Neutral Citation Number: [2024] EAT 36

Case No: EA-2022-000656-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 March 2024

Before :

ANDREW BURNS KC
DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MR R MELKI **Appellant**

- and -

BOUYGUES E AND S CONTRACTING UK LTD **Respondent**

- -
- -

JAMES GOUDIE KC, OLIVER MILLS and ALIYA AL-YASSIN
(instructed by **Advocate**) for the **Appellant**
COLM KELLY (instructed by **Pinsent Masons**) for the **Respondent**

APPEAL FROM REGISTRAR'S ORDER
Hearing date: 27 February 2024

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE, JURISDICTIONAL/TIME POINTS

The 2023 amendment of the EAT Rules introduced a new power for the EAT to extend time where a minor error to submit relevant documents with the Notice of Appeal has been rectified and it is just to extend time having regard to all the circumstances. The amended EAT Rules came into force on 30 September 2023 and from that date the new rule 37(5) applied to all appeals not only to those appeals which were instituted after 30 September 2023.

The Claimant appealed the order of the Registrar refusing his application to extend time to present his notice of appeal. The Notice of Appeal was served but the Respondent's ET3 Response form was attached omitting the Grounds of Resistance which formed an important part of the Response. The Claimant rectified the error by serving the Grounds of Resistance 6 days out of time.

The EAT applied rule 37(5) but held that this was not a minor error in complying with the requirement to submit the relevant documents. The EAT therefore could not extend time under rule 37(5).

Applying the rule 37(1) test in the alternative, there was no good explanation or excuse for the failure to submit the Grounds of Resistance. There were no exceptional circumstances to justify an extension of time. The Appeal against the Registrar's order was dismissed.

ANDREW BURNS KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. Following a statutory consultation in 2023 there was an amendment to the Employment Appeal Tribunal Rules 1993 SI 1993/2845 ('the EAT Rules'). A new EAT Practice Direction was issued. The changes to the EAT Rules meant that, in broad terms, the requirement to file the ET1 Claim form (including the Grounds of Complaint) and the ET3 Response form (including Grounds of Resistance) with the Notice of Appeal was dispensed with. A new power was given to the EAT to extend time where a minor error to submit relevant documents with the Notice of Appeal had been rectified. Time can now be extended if it is just to do so having regard to all the circumstances.

2. The EAT Rules were amended by the Employment Appeal Tribunal (Amendment) Rules 2023 SI 2023/967 which came into force on 30 September 2023. They do not contain any transitional provisions and the first issue before me on this appeal from the Registrar's order is whether the new rule 37(5) applies to all appeals or only to those which were instituted after 30 September 2023. The second issue is what is a minor error. If the error is minor and rectified, I have a broad discretion to extend time. If it is not, I can only extend applying the strict test under rule 37(1).

3. The Appellant ('the Claimant') appeals the order of the Registrar dated 10 August 2023, refusing his application to extend time to present his notice of appeal. The final date to lodge an appeal with the EAT was 24 May 2022. The Notice of Appeal was deemed received on 23 May 2022 but one of the required documents was not served properly. The Respondent's ET3 Response form was attached to the Notice of Appeal without the Grounds of Resistance which were attached to and formed an important part of that response. The Registrar concluded that the Grounds of Resistance were provided on 3 August 2022 although the Respondent accepts that documents containing its draft Grounds of Resistance and Amended Grounds of Resistance were actually sent to the EAT on 30 May 2022, but that was still some 6 days out of time.

4. The Claimant accepts that his Notice of Appeal was not properly instituted. He did not realise that the Grounds of Resistance needed to be included as part of the ET3 Response form and attached to the Notice of Appeal. He says that he called the EAT six days after the deadline for instituting the appeal, was told he needed to submit the Grounds of Resistance and he immediately did so. He says that this was a minor error in complying with the requirement to submit the relevant documents and that it is just to extend time for submitting these documents under rule 37(5) of the EAT Rules.

