Neutral Citation Number: [2024] EAT 21

Case No: EA-2022-000392-AT

EMPLOYMENT APPEAL TRIBUNAL

Field House
15-25 Breams Buildings, London, EC4A 1DZ

Date: 19 January 2024

Before:

JASON COPPEL KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MR M SHAH

Appellant

- and –

HOME OFFICE

Respondent

- -

- -

Mr J McCabe (representative) for the **Appellant**
Mr D Mold (instructed by Government Legal Department) **for the Respondent**

APPEAL AGAINST REGISTRAR'S ORDER
Hearing date: 19 January 2024

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE, JURISDICTIONAL/TIME POINTS

The appellant filed a notice of appeal which contained the ET1 and ET3 for the claim which he wished to appeal but, in breach of the EAT Rules, not for other claims which had been before the tribunal at the same time. The other ET1s and ET3s were only provided after the time-limit for appealing had expired so he required an extension of time. There was no good reason for the time limit being missed but there were nevertheless exceptional circumstances which justified an extension, essentially that the requirements of the relevant rule were, on one reading, internally inconsistent and published information about what documents needed to be supplied with a notice of appeal was incorrect, or at least confusing.

JASON COPPEL KC, DEPUTY JUDGE OF THE HIGH COURT:

The appeal

1. This is an appeal under rule 21 of the **Employment Appeal Tribunal Rules** from the decision of Ms Althia Kerr on behalf of the Registrar of the Employment Appeal Tribunal ("EAT/Tribunal") dated 16 March 2023 refusing the appellant, Mr Mohammed Shah, an extension of time to file a notice of appeal.

2. The appellant seeks to appeal an employment tribunal judgment ("the judgment") sent to the parties on 10th January 2012. The last day of the 42-day time limit for lodging an appeal against the judgment was 21st February 2022.

3. The judgment contained the tribunal's ruling on 8 separate claims which had been brought by the appellant. The first two of those claims in time had been formally consolidated by the tribunal in a case management order dated 24 July 2018; the other 6 were heard at the same time as the consolidated claims. The appellant sought to appeal the tribunal's findings in respect of only the first in time of the claims, which had alleged disability discrimination in respect of a disciplinary investigation commenced against him for providing false information about his disability when applying for posts under the respondent's Guaranteed Interview Scheme.

4. The appellant's appeal, submitted on his behalf by his representative, Mr McCabe, included the ET1 and ET3 for that claim, but not for any of the other claims which had been before the tribunal, and which the appeal did not concern.

5. On 21 July 2022, the EAT notified the appellant that the appeal as lodged was not properly instituted because it had not included all of the ET1s and ET3s which had been before the tribunal. The additional documents were provided on 25 July 2022 and the appeal was considered by the EAT to have been brought on that day, which was 154 days after expiry of the time limit.

6. The appellant applied for an extension of time which was refused by the Registrar. The appeal

before me is a re-hearing of that application.

Relevant law and information

7. Rule 3(1) of the Employment Appeal Tribunal Rules 1993 ("the Rules") stated at the material time, and so far as material:

> **"Every appeal to the Appeal Tribunal shall, subject to paragraphs (2) and (4), be instituted by serving on the Tribunal the following documents–**
> **(a) a notice of appeal in, or substantially in, accordance with Form 1, 1A or 2 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;**
>
> **(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; …"**

8. Rule 3(1)(b) was revoked by the Employment Appeal Tribunal (Amendment) Rules 2023. The current position is, therefore, that a notice of appeal does not have to include copies of the claim(s) before the employment tribunal or any response to the claim(s). According to the Explanatory Note to the amending instrument, this was **"to reduce the number of documents that are required to be submitted with the Notice of Appeal in order for an appeal to be properly instituted in the EAT"**.

