

Neutral Citation Number: [2022] EAT 173

Case Nos: EA-2020-000798-AT

EA-2020-001088-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 December 2022

His Honour Judge James Tayler

Between :

Mr R Richardson
- and -
Extreme Roofing Limited

Appellant

Respondent

Written submissions for the **Appellant**
Written submissions for the **Respondent**

Appeal from Registrar's Order
Hearing date: 17 November 2022

JUDGMENT

SUMMARY

Practice and Procedure

The two appeals were not properly instituted. The first because the judgment was not attached (it is not adequate to cut and paste text from a judgment into a Word document – a copy of the signed judgment must be sent) and the ET3 was missing. The second because the ET3 was missing. Extensions of time to properly institute the appeals were refused.

His Honour Judge James Tayler:

1. This is an appeal from the Registrar's order refusing an extension of time for the institution of two appeals against decisions of the employment tribunal. The claimant seeks to appeal the judgment with written reasons sent to the parties on 21 August 2020 (“the judgment”) and the reconsideration judgment sent to the parties on 14 September 2020 (“the reconsideration judgment”).

2. The claimant sought to appeal the judgment and the reconsideration judgment by one notice of appeal sent by email, received by the EAT at 6.50 pm on 29 September 2020, which was deemed to have been received on 30 September 2020, because it was received after 4pm.

3. The appeal against the judgment was not properly instituted because the judgment and reasons were not attached. Instead, the claimant attached text he had copied from the judgment and inserted into a word document. In addition, the claimant failed to attach the ET3 response. The appeal against the reconsideration judgment was also not properly instituted because the ET3 was missing, although the claimant did send the reconsideration judgment and reasons.

4. The claimant realised that documents were missing. He stated at the end of the grounds of appeal:

I have problems downloading the Judgement Document so I copied it and turned it into a word document.

I have problems opening up the files Extreme Roofing sent to me to get a copy of the ET3, so I will either try to send it at a later date or you can ask the court to forward a copy to you.

5. The EAT wrote to the claimant on 23 October 2020 and stated that the appeal was not properly instituted because of the missing documents.

6. On 5 November 2020, the claimant provided a copy of the judgment and reasons and the ET3, but with one page missing. The claimant sent the missing page to the EAT on 9 November 2020. The ET3 was sent as a number of images taken using the camera of the claimant's mobile phone.

7. Accordingly, the appeal against the judgment was properly instituted 38 days out of time and

against the reconsideration judgment 14 days out of time.

8. On 12 January 2021, the claimant sent an email seeking to explain the delay in properly instituting the appeals. He stated that he left out documents because he was not sure whether he might exceed the email size limit. This was a different explanation to that at the end of the grounds of appeal and suggests that he did have all the relevant documents when the Notice of Appeal was submitted and could have sent them to the EAT. The claimant also asserted he had laptop problems and had tried to use his telephone. He suggested that the respondent had provided documents in a form that he could not access. He argued that the fault was that of the EAT because he had not been contacted about the missing documents, although it is clear from the end paragraph of the grounds of appeal that he knew that he was required to send the ET3 but had not done so. The claimant also suggested that he had been delayed by awaiting a response to his reconsideration application. The claimant sent further emails on 13 January 2021, 19 March 2021, 8 April 2021, 28 April 2021, 30 April 2021, 2 May 2021 and 3 May 2021, making similar points and asserting that the respondent had been allowed extra time in the employment tribunal, that the EAT should have obtained the additional documents and that the EAT delayed in responding after the submission of his Notice of Appeal. The claimant also made comments about the employment tribunal proceedings that are not relevant to the appeal from the Registrar's order.

9. The claimant failed to comply with the **EAT Practice Direction** to prepare for this hearing. He has not properly co-operated with the respondent to produce a bundle of documents and has not provided a skeleton argument. The parties have engaged in lengthy and acrimonious correspondence. It appears that the respondent has contacted the Police making complaints about the claimant's conduct.

10. On 25 October 2022, the claimant sent an email stating “Just a quick message to confirm that I am withdrawing my Appeal”. The EAT wrote to the respondent, in accordance with the **EAT Practice Direction**, asking whether they consented to the withdrawal of the appeal. The respondent wrote on 10 November 2022: “I consent to the withdrawal of the appeal by the Appellant”. The

claimant subsequently wrote stating that he had decided to withdraw the withdrawal of his appeal.

11. On 11 November 2022, a letter was sent by the EAT staff on my instructions:

This matter is listed for a hearing of the appellants' appeal against the Registrar's order refusing an extension of time for the institution of the appeal. The question of whether there is a binding agreement that the claimant will withdraw the appeal arising out of the recent correspondence, in which the appellant stated he wished to withdraw the appeal, the respondent agreed, but now the appellant is seeking to withdraw his withdrawal, will be considered at the hearing. The appellant has failed to provide a bundle of documents or a skeleton argument. I will also consider whether the appeal should be struck out because of the appellant's breach of the EAT Practice Direction in failing to provide a bundle of documents and a skeleton argument. If the claimant seeks to comply with these requirements out of time he should provide the documents to the EAT and the respondent by 4pm on 14 November 2022.