5. The Respondent says the EAT cannot exercise a discretion under rule 37(5) to extend time in favour of the Claimant as:

a. the error in question occurred and was resolved prior to rule 37(5) taking effect; and/or
b. the Appellant's error was not minor and it would not be just to extend time.

It further submits that I should not extend time under rule 37(1).

The Appeal

6. The Claimant was employed by the Respondent as a planning manager on a probationary basis from 25 November 2019. The Amended Grounds of Resistance describe how he failed to attend his probationary review meetings and a disciplinary hearing for being absent without permission. He was dismissed on 9 March 2020 and an internal appeal was rejected. His claims of direct race discrimination and harassment were dismissed by the Manchester Employment Tribunal ('ET') following a 5-day hearing in a Judgment with Reasons sent to the parties on 12 April 2022.

7. On 26 April 2022 the Claimant applied for reconsideration of the ET decision. That was refused by EJ Butler on 20 May 2022 and so the Claimant submitted his Appeal to the EAT.

8. The Appeal was sent by email to the EAT on 22 May 2022. It consisted of a 2-page Notice of Appeal, the ET Judgment and Reasons, an email applying for reconsideration of the ET decision, the ET1 Claim form containing his brief grounds of claim in box 8.2 and the ET3 Response form, but

omitting the Grounds of Resistance.

9. There were several versions of the Grounds of Resistance in the ET hearing bundle. The ET3 Response form had been sent to the ET attaching a 'Draft Grounds of Resistance' dated 18 September 2020. Following a preliminary hearing on 11 December 2020, the issues were clarified and the Respondent was directed to file an amended response. It did so in an 'Amended Grounds of Resistance' dated 18 February 2021. Following a further preliminary hearing on 21 May 2021, the ET directed the Respondent to file a further amended response confirming its position on vicarious liability. It did so in another document also called 'Amended Grounds of Resistance' dated 4 June 2021 which was largely identical to the previous version except with one amended paragraph.

10. After a telephone call to the EAT the Claimant sent an email dated 30 May 2022 attaching the 'Draft Grounds of Resistance' which were part of the original ET3 Response form. He also attached the Respondent's second Amended Grounds of Resistance dated 4 June 2021. The Claimant's error in not sending the Grounds of Resistance to the EAT was therefore rectified within a few days.

11. On 30 August 2022 the EAT acknowledged receipt of the Notice of Appeal. On 24 February 2023 it informed the Claimant that the appeal was not properly instituted. The Claimant made an application to extend time on 28 February 2023 on the grounds that he was not legally represented, only had access to the EAT website on 22 May 2022 and had provided the Grounds of Resistance immediately when asked for it.

The EAT Rules and Practice Direction

12. The Registrar's decision on 10 August 2023 refused the application to extend time. The EAT Rules in force at the time of her decision were:

> **3 Institution of Appeal**
>
> (1) Every appeal to the Appeal Tribunal shall, subject to paragraphs (2) and (4), be instituted

> by serving on the Tribunal the following documents—
> …
> (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;
> …
> (3) The period within which an appeal to the Appeal Tribunal may be instituted is—
> (a) in the case of an appeal from a judgment of the employment tribunal–
> (i) where the written reasons for the judgment subject to appeal–
> (aa) were requested orally at the hearing before the employment tribunal or in writing within 14 days of the date on which the written record of the judgment was sent to the parties; or
> (bb) were reserved and given in writing by the employment tribunal
> 42 days from the date on which the written reasons were sent to the parties;

13. At that time the Practice Direction (Employment Appeal Tribunal – Procedure) 2018 was in force. Paragraph 3.1 read as follows:

> 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.

14. Rule 37 of the EAT Rules stated then and now:

> (1) The time prescribed by these Rules or by order of the Appeal Tribunal for doing any act may be extended (whether it has already expired or not) or abridged, and the date appointed for any purpose may be altered, by order of the Tribunal.