9. According to rule 3(1)(a), a notice of appeal must be at least substantially in accordance with Form 1 in the Schedule to the Rules. Form 1 requires an appellant to confirm that the following documents are attached to the notice of appeal:

> **"(a) the written record of the employment tribunal's judgment, decision or order and the written reasons of the employment tribunal;**
> **(b) the claim (ET1);**

(c) the response (ET3); and/or (where relevant)

(d) an explanation as to why any of these documents are not included;"

10. The Practice Direction (Employment Appeal Tribunal - Procedure) 2018, which was the version in force at the material time, stated, in paragraph 3.1:

> **"A Notice of Appeal and accompanying documents may be delivered to the EAT by any method, such as email, fax, post, courier, or hand-delivery. The Notice of Appeal must be, or be substantially, in accordance with Form 1 (in the amended form annexed to this Practice Direction) or Forms 1A or 2 of the Schedule to the Rules. It must identify the date of the judgment, decision or order being appealed. Copies of the judgment, decision or order appealed against must be attached by the Appellant. In addition the Appellant must provide copies of the Employment Tribunal's written reasons, together with a copy of the claim (the form ET1 and any attached grounds) and the response (the form ET3 and any attached grounds), or if not, a written explanation for the omission of the reasons, ET1 and ET3 must be given. It must include a postal address at or through which the Appellant can be contacted, and may also include an email address if the Appellant wishes the EAT to communicate by email. A Notice of Appeal without such documentation will not be validly presented."**

11. HM Courts and Tribunals Service publishes an information leaflet, serial number T440, entitled "I want to appeal to the Employment Appeal Tribunal" which prospective appellants from the employment tribunal are advised to consult, including in letters sent out by employment tribunals together with tribunal judgments. This states, so far as material:

> **"Please read section 1 to 4 of the Practice Direction and the Practice Statement before sending your appeal to the EAT.**
>
> **You must complete a notice of appeal (Form 1) or, if you do not use this form, you must provide the same information in some other way.**
>
> **Send the completed notice of appeal to the EAT using the EAT's electronic online filing system, E-Filing service. (Please see below for further information about E-Filing service). Your completed notice of appeal must be accompanied by a clean (unmarked) copy of the judgment, decision, direction or order against which you are appealing.**

> **You must also send clean (unmarked) copies of the following documents (if you omit any which are relevant then you must include an explanation of why you did not send them):**
> **• written reasons – if your appeal is against a judgment (or an order which requires written reasons) and the reasons are not included with the judgment or order**
> **• claim (ET1) – which the claimant sent to the Employment Tribunal**
> **• response (ET3) – which the respondent sent to the Employment Tribunal**
> **Please see paragraphs 3.1 to 3.4 of the Practice Direction."**

Non-compliance with the time limit

12. In his oral submission on the appeal, Mr McCabe frankly accepted that it was "clear as day" that he had been required to submit with the notice of appeal copies of all of the ET1s and ET3s which had been before the employment tribunal at the hearing which gave rise to the judgment which the appellant sought to appeal. Whilst his candor, and willingness to take responsibility for the error which the Registrar identified, is admirable, I do not regard the position as being quite that clear.

13. The notice of appeal complied with Form 1, and so with rule 3(1)(a), in that it attached "the claim" and "the response", which would appear to mean the claim in respect of which the appeal was pursued (or claims, if an appeal was pursued in respect of more than one claim). The wording of the Practice Direction and of leaflet T440 support the view that that was sufficient, and that the Appellant did what was required. However, rule 3(1)(b) then imposed, in the specific case of appeal from a judgment of an employment tribunal, a requirement to include "any claim and response in the proceedings before the employment tribunal". On its natural and ordinary meaning, this imposed a requirement to include all claims and responses which were before the tribunal, even those in respect of which an appeal is not pursued. That requirement must be read as cumulative with, and additional to, rule 3(1)(a) but is in truth not entirely consistent with reg. 3(1)(a). Rule 3(1)(b) might be read as referring to claims of other claimants which were heard by the tribunal at the same time as the claim of the appellant, rather than other claims of the appellant which are not pursued on appeal, but I can see no basis in its wording for limiting its scope in that way, that is not the reading which has been

adopted by this tribunal in previous cases, and it would not serve to remove altogether inconsistency with rule 3(1)(a).

14. Mr Mold for the Respondent helpfully drew my attention to the judgment of the Court of Appeal in **Sud v London Borough of Ealing** [2011] EWCA Civ 995, where there had been two claims before the employment tribunal and the appellant had submitted with her appeal an ET1 for the second claim which was incomplete. The Court of Appeal held that the two claims had to be considered separately, that the appeal in respect of the first claim had been properly constituted and that, in light of the appeal on the first claim going ahead, there were exceptional circumstances justifying an extension of time for the second claim (§§28-32). It was central to the Court's reasoning on the first claim that "[t]here is no principle of common law causing [the] two claims to become a single claim".