12. The respondent provided a skeleton argument but stated that they would not attend the hearing. The claimant contended that the bundle could not be completed because the respondent had not provided a Police report. The claimant has not provided a skeleton argument. The claimant also stated that he was not going to attend the hearing.

13. I have concluded that the claimant has not entered into a binding agreement with the respondent that prevents him continuing with this appeal. Paragraph 17 of the **EAT Practice Direction** sets out the procedure for the withdrawal of an appeal. An appellant is required to seek permission to withdraw the appeal. The respondent has an opportunity to consent to the EAT dismissing the appeal. That is what has happened in this case. However, before the EAT was able to make an order dismissing the appeal the claimant stated that he was no longer seeking to withdraw the appeal. I do not consider that the parties had the necessary intention to enter into legal relations to bring a contract into being that settled the proceedings and prevents the claimant pursuing the appeal from the Registrar's order.

14. The claimant has failed to comply with the requirements of the **EAT Practice Direction** to agree a bundle and provide a skeleton argument. It is no answer for the claimant to say he needed the Police report. Any Police report is irrelevant to the appeal against the Registrar's order. There is power under rule 26 **Employment Appeal Tribunal Rules 1993** (as amended) ("**EAT Rules**") to strike out

an appeal for failure to comply with directions of the EAT. I consider it would be disproportionate to do so. The respondent is not significantly disadvantaged by there being no bundle as it has not attended the hearing. I have the documents the claimant has submitted to the EAT. Had the claimant attended I would have limited him to the arguments advanced in the documents he had submitted prior to the hearing as a proportionate response to his failure to submit a skeleton argument. That is the outcome of his non-attendance in any event. Accordingly, I have gone on to consider the merits of the appeal from the Registrar's order. My role is to determine the matter afresh.

15. Rule 3 of the **EAT Rules** provides:

“(1) Every appeal to the appeal tribunal shall ... be instituted by serving on the tribunal the following documents— ... (a) a notice of appeal in, or substantially in, accordance with Form 1 ... in the Schedule to these rules (b) in the case of an appeal from a judgment of an employment tribunal a copy of any claim and response in the proceedings before the employment tribunal or an explanation as to why either is not included; and (c) in the case of an appeal from a judgment of an employment tribunal a copy of the written record of the judgment of the employment tribunal which is subject to appeal and the written reasons for the judgment, or an explanation as to why written reasons are not included ...”

16. The **EAT Practice Direction** sets out at Paragraph 3.1 the documents that an appellant is required to send to the EAT to institute the appeal properly. The judgment must be sent. Paragraph 3.1 provides that if the written reasons, claim form or response are not provided the appellant must provide an explanation. Paragraph 3.4 requires that where written reasons for the judgment have not been provided a written application must be made by the appellant requesting the EAT to exercise its discretion to hear the appeal without written reasons, or to request written reasons from the employment tribunal. No application has been made by the appellant pursuant to paragraph 3.4.

17. In **Fincham v Alpha Grove Community Trust** UKEATPA/0993/18/RN HHJ Auerbach noted in a case where one page from an ET1 was missing:

21. The authorities clearly establish that the requirement in the Rules and Practice Direction for specified documents to be included, save in certain cases where an explanation for the non-inclusion is provided, mean that the documents in question that are included with the Notice of Appeal have to be complete. The conclusion that this one page was missing from what the Claimant handed in, means that the copy of the Grounds of Resistance that he provided was not

complete, and he therefore had not complied with the EAT's Rules and Practice Direction in this respect at that point. Additionally, as a matter of fact, that was not rectified until he provided a scanned copy of the missing page on 12 December 2018. I therefore agree with the Registrar on the first issue, that this appeal was not properly instituted until that date, and therefore it was 20 days out of time.

22. I turn to the question of extension of time. There are number of general principles that are well established in the authorities. Firstly, that the extension of time is an indulgence and not a right. A party who has litigated their claim at first instance, been unsuccessful in some respect or otherwise wishes to challenge the outcome on appeal, bears the onus of instituting their appeal within time and does not have the right to an extension if they do not do so. Secondly, the 42-day time limit for appealing to the EAT is a particularly generous one which, among other things, makes generous allowance for the difficulties that might be faced, including by litigants in person. Thirdly, in principle, no greater indulgence is to be given to litigants in person than to those who are represented, having regard to the generous time limit, and to the availability of information through various means about what documentation is required, and by when it is required.