15. Since the amendment which came into effect on 30 September 2023 rule 37 now contains an addition provision:

> (5) If the appellant makes a minor error in complying with the requirement under rule 3(1) to submit relevant documents to the Appeal Tribunal, and rectifies that error

> (on a request from the Appeal Tribunal or otherwise), the time prescribed for the institution of an appeal under rule 3 may be extended if it is considered just to do so having regard to all the circumstances, including the manner in which, and the timeliness with which, the error has been rectified and any prejudice to any respondent.

16. The Respondent submits that rule 37(5) does not apply to this Appeal and that I have to apply the strict guidance laid down for extension under rule 37(1) in *United Arab Emirates v Abdelghafar* [1995] ICR 65 endorsed by the Court of Appeal in *Aziz v Bethnal Green City Challenge Co Ltd* [2000] IRLR 111 and *Jurkowska v Hlmad Ltd* [2008] ICR 841. In the absence of rule 37(5) applying I must, it is submitted, apply a time limit that "ought only to 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'" (*Aziz* at [20]). Sedley LJ in *Jurkowska v Hlmad* at [65] called the policy "unforgiving" and "an equality of misery: anyone who is caught out by the 42-day time limit has, barring something quite exceptional, only himself or herself to blame for leaving it so late to institute their appeal". *Woods v Suffolk Mental Health Partnership NHS Trust* [2007] EWCA Civ 1180 held that it was not an exceptional case where a Notice of Appeal had been filed, but, through honest error, without attaching a complete ET1 Claim form.

17. Therefore the first question is whether rule 37(5) applies to this Appeal and whether the Claimant can take advantage of the new discretion to extend in cases of minor errors in attaching documents to the Appeal.

Application of rule 37(5)

18. Mr Goudie KC for the Claimant puts forward three broad grounds for arguing that rule 37(5) applies to this Appeal:

a. He points out that any appeal from an order of the Registrar is by way of a rehearing, not a review. In rehearing the matter the EAT must decide in accordance with the EAT Rules in force at the time it determines the appeal.

b. He relies on the general common law presumption that changes to procedure apply to pending as well as future proceedings: *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, The Boucraa* [1994] 1 AC 486 at 495.

c. Thirdly, he submits that although the EAT Rules do not contain any transitional provisions the 2023 Practice Direction is explicit about its application and scope. At paragraph 1.2.1. the Practice Direction states, "This Practice Direction applies to all appeals commenced on or after 30 September 2023; and to appeals commenced before that date for steps that take place on or after it." Mr Goudie submits that I should interpret the EAT Rules consistently with the Practice Direction.

19. Mr Kelly for the Respondent submits that in the absence of express transitional provisions I must draw such inferences as to the intended transitional arrangements as permissible in the light of admissible interpretative criteria (*Bennion on Statutory Interpretation* (8th ed., 2022), at [7.10(3)]). I accept that I must construe the EAT Rules in context and regard the words of the EAT Rules as the primary source by which meaning is ascertained. I may use external aids such as government and other reports which may disclose the background to the amendment and may assist in identifying not only the mischief which it addresses but also its purpose (*R (O) v Secretary of State for the Home Department* [2022] 2 WLR 343).

20. Mr Kelly observes that rule 37(5) was introduced as what he refers to as a package of amendments intended to rebalance the obligations which appellants owe in respect of filing documents with notices of appeal and the approach which the EAT will take to non-compliance with that obligation. He relies on the Explanatory Note to the 2023 Amendment Rules to this effect.

21. He submits that the EAT cannot apply one aspect of those amendments (i.e. rule 37(5)) to

an appeal where the other aspects of those amendments (e.g. the removal of rule 3(1)(b)) could not apply as their effect post-dates the Claimant's erroneous presentation of his appeal. He suggests that it would be absurd if the application of rule 37(5) depended not on when the appeal was instituted but on whether or not any application came before the EAT before or after the commencement date of 30 September 2023. It is said that would be unfair or unjust to the Respondent who until 30 September 2023 was entitled to assume that the previous, stricter, rules applied.

