigant is represented.
4. Neither ignorance of the time limit nor failure within the limit to assemble the papers justifies a relaxation.
5. The EAT must first be satisfied that it has been given a full, honest and acceptable explanation for the delay.
6. The EAT will have regard to the length or shortness of the delay, in this case a few hours, but the crucial issue is the excuse or explanation, and that means an explanation covering the full period from the original decision to late submission.
7. The merits of the appeal are rarely relevant.
8. Lack of prejudice to the other party is usually not relevant, but any prejudice to them is relevant.
9. These guidelines are not to be treated as a fetter. The Registrar, or the Judge re-taking such a decision, must exercise a judicial discretion in the matter.

17. In the present case, the most fundamental point is that I am not satisfied that I have been given a full, honest and acceptable explanation for the delay. In oral argument the Appellants could not clearly remember what happened on 25 August 2020. While their written appeal grounds suggest that the notification was sent before 4 p.m. but must have been held up by some technical malfunction, they could not tell me when it was sent. Mrs Griffiths' initial recollection that it was sent after the children had been collected from school, but she then accepted that on 25 August they were not at school. There is no evidence of the time at which the first email was sent, other than the printout which records the time as 23.12. The closeness in time of the two emails suggests that they probably were sent within a short time of each other. The reference in the first email to having internet issues "all day" suggests that it must have been sent towards the end of the day.

18. So, although the explanation advanced is that there was some electronic delay in transmission of an email that was sent in time, the Appellants have not established on the balance of probabilities that this is what happened. It is at least as likely that the email was simply sent too late.

19. Meanwhile there is no good explanation for the undisputed fact that sending the notification was left until the 28th day. The Appellants refer to the strain on them as busy working parents. That is understandable but is not unusual, let alone exceptional.

20. I do bear in mind that the extension sought is only one day. Nevertheless, the principle that extensions will be rare and exceptional applies also to short extensions.

21. I have also considered this appeal on the assumption that there may be merit in the grounds of appeal against the costs decision. This does not carry much weight and, where an appeal deadline has been missed, is usually outweighed by the need for finality in litigation. Nevertheless, it is a relevant factor.

22. Against that, I also bear in mind that the Appellants were seeking to reverse an award of only £507. The financial prejudice to them of being unable to pursue the appeal is slight.

23. The Appellants have sought to persuade me that it is nevertheless very important for this appeal to proceed.

24. It is evident that in the course of this litigation, tremendous bad feeling has developed between the parties. They accuse each other of various kinds of misconduct. In particular the Appellants refer to unfounded allegations being made against them in anonymous letters to

their employers and to such allegations being published on a website whose address contains the Respondent's name and which solicits donations to fund future litigation costs.

25. The Appellants also claim that both judgments (costs and liability) have given rise to unlawful processing of their personal data, contrary to article 5 of the General Data Protection Regulation ("GDPR"), for example because they contain errors of fact and personal information which was not relevant. They argue that there is a legal obligation to correct this and that, because there is no time limit for seeking such correction, the EAT appeal time limits should not operate so as to impede that process.

26. I am not persuaded that any of these are reasons why I should take the exceptional step of extending time for the costs appeal. In particular it seems to me that allowing the appeal to proceed will not cure the matters of which the Appellants complain.

27. The Appellants may have other legal remedies for the Respondent's behaviour towards them but allowing an appeal against an order to pay costs of £507 has no direct relevance to that behaviour.

28. The GDPR point in my view is misconceived. If the Appellants feel that the Ministry of Justice or HM Courts Service has infringed the GDPR, then there are legal remedies available, for example via the Information Commissioner. But their GDPR concerns are simply not relevant to the question which would arise on an appeal, namely whether the decision to award costs of £507 to the Respondent (and not to award any costs to the Appellants) was vitiated by some error of law.

29. Nor is any extension merited by the fact that the Respondent needed the repeated indulgence of the ET in respect of time limits. Case management deadlines in the ET are important, but they are by their nature less rigid than appeal time limits in the EAT which, as I have said, are applied strictly except in rare and exceptional cases. Different principles are applied to the different types of application.

30. Nor is my conclusion affected by the fact that the Respondent is also trying to pursue an appeal against the outcome of the ET proceedings (despite having been the successful party). This Tribunal has, to date, rejected her appeal as disclosing no reasonable grounds. But if the Court of Appeal were to find any merit in it, that would not in my view provide any excuse for the delay in the Appellants' costs appeal or any reason to extend time.

31. I therefore dismiss the appeal against the Registrar's decision not to extend time for the rule 3(10) application in relation to the costs appeal.

The liability appeal

32. As I have said, whereas the costs appeal was lodged in time, the accompanying liability appeal was 219 days out of time. It has therefore not been considered by a Judge under the rule 3 sifting process. Instead, by an order stamped on 5 January 2021, the Registrar refused the application to extend time.

33. The Registrar's written reasons refer to the strict approach to which I have referred above, and to the *United Arab Emirates* case, approved by the Court of Appeal in *Green v Mears* [2018] EWCA Civ 751, which directs this Tribunal to ask what is the explanation for the default, whether the explanation provides a good excuse and whether there are circumstances

justifying the exceptional step of granting an extension. The Registrar, in short, was not satisfied that this test was met on the facts.

34. The high hurdle is if anything made higher by the length of the extension sought and by the fact that the liability which the Appellants seek to overturn is for the sum of only £296.90.