23. Next, it is the duty of the party seeking to appeal, to ensure that they do comply and that all their documentation is presented complete within the time limit. It is not the duty of the EAT, or its staff, either before or after the time limit has expired, to raise defects in compliance with a party, to inform them, within any particular time frame, whether or not their documentation is considered to comply, or otherwise to take proactive steps to assist them, by checking and informing them whether they have complied. It is the responsibility of the party seeking to appeal, to take the necessary trouble and care to ensure that they understand what they have to do and to ensure their own compliance. Many of the cases which arise involve some accidental or unintentional error on the part of the party seeking to appeal, but that is not, itself, a sufficient reason for granting an extension of time.

18. I consider that the requirement in the **EAT Rules** and **EAT Practice Direction** to provide the judgment and reasons means the judgment and reasons as sent by the employment tribunal (or possibly the online version) rather than text cut and pasted into a word document that does not include the signature (electronic or actual) of the employment judge. If a document is produced by cutting and pasting text from the original judgment the EAT cannot be satisfied that the judgment is the final, complete and unaltered version. The requirement of the **EAT Rules** and **EAT Practice Direction** are for copies of the judgment and reasons, rather than cut and pasted text. It is a requirement of the **Employment Tribunals Rules of Procedure 2013** that the judgment be signed: Rule 61.

19. I consider that any explanation for a failure to provide required documents, where permitted, must be a genuine explanation of why the documents cannot be provided. It could not be sufficient to comply with Rule 3.1 to state that the document has not been provided because an appellant could not be bothered to do so and/or considered that the EAT should obtain the documents itself, or some similar reason that would not prevent compliance. This construction fits with paragraph 3.4 of the **EAT Practice Direction** that is clearly written on the assumption that, where reasons for a judgment have not been provided, that is because the appellant does not have them and so must request that the EAT consider the appeal without the reasons or direct the employment tribunal to provide them.

20. Accordingly, the appeals were not properly instituted until the judgment and reasons and the complete ET3 were provided. The claimant therefore requires an extension of time if the appeal is to proceed.

21. In **United Arab Emirates v Abdelghafar and Anor** [1995] ICR 65 the then President of the EAT, Mummery J, provided guidance on extensions of time to institute appeals to the EAT, from page 74H. Mummery J reviewed the approach to time limits in the courts generally, noting that the grant or refusal of an extension of time is a matter of judicial discretion to be exercised in a principled manner by weighing and balancing the relevant factors. He noted that the rules of practice are devised in the public interest to promote expeditious dispatch of litigation, and must be observed; they are not targets to be aimed at or expressions of pious hope, but requirements to be met. He noted that, generally, at first instance procedural default would not preclude a party from being permitted to proceed with a claim unless it had caused prejudice to the opposing party, but noted that the approach is different in an appeal. A party at first instance has a right to a trial; for the case to be heard and to be determined. However, if dissatisfied with the result after the trial the party must act promptly. Mummery J noted that an extension may be refused even though the default in observing the time limit has not caused any prejudice to the party that was successful in the original hearing. Mummery J stated that an extension of time is an indulgence to be requested. There is no legitimate expectation

that an extension of time will be granted. There is a strict time limit within which an appeal must be properly instituted.

22. Mummery J stressed that the EAT will expect a full and honest explanation for the delay and will consider whether it is a good reason or there are any other circumstances that justify the exceptional step of granting an extension of time.

23. The authorities about extensions of time to appeal to the EAT were considered by Underhill LJ in **Green v Mears Ltd** [2018] EWCA Civ 751. Underhill LJ concluded that there was well-established Court of Appeal authority binding upon the EAT, requiring it to apply the **Abdelghafar** guidance, which involves the EAT applying an even stricter approach to time limits than that applied by the Court of Appeal.

24. I am not satisfied that the claimant has provided a full explanation for the failure to properly institute the appeal in time. The claimant initially suggested that he was concerned that he might exceed the maximum attachment size for an email to the EAT, which suggests that the documents were available. The claimant was able to submit the documents eventually by sending photographs taken on his phone by email. That suggests that the claimant must have had hard copies to take photographs of. The ET3 and the judgment and reasons will have been sent to the claimant by the employment tribunal. The respondent states that they provided a hard copy bundle to the claimant. The claimant has not explained why he did not take images of the documents within the time limit. Alternatively, there is no good reason why the documents could not have been copied and submitted by post. I do not consider there is a good excuse for failing to institute the appeal properly within time. It is incumbent on an appellant to get the documentation in order in good time to ensure that it can be delivered to the EAT in time. It is not the responsibility of the EAT to inform a party if they have not submitted the necessary documents. Sometime EAT staff have the opportunity to tell an appellant that documents are missing, but they are not required to do so. Furthermore, it is clear from the rider to the grounds of appeal that the claimant appreciated that he had not included all of the required documents when he submitted the appeal. It was his responsibility to remedy the defect.

25. Accordingly, the appeal from the Registrar's Order is refused and the appeal is dismissed.