22. Mr Kelly also refers to the Employment Appeal Tribunal Rules and Practice Direction Consultation Report (September 2023) ('the Consultation Report') as a permissible external aid to statutory construction. He suggests that the new Practice Direction is not a permissible aid as that would 'put the cart before the horse'.

Discussion

23. This matter has not previously been decided. In *Di Fiore v Introhive UK Ltd* [2023] EAT 139 it was common ground that the amendments to the EAT Rules had no bearing on the extension of time application in that appeal and so the question was not decided.

24. The EAT Amendment Rules brought rule 37(5) into force on 30 September 2023. As held in *United Arab Emirates v Abdelghafar* [1995] ICR 65 at 69E an appeal against the decision of the Registrar to the judge is conducted as a rehearing of the original application to extend time and not by way of a review. That would suggest that I must apply the EAT Rules as they apply today rather than review the Registrar's decision in the light of the rules as they were when she made her decision.

25. The general presumption is that changes to procedure apply to pending as well as future proceedings. This is because a procedural change is expected to improve matters and

support the better administration of justice as explained in *The Boucraa* [1994] 1 AC 486. In that case Lord Mustill cited long-standing authority such as *Gardner v Lucas* (1878) 3 App.Cas. 582, 603, where Lord Blackburn said: "Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be." A litigant has no right to complain that procedure is changed during the course of litigation unless it causes unfairness or injustice. Lord Mustill applied this to the question in *The Boucraa* which was whether a procedural provision relating to arbitrations could be exercised by reference to acts or omissions which had taken place before the new section came into force. A similar question arises in this Appeal.

26. How fairness determines such retrospective application depends on several factors, including the value of any rights which the new rule affects or the extent to which that value is diminished or extinguished. Light may be shed by **c**onsideration of the circumstances in which the legislation was enacted. The essential question is whether the result is so unfair that the words used by Parliament in the new EAT Rules cannot have been intended to mean what they might appear to say.

27. The EAT Rules were amended to improve the fairness and justice of consideration of incomplete Notices of Appeal. Under the previous rules the EAT took the same strict approach to missing documents as if the Notice of Appeal had not been lodged in time at all (*Kanapathiar v London Borough of Harrow* [2003] IRLR 571 approved in *O'Cathail v Transport for London* [2012] IRLR 1011). *Anghel v Middlesex University* [2022] EAT 176 held that a litigant in person who was one day out of time in attaching her grounds of claim along with her ET1 when filing her notice of appeal was out of time. This was on the basis that under rule 37(1) "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" (at [26]). In *Carroll v Mayor's Office for Policing* [2015]

ICR 835, the EAT held the obligation to file "any claim and response" even included the ET1 and ET3 of a co-claimant who had not appealed.

28. I agree with the parties that it is right to have regard to the Consultation Report in informing the proper interpretation. That confirms that the context of new rule 37(5) is to remedy the previous strict rule which was perceived to have disproportionate effects. At paragraph 24 of Annex A it was said:

> "In proposing a possible amendment to rule 37 of the EAT Rules, it is not intended to change the approach laid down in **Abdelghafar**. Mindful, however, of the issues identified at paragraphs 9-10 above, the EAT is also proposing to ask the Lord Chancellor to consider amending this rule [to add rule 37(5)]."

29. Those issues identified at paragraphs 9-10 were that about one fifth of putative appeals were not properly instituted. The high proportion was said to be potentially due to the difficulty in filing documents from digital bundles. The EAT staff were often unable to spot errors before the end of the 42-day time limit. The high number of not properly instituted appeals had negative consequences for the administration of justice in the EAT. The consequent delays to all appeals could lead to unfairness to all litigants in the EAT.