35. The Notice of Appeal itself puts forward the following arguments for the Appellants:

1. The liability appeal was prompted by seeing the Respondent's reconsideration application dated 31 October 2019, in which she said that she had neither written nor read the witness statement on which she relied at the liability hearing and in which she contradicted her oral evidence given at that hearing in some respects.
2. The late appeal would cause no prejudice to the Respondent because she herself had appealed against the liability judgment.
3. It is in the public interest to entertain the liability appeal because there is little case law on the family exception, and the law in this area could be applied in a way which would encourage discrimination.
4. In the liability appeal she would rely on grounds of appeal alleging (1) a failure to apply relevant law, (2) procedural irregularities (the EJ knew that the Appellants had made a complaint about the handling of the case but did not recuse herself; at the start of the hearing the Respondent handed the EJ a letter which the Appellants were not shown; the EJ relied on the Respondent's statement which the Respondent later admitted not having read, and on the contract of employment which could be amenable to rescission for misrepresentations by the Respondent; the EJ relied on various conclusions of fact without giving the Appellants the chance to challenge them; the claim succeeded on a NMW point which was not in the original form ET1), (3) bias, revealed by treating the Respondent as vulnerable and needy and the

Appellant as wealthy and independent and (4) perversity, by disregarding the evidence on the key issue.

36. On 16 March 2020 the Appellants lodged further written submissions in support of their application for time to be extended, with supporting materials. In particular they relied on events which occurred after the appeal deadline had expired on 24 April 2019, numbered from A to H as follows:

A. In her reconsideration application on 31 October 2019 the Respondent admitted that she had neither written nor read her original witness statement. This was consistent with her conduct at the oral hearing where she had disavowed parts of the statement.

B. She submitted new evidence for the costs hearing in August 2019 consisting of relevant WhatsApp messages.

C. Although the Appellants had wished to put the matter behind them, they found out in June 2019 that the Respondent was attempting an appeal, in January 2020 that she was bringing a new ET claim against them and in February 2020 that she had published material about them on her website.

D. The costs hearing in August 2019 and the costs judgment of 18 October 2019 revealed the full extent of the EJ's bias against the Appellants.

E. The costs judgment made it unclear whether the EJ had read the letter provided by the Respondent at the start of the liability hearing (see 34.4 above).

F. In June 2019 and January 2020 other tribunals or courts rejected allegations made by the Respondent against other employers.

G. In January 2020, following a referral to the Legal Ombudsman, the Appellants' former representatives admitted failures on their part, including giving wrong advice, and offered compensation. They had assessed the chances of a liability appeal at 51% but had said the costs would be prohibitive.

H. Some relevant evidence about family life was located after 28 November 2018 but within the appeal deadline.

37. In oral argument Mrs Griffiths developed and expanded on these points. Much of what was said was directed at the merits of the liability appeal. As I have already explained that it is of limited weight and in any event cannot be determined at this preliminary stage. The relevant point which was made most clearly and emphatically was that whilst the Appellants did not appeal against the liability judgment in time because, having taken advice, they wished to put the matter behind them, nevertheless the appeal was triggered by the later discovery of new information, in particular about the Respondent disowning her original witness statement and about the EJ having been aware that a complaint had been made. The Appellants also pressed their point, discussed above, about reliance on the GDPR.

38. When careful consideration is given to all of these arguments, it is apparent that the Appellants were in a position to make a proper decision on whether to appeal against the liability judgment, in time. The grounds of appeal, summarised at 34.4 above, were matters almost all of which were known to the Appellants at the relevant time. For example, although they place great reliance on the Respondent's apparent retreat from her witness statement (a point which I suspect may not bear the weight which they seek to place on it, given the reliance of the EJ on oral evidence at the liability hearing), part of that retreat had already happened at the liability hearing. There was scope, at that time, to challenge the employment contract (another point which, in my view, was very unlikely to have prevented an award under the NMW Regulations) which the Respondent at the liability hearing said was a "fake". The EJ's awareness of a complaint having been made was revealed when she announced her liability decision on 10 January 2019. In short, I am not satisfied that any real "smoking gun" emerged

at a later date which really changed the picture, and which could justify the very lengthy extension of time which is sought.

39. I have also considered whether failures by the Appellants' representatives could provide a real excuse for not appealing in time. As the Registrar explained in her decision on this application, it is clear that the Appellants had received the EJ's written reasons, had dispensed with the services of their representatives and were in a position, acting for themselves, to lodge a reconsideration request by no later than 27 March 2019, 28 days ahead of the appeal deadline. They have stated that they were advised (whether rightly or wrongly I cannot say) that the appeal would have a better than evens chance. I have no reason to think that the advice they were given about the likely costs of an appeal was wrong.

40. The reality, in my judgment, is that the Appellants changed their mind about wishing to appeal. I do not criticise them for that. Their change of mind may well have been motivated by hostile behaviour against them on the part of the Respondent. However, the strictness of the appeal time limit should not be relaxed because of a mere change of mind.

41. Even if the receipt of new information had been capable of justifying the extension, a further difficulty would be that the Appellants had received all or almost all of the significant information by 31 October 2019. Despite already being months out of time for their appeal, they did not lodge it for a further 28 days. Beyond the fact that they are busy people, no explanation is offered for this further delay.

42. My overall conclusion is reinforced by some of the points made above in relation to the costs appeal. The GDPR point is misconceived. The merits of the appeal carry little weight. An appeal against the lawfulness of the award of £296.90 is not calculated to remedy the

Respondents' wider grievances. This appeal cannot be allowed to proceed just because the Respondent obtained indulgent case management orders below or because she, herself, is trying to proceed with an in-time appeal.

43. In my judgment the circumstances are far from justifying the extension sought, and the application must be dismissed.

44. As a final comment, it is notable that the bad feeling in this case has been magnified by steps taken, in particular the disclosure of information, outside the litigation. The parties must take their own advice on their legal rights and remedies relating to such conduct. However, it is hard to imagine a more effective way of escalating and prolonging the dispute between them.

Conclusion

45. Both applications to extend time must be dismissed.