Neutral Citation Number: [2024] EAT 87

Case No: EA-2023-000113-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 June 2024

Before:

His Honour Judge James Tayler

- -

Between:

Mr Adrian Ikeji **Appellant**

- and -

(1) Office of Rail and Road
(2) Ian Prosser
(3) Matthew Farrell
(4) Victoria Rosolia
(5) Donald Wilson

Respondents

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Mr Adrian Ikeji the **Appellant**
Mr Gordon Menzies (instructed by TLT LLP) for the **Respondents**

Appeal from Registrar's Order
Hearing date: 9 May 2024

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JUDGMENT

SUMMARY

Practice and Procedure

The claimant brought two claims in the Employment Tribunal. The claimant sought interim relief in the second of the two claims. At a Preliminary Hearing, on 24 October 2022, the application for interim relief was refused, as was an application to amend the second claim. The appeal against those decisions was properly instituted because the claimant provided the necessary documents within time, including the ET1 claim and ET3 response for the second claim that were required to appeal against the judgment refusing interim relief. It was not necessary to provide the ET1 claim and ET3 response for the second claim to appeal against the refusal to permit the amendment of the second claim because that appeal was against an order, rather than a judgment. The claimant was not required to submit the ET1 claim and ET3 response for the first claim because he did not appeal any decision made in that claim.

His Honour Judge James Tayler:

1. The parties are referred to as the claimant and respondents as they were before the Employment Tribunal. The claimant appeals from a decision of the Registrar refusing an extension of time to institute his appeal, which was found to have been submitted out of time.

2. A claim to the Employment Tribunal is commenced by submitting an ET1, which is a standard form to which particulars of the complaint are often attached. I will refer to the ET1 form and any attached particulars as the "ET1 claim". A respondent replies to the claim on form ET3; and often attaches particulars of response. I will refer to the ET3 and any attached particulars as the "ET3 response". The terminology can be a little confusing as the term claim is used in some of the relevant provisions to refer to the ET1 claim but in others to all of the causes of action (complaints) raised in an ET1 claim. I will use the term "claim" in that latter sense; the ET1 claim is the document and the claim is the sum of the complaints raised in it.

3. The claimant submitted two claims to the Employment Tribunal.

4. Claim 3201367/2022 was received by the Employment Tribunal on 4 April 2022 ("the first claim"). The first claim included complaints of breach of contract (albeit that the claimant's employment had not terminated), race discrimination/race related harassment and victimisation. The respondents responded to the first claim on 20 June 2022.

5. Claim 3204202/2022 was received by the Employment Tribunal on 15 July 2022 ("the second claim"). The second claim included complaints of automatic unfair dismissal on the basis that the reason, or principal reason, for dismissal was that the claimant had made protected disclosures (in respect of which he sought interim relief), disability discrimination and unauthorised deduction from wages. The respondents responded to the second claim on 26 August 2022.

6. By letter dated 22 August 2022, the Employment Tribunal stated that the claims would be considered together.

7. Rule 10(2)(j) of the **Employment Tribunal Rules 2004** ("**ET Rules 2004**") included a specific power for an Employment Tribunal to make an order that different claims be considered

together. That specific power was not repeated in the **Employment Tribunal Rules 2013** ("**ET Rules 2013**"). A number of the specific powers provided for in the **ET Rules 2004** were not replicated in the **ET Rules 2013**. The **ET Rules 2013** include a general power, in Rule 29, to make case management orders. That general power is often used to make orders that complaints be considered together. The **ET Rules 2013** were amended so that certain matters may be determined by a Legal Officer; including determining an application that different claims be considered together. That amendment demonstrates the continuation of the concept of claims being considered together. The **ET Rules 2013,** like their predecessors, do not provide for claims being consolidated. The **ET Rules 2013** applied to the claims subject of this appeal.

8. The claimant applied to amend the second claim to add further complaints of discrimination because of something arising in consequence of disability.