Conclusion on application of rule 37(5)

30. Although it is right that rule 37(5) was introduced together with other amendments, that does not mean that it does not apply to all appeals. The amendment to rule 3(1) applied to all appeals from the commencement date. As that specifies what is required to start an appeal it necessarily applies only to appeals instituted after that date. Rule 37(5) is a power that can be exercised to pending appeals. It can therefore apply to all appeals whenever they were instituted. There is no absurdity about the test being different before and after 30 September 2023. Rules, whether it be the EAT Rules or the Civil Procedure

Rules change from time to time. Unless a transitional provision is included stating the opposite (or unless there is unfairness) the new provision applies to all litigation from the date it comes into force. The parties helpfully investigated whether there were any relevant decided cases or principles arising from changes to the CPR over the years since they were introduced, but found none that assisted.

31. I apply the approach of Lord Mustill in *The Boucraa* that Parliament intended this slightly problematic system to be brought to an end for prospective appeals in the future and also pending appeals. The previous rules were amended as they were too rigid in cases of minor errors and led to potential unfairness. The new rule includes a safety valve against causing unfairness or prejudice to the Respondent in this case and other respondents who might seek to hold an appellant to the strict consequences of a minor error in submitting documents. If the appellant makes such a minor error:

    a. first it must have rectified that error so there is no continuing unfairness or prejudice to the other party; and
    b. secondly, an extension will only be granted if it is considered "just to do so having regard to all the circumstances". This caters for an appeal where there is substantial injustice in applying the new rule to the circumstances that pertained at the time when the Notice of Appeal was submitted.

32. In these circumstances Parliament intended to apply rule 37(5) to all appeals including those appeals which were instituted before 30 September 2023. The new rule is proposed to draw a better balance between parties to appeals than the old rules. The rules were changed because of the difficulties noted in the Consultation Report. In the interests of reform Parliament is taken to be willing to tolerate any modest hardship befalling a respondent who is denied the opportunity to rely on the strictness of the former rules.

Was the Error Minor?

33. It is accepted that the Claimant made an error in submitting a partial ET3 Response form with the Notice of Appeal. The second issue is whether that error was minor. If it is and the Claimant has rectified the error, I must decide whether to exercise the rule 37(5) discretion in his favour.

34. The Claimant submits that the Notice of Appeal itself was served in time with the ET3 Response form and the omission of the Grounds of Resistance was a minor matter which was quickly rectified. In contrast, the Respondent submits that the Grounds of Resistance are an integral part of the ET3 Response form and that this is an essential document. Mr Kelly submits that this was not a trivial error and the Practice Direction and EAT leaflets made it clear at the time the importance of the grounds being provided.

35. The ordinary meaning of 'minor' is something that is comparatively unimportant. In the context of this rule it can be contrasted with a serious or substantial error. Rule 37(5) is designed to forgive errors which are negligible or of no real importance to the proper progress of an appeal.

36. The EAT Rules did and still do require an appellant to serve a Notice of Appeal substantially in accordance with the standard forms. It requires a written record of the ET's Judgment or Order and Written Reasons for it (or an explanation why they are not included). These are core documents in an appeal. Without the Notice the EAT cannot understand the complaint. Without the Judgment and/or Reasons the EAT cannot normally assess whether there has been an arguable error of law. It would be a rare case in which it could be said that the omission of one of these documents was a minor error. Such an error would normally be serious and of real importance to the proper progress of the appeal.

37. The other end of the spectrum is where all the required documents have been attached but just one or two pages are missing. It is likely to be a minor error to omit a single page of a document that is otherwise intelligible. Indeed even under the existing stricter test there were extensions granted where a single irrelevant page was omitted (*Sud v London Borough of Ealing* [2011] EWCA Civ 995 and HHJ Auerbach mentioned further examples of omission of isolated pages in *Fincham v Alpha Grove Community Trust* UKEATPA/0993/18 (2 March 2020, unreported)).