15. Whilst it may certainly be argued from **Sud** that the appeal on the first claim in the present case should also be regarded as properly constituted, I accept Mr Mold's submission that the present case is distinguishable because the appellant's first two claims had formally been consolidated by the tribunal. The effect of consolidating proceedings is "to combine two or more claims so that they will proceed thereafter as one claim" (see the White Book (2024 ed.), notes to CPR 3.1.9). On that footing the appellant's first two claims are to be regarded as a single claim, at least to the extent of ruling out the application of the approach in *Sud* so as to enable the first claim to proceed to appeal regardless of the position *vis-à-vis* other claims.

16. In conclusion, I agree with the Registrar that the appeal was not properly constituted within the time limit, but the position is by no means as clear as Mr McCabe was prepared to accept.

Extending the time limit

17. The principles which fall to be applied by the EAT when deciding whether or not to extend time for the institution of an appeal are well-established. In **United Arab Emirates v**

Abdelghafar [1995] ICR 65, Mummery J stated, at pp. 71-72:

> **"(1) The timetable set by the Employment Appeal Tribunal Rules 1993 should be observed by the parties and their lay and professional advisers. Although more sympathy may be shown to a party who is unrepresented, as many are, there is no excuse, even in the case of an unrepresented party, for ignorance of the time limit or of the importance of compliance. When parties are notified of the reasons for the [employment] tribunal's decision they are informed of the 42-day time limit for appealing. The limit will, therefore, only be relaxed in rare and exceptional cases where the appeal tribunal is satisfied that there is a reason which justifies departure from the time limit laid down in the Rules.**
>
> **(2) The appeal tribunal's discretion will not be exercised, unless the appellant provides the tribunal with a full and honest explanation of the reason for non-compliance. If the explanation satisfies the tribunal that there is a good excuse for the default, an extension of time may be granted. Experience has shown that most of the explanations offered do not in fact excuse the delay which has occurred. For example, the following explanations have been rejected by the appeal tribunal as excuses for delay: ignorance of the time limit; oversight of the passing of the limit, for example, by a solicitor under pressure of work; prior notification to the appeal tribunal or the industrial tribunal or to the successful party of the intention to appeal; the existence of pending applications for review of the decision or for remedies; delay in the processing of an application for legal aid or of an application for advice or support from elsewhere, such as the Equal Opportunities Commission or the Commission for Racial Equality. It is always possible, in cases where there may be unavoidable delay, for an extension to be agreed between the parties or granted by order of the appeal tribunal before the period has expired. Alternatively, a notice of appeal may be served in order to comply with the Rules, with a covering letter saying that it may be necessary to apply to amend it later.**
>
> **(3) If an explanation for the delay is offered, other factors may come into play in the exercise of the discretion. It is, of course, impossible to make an exhaustive list of factors. The appeal tribunal will be astute to detect any evidence of procedural abuse, questionable tactics or intentional default. The tribunal will look at the length of the delay which has occurred, though it may refuse to grant an extension even where the delay is very short. Extensions have been refused, even where the notice of appeal was served only one day out of time. Parties who have decided to appeal**

> **are also strongly advised not to leave service of the notice of appeal until the last few days of the 42-day period. If they do, they run the risk of delay in the delivery of post or of the misdirection of mail. That risk can be avoided by service of the notice of appeal well within the period. The merits of the appeal may be relevant, but are usually of little weight. It is not appropriate on an application for leave to extend time for the appeal tribunal to be asked to investigate in detail the strength of the appeal. Otherwise there is a danger that an application for leave will be turned into a mini-hearing of the substantive appeal. Lack of prejudice or of injustice to the successful party in the original proceedings is also a factor of little or no significance. If there is irreparable concrete prejudice, that will strengthen the opposition to the application for extension; but, even if there is no prejudice, the application may still be refused.**
>
> **Thus, the questions which must be addressed by the appeal tribunal, the parties and their representatives on an application for an extension are: (a) what is the explanation for the default? (b) does it provide a good excuse for the default? (c) are there circumstances which justify the tribunal taking the exceptional step of granting an extension of time?"**