9. A Preliminary Hearing took place before Employment Judge Russell on 24 October 2022. The application for interim relief was refused. The decision to refuse interim relief was set out in a judgment sent to the parties on 4 January 2023. The application to amend, to add further complaints of discrimination because of something arising in consequence of disability, was dismissed in a separate document headed Case Management Summary, also sent to the parties on 4 January 2023.

10. On 26 January 2023, the respondents submitted amended responses in the first and second claims.

11. On 10 February 2023, the claimant submitted an appeal to the EAT. He seeks to challenge the refusal of the applications for interim relief and to amend. The claimant provided the judgment dismissing the application for interim relief and the Case Management Summary refusing the application to amend when he submitted the Notice of Appeal. The claimant sent the EAT Form 1 Notice of Appeal and grounds of appeal. The claimant submitted the ET1 claim and the ET3 response (in the unamended form) in the second claim. The claimant did not submit the ET1 claim and the ET3 response in the first claim.

12. On 18 February 2023, the claimant was asked by the EAT to provide the ET1 claim and the

ET3 response in the first claim. They were provided that day. On 22 May 2023, the claimant was informed that the appeal was not properly instituted because documents were missing in respect of the first claim when the appeal was originally submitted.

13. The claimant sought an extension of time in which to properly institute the appeal. The application was refused by the Registrar by an Order sealed on 21 August 2023.

14. The claimant appealed from the Registrar's Order. I have considered the matter afresh. The claimant asserts that the appeal was properly instituted within time because he submitted all necessary documents in respect of the second claim, which is the claim relevant to his appeal against the refusal of the applications for interim relief and to amend. Alternatively, he asserts that he should be granted an extension of time. The respondents assert that the claimant was required to submit the ET1 claims and the ET3 responses for both claims for the appeal to be properly instituted; and that his error in failing to do so is not a proper basis for granting an extension of time.

15. Rule 3 of the **EAT Rules 1993** provided at the relevant time:

> 3 (1) Every appeal to the Appeal Tribunal shall, subject to paragraphs (2) and (4), be instituted by serving on the Tribunal the following documents–
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> (a) a notice of appeal in, or substantially in, accordance with Form 1, 1A or 2 in the Schedule to these rules;
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> (b) **in the case of an appeal from a judgment** of an employment tribunal **a copy of <u>any</u> claim and response in the proceedings** before the employment tribunal **or an explanation as to why <u>either</u> is not included**; and
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> (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; …
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> (e) **in the case of an appeal from an order** of an employment tribunal **a copy of the written record of the order of the employment tribunal which is subject to appeal and (if available) the written reasons** for the order; [emphasis added].

16. I will start by considering the appeal against the refusal of the application for interim relief. That decision was set out in a judgment. Accordingly, at the time the appeal was submitted, the claimant was required to serve with the Notice of Appeal "a copy of **any** claim and response in the

proceedings" or "an explanation as to why **either** is not included".

17. Rule 3 **EAT Rules 1993** gives rise to a number of questions. The first is what does "any" mean when there is more than one ET1 claim and ET3 response. There could be more than one ET3 response in a single claim because there are multiple respondents. A number of claims might be heard together at one hearing, so there could be a number of ET1 claims and ET3 responses for each separate claim.

18. Possible meanings of the term "any" include:

18.1. each and every ET1 claim and ET3 response in all claims considered at the hearing at which the decision subject of the appeal was made

18.2. a pair consisting of an ET1 claim and an ET3 response from any claim considered at the hearing at which the decision subject of the appeal was made

18.3. each and every ET1 claim and ET3 response in the claim (or claims) subject of the appeal (so, for example, if there is more than one claim that was considered at the hearing, but the appeal only relates to one of the claims, only the ET1 claim(s) and ET3 response(s) for the claim subject of the appeal would be required)

18.4. only the ET1 claim(s) and ET3 response(s) relevant to the appeal (so, for example, if there was a respondent in the Employment Tribunal in the claim that is the subject of the appeal, but the appeal is not brought against that person, the ET3 response submitted by that person is not required

19. Another linked question is what will be sufficient to constitute "an explanation as to why either is not included".

20. In **Richardson v Extreme Roofing Ltd** [2022] EAT 173, [2023] ICR 328 I held:

> 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.

21. HHJ Auerbach adopted a similar approach in **MTN-1 Ltd v O'Daly** [2022] EAT 130; in which he accepted an explanation, which while not entirely satisfactory, was not misleading. The explanation must be genuine but the rule does not require that it results from exceptional circumstances, or the like.

22. In this matter the claimant could have provided a written explanation with the Notice of Appeal stating why the ET1 claim and ET3 response for the first claim were not served. He could have explained that they were not served because they are not necessary for consideration of the appeal which relates only to the second claim.

23. I may have been a little too proscriptive in **Richardson** in referring to a genuine explanation as to why the document "cannot be provided". It may be sufficient to explain why it was not necessary for a ET1 claim or ET3 response to be served, because they relate to some other claim than that which is the subject of the appeal. I also consider that it is at least arguable that in some circumstances the explanation might be implicit in the grounds of appeal. In this case it might be argued that, because the grounds of appeal related only to the refusal of interim relief and permission to amend in the second claim, the grounds of appeal included an implicit explanation of why the ET1 claim and ET3 response from the first claim were not served. For reasons I will now explain, I do not consider it is necessary for me to determine that point.

24. The question of what documents must be submitted to institute an appeal properly when there is more than one claim has been considered in a number of cases.

25. In **Sud v London Borough of Ealing** [2011] EWCA Civ 995 the Court of Appeal considered a case in which there were two claims. One page was missing from the ET1 in the second claim when the appeal was originally submitted. The missing page was submitted two days after the last date for properly instituting the appeal. Etherton LJ, with whom Laws and Longmore LJJ agreed, said:

> 28. … It seems to me, first of all, perfectly clear that at all times there were two separate claims before the ET. They are identified separately by the ET, both in the endorsement on each page of the ET's decision and in the decision itself. Indeed, at the appeal stage, in acknowledging receipt of the documents

> lodged for the purpose of the appeal by the appellant, the EAT explicitly recognised that there were two ET1s, both of those being identified separately on the document receipt form which was issued by the EAT's officers.
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> 29. **There is no principle of common law causing those two claims to become a single claim. Nor has, Mr Downey been able to point us to any specific rule either of the ET or of the EAT which would have had the effect of merging the two claims for all purposes into one. In those circumstances it seems to me perfectly clear that an appeal was properly and fully constituted on any footing in relation to the first ET1.** That being so, the discretion of the Registrar was exercised without taking into account that vital feature. Furthermore, it seems to me that, bearing in mind that the appeal in relation to the first ET1 was fully constituted and required no extension of time, there are exceptional circumstances in the present case, which inevitably would result in an extension of time being given in relation to the second ET1.
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> 30. **Mr Downey's submission that it is in practical terms impossible to deconstruct, if I can put it that way, the ET's judgment, so as to allocate certain findings in relation only to the first ET1 and others to the second ET1, cannot result in the consequence that there can be no appeal in relation to either ET1**. The consequence, it seems to me, of substantially the same matters being covered in both ET1s including, in particular, the question of whether or not the appellant's mental state fell within the DDA is that it is just and right, in accordance with the Overriding Objective, that the two-day extension should be granted in relation to the second ET1 so as to constitute that also a proper appeal. [emphasis added]

26. Notwithstanding the decision of the Court of Appeal in **Sud** there are subsequent decisions of the EAT in which "any" has been interpreted to require the submission of all ET1 claims and ET3 responses. This issue was recently considered by HHJ Auerbach in **Jasim v LHR Airports Limited** [2024] EAT 59:

> 10.In *Carroll v The Mayor's Office for Policing and Crime* [2015] ICR 835 (EAT) the difficulty for the would-be appellant was that he had been one of two claimants in the tribunal, and he had not submitted the claim and response forms for his fellow claimant to the EAT. The EAT concluded that these were required. An issue of interpretation of the EAT's Rule 3(1)(b) arose, whereby that sub-rule referred to the requirement for "any claim and response in the proceedings before the employment tribunal" to be provided. The EAT concluded that "the proceedings" were the overall proceedings involving both Mr Carroll and his erstwhile colleague, Mr Cook. At [56] the EAT said:
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> > "In my judgment the rules do not leave this kind of editorial decision to the prospective Appellant and I reject Mr Crawford's submission that the prospective Appellant can choose, without explanation, whether or not to include the pleadings in the case of a party, who is not minded to appeal. The use of the words "any claim and response in the proceedings before the employment

> tribunal" in rule 3(1)(b) of the EAT Rules are to my mind clear and it is not necessary to interpret "any" as "every" in order to arrive at the meaning contended for by Ms Tuck. The "proceedings before the employment tribunal" where those involving both the Appellant and Mr Cook and "any claim and response" in my judgment clearly means both sets of pleadings in both cases."

11. The third authority to which I was referred is *Shah v The Home Office* [2024] EAT 21, a recent decision of Deputy High Court Judge Jason Coppel KC. Judge Coppel was concerned with a claimant who had brought a number of separate claims but was seeking to appeal the outcome in respect of only one of them. Judge Coppel considered that Sud fell to be distinguished, because the first two claims brought by Mr Shah had been formally consolidated by the tribunal, and on that footing they were to be regarded as a single claim. He cited the White Book (2024 ed.), notes to CPR 3.1.9 (see paragraph 15 of Shah).

12. I take as my starting point the decision in *Sud*. **True it is that the Court of Appeal did not consider specifically the wording of Rule 3(1)(b), but what it did clearly say was that it did not consider that there was any basis on which the two claims could be treated as having merged into one.** Furthermore, in the passage that I have cited, **it did not consider that the argument that, in practice, the issues or evidential territory covered by the two claims overlapped and could not be disentangled, affected the outcome that there were nevertheless two claims; and it considered that if all the paperwork was in order in relation to one of them in time, then the appeal from the decision relating to that one claim was properly instituted in time**. The fact that what was missing in respect of the other claim was only one page was said to be relevant to the issue of whether time should be extended in relation to *that* claim, but did not go to the point about whether, if the paperwork in relation to the *first* claim was complete, the appeal in respect of the decision on that claim was properly instituted.
13.Turning to *Carroll*, while that decision did consider the wording of Rule 3(1)(b), *Sud* does not appear to have been considered by the EAT in that case. It also appears to me, respectfully, that in paragraph 56, whilst stating that it was not necessary to interpret "any" as meaning "every", in order to arrive at the conclusion that Mr Carroll's paperwork was defective without copies of the claim and responses in Mr Cook's case being provided, the EAT went on effectively to reach exactly that conclusion.

14. I am not persuaded that this is the only possible or, indeed, the correct, interpretation of Rule 3(1)(b). True it is that it refers to the "proceedings", and I accept the argument, as such, that the overall proceedings may involve more than one claim, whether by the same claimant or by more than one claimant. **But it seems to me that the words "any claim and response" in the proceedings do not by themselves necessarily mean "every claim and response". By themselves they might equally mean "the claim and response, if any."**

15. Furthermore, I note that the rule (as it was) went on to say "… or an explanation as to why either is not included", suggesting that the drafter was

> making the assumption that only one of each would be needed. This interpretation is also supported by the wording in Form 1, with which rule 3(1)(a) requires an aspirant appellant to comply, which referred to "the claim (ET1)" and "the response (ET3)" and the wording of the 2018 Practice Direction at paragraph 3.1 which referred to "the claim" and "the response".
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> 16. Judge Coppel suggested in *Shah* that the wording of the rule and the wording of the Practice Direction were not entirely consistent with each other and that the position on this point was not entirely clear. I would respectfully suggest that the interpretation that "any" means "if any" means that the wording can be reconciled and is consistent, the focus of the Rule being on the relevant claim and response, even if there may have been others in the wider proceedings in the tribunal.
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> 17. Nor do I think this is a fanciful interpretation, as there will be cases in which there