38. HHJ Auerbach in *Anghel v Middlesex University* [2022] EAT 176 at [28] said that the grounds of claim or resistance are essential documents. They set out the substance of the claim and the defence to it which are likely to be essential in understanding the decision appealed. I agree. The EAT is likely to be more interested in the substance of the claim or the response set out in the grounds rather than the information in the formal parts of the ET1 and ET3 forms which record the personal and contact details of the parties, the dates of employment, earnings and representatives' details. The core elements of the claim and defence as set out in the grounds will often be relevant when assessing a judgment. The contact details of the parties and their representatives are not needed as they are contained in the opening paragraphs of the Form 1 Notice of Appeal. There may be some appeals were the ACAS Early Conciliation information or earnings information is a central issue in the appeal in which case the formal information may be important. However in many other appeals that formal information may have no bearing on issues in the appeal as all the important information about the parties' respective positions below will be contained in the Grounds of Claim and Grounds of Resistance.

39. It may amount to a minor error to omit one or even more pages of a document required by rule 3(1) but that it is unlikely to be a minor error to omit the whole document or a

substantial or important part of the document unless there are circumstances in which it can be said that the document is irrelevant to the appeal. One example of this might be as in the recent appeal in *Shah v Home Office* [2024] EAT 21. Jason Coppel KC, sitting as a Deputy High Court Judge, allowed an appeal from the Registrar refusing an extension where the Appellant had filed the complete ET1 and ET3 forms relating to the claim under appeal, but not the equivalent documents for his six other claims which were heard at the same time. The EAT held that there was room for confusion between the old rule 3 read together with Form 1, the Practice Direction and a guidance leaflet. The Deputy Judge went on to say:

> "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."

Conclusion on Minor Error

40. I must judge the error at the date when it was made. At that date it was a requirement that the Notice of Appeal included the ET3 Response form including the Grounds of Resistance. At the time that was held to be an 'essential document' (*Anghel*, above) which was mandatory to serve with the appeal. The Practice Direction then in force quoted above (and available online to all parties) made it clear that the grounds must be included and without such documentation the appeal would not be validly presented. It cannot be a minor error to omit the whole of a document that was 'essential' to an appeal.

41. Reinforcing this conclusion is that without the Grounds of Resistance the EAT could not have a complete understanding of this Appeal. The EAT had to assess the Claimant's grounds of appeal that the ET was unfairly biased in accepting the Respondent's case. To do so it needs not only the ET's Reasons, but also an understanding of the Respondent's

contentions in the Grounds of Resistance. That contains a detailed section about the background to the claim which is important to understand the Appeal. It also sets out the defences to direct race discrimination and harassment which is important context.

42. In those circumstance I do not regard the Claimant's error as a minor one and so I do not have a discretion to extend time under rule 37(5).

Extension of time under rule 37(1)

43. Although it was not argued by Mr Goudie, I have considered whether to exercise my discretion under the pre-existing power under rule 37(1). I have considered the cases I have cited including those which followed *Abdelghafar*.

44. The Claimant's explanation, as summarised by Mr Goudie's skeleton argument, is that he had included the other documents and "was unaware that he was also required to include the Respondent's Grounds of Resistance". The Claimant's explanation does not amount to a sufficient or good excuse. I note some material similarities to the case of *Anghel* – the Claimant was a litigant in person, he applied for reconsideration of the ET decision and was able to submit an improperly constituted, but in-time, Notice of Appeal which appended most of the required documents, but omitted one essential one. These reasons do not justify an extension of time.

45. I go on to consider whether there are nevertheless exceptional circumstances which justify an extension. I do not regard this case as one involving exceptional circumstances. The Claimant left matters until the end of the 42-day period to submit his appeal, failed to follow the guidance in the Practice Direction and omitted an important document. These were not exceptional circumstances.

46. For these reasons I dismiss the appeal against the Registrar's decision. I record my thanks to both parties for their careful and helpful arguments.