18. In **Green v Mears Ltd** [2019] ICR 771, the Court of Appeal noted (§21) that "on at least three occasions – that is, in [**Aziz v Bethnal Green City Challenge Co. Ltd** [2000] IRLR 111, **Woods v Suffolk Mental Health Partnership NHS Trust** [2007] EWCA Civ 1180 and **Jurkowska v HLMAD Ltd** [2008] EWCA Civ 231, [2008] ICR 841] – this Court has considered whether the **Abdelghafar** approach is too strict, particularly since it is stricter than the approach which it itself takes to applications for extension of time for appealing; and on each occasion its application has been upheld". It also highlighted that whilst the **Abdelghafar** approach was strict, it did not absolutely rule out the grant of an extension even in the absence of a good excuse for the deadline having been missed and nor did it require a case to be exceptional as a condition of granting an extension (citing **Jurkowska**, §19).

19. I do not consider that the Appellant has shown a good excuse for his failure to comply with the time limit for appealing. First and foremost, the essential reason for the default was a failure on

the part of his representative to appreciate what was required by the EAT Rules. It has been held in very many cases that ignorance of the rules will not constitute a good excuse. As HHJ Auerbach put it recently in **Anghel v Middlesex University** [2022] EAT 176, §26: "Error, oversight, or carelessness are not ordinarily acceptable excuses. Nor are ignorance of the time limit or what documents are required to properly institute an appeal." It is also of some relevance that the appellant does not have any satisfactory explanation for failing to commence the process of lodging the appeal documents until the very last day of the time period for appealing. Mr McCabe told me that the rest of the period was taken up by him considering whether or not to appeal and on which grounds, but that is far from sufficient.

20. However, the present case is, in my judgment, one of the unusual cases where it is appropriate to grant an extension of time notwithstanding the absence of a "good excuse" for the time limit having been missed. That is for the following reasons:

a. The requirements of rule 3 as it stood at the material time, when read together with Form 1, the Practice Direction and leaflet T440 were, on one reading, internally inconsistent and, on any view, were somewhat confusing. In accordance with the guidance given in **Abdelghafar**, more sympathy can be shown towards the appellant in this regard, as his representative, Mr McCabe is not a lawyer (although that would not, in itself justify an extension of time).

b. An important reason why ignorance of the requirements of the rules is not usually considered to be a sufficient basis for granting an extension of time to a party who is not legally represented is that – as HHJ Auerbach went on to explain in §26 of **Anghel** - the requirements of the rules "are clearly explained in materials to which parties are signposted when judgments are sent out, and which are readily available on the internet". Unusually, that is not the case here; on the contrary, the explanatory materials to which the appellant was signposted, and which he might have consulted, including leaflet T440,

did not clearly explain that all claim forms and responses had to be included with the notice of appeal. Indeed, they suggested that only the claim or claims under appeal (and the relevant responses) need be included.

c. The default which caused the time limit to be missed was minor and technical. The claim form and response for the claim that was under appeal were included with the notice of appeal; the claim and response for the other claims was, at best, of little relevance to the appeal. In this regard, I place some weight upon the fact that the EAT Rules were subsequently amended so as to remove the requirement for any claim form or response to be included with a notice of appeal.

d. An important reason why appellants are encouraged not to leave the submission of a notice of appeal until the end of the time period for appealing is that earlier action will mean that there is time in which errors can be rectified before the time limit expires (see the reference in **Abdelghafar** to "delay in the delivery of post or of the misdirection of mail"). However, in the unusual circumstances which prevailed in the aftermath of the Covid-19 pandemic, and due to a backlog in processing appeals, there was no prospect of the EAT Registry informing the appellant of the mistake which had occurred even if an appeal had been lodged on the very first day of the 42-day time period for appealing. That is demonstrated by the fact that the EAT Registry did not consider the notice of appeal filed on behalf of the appellant until almost five months after it had been filed. It is not, of course, the duty of the Registry to alert appellants to their errors, but it is at least a partial answer to the appellant's failure to act until the very end of the time period for appealing that acting much more quickly would have made no practical difference to him missing the time limit.

21. Accordingly, I allow the appeal against the Registrar's decision and grant an extension of time for appealing to 25 July 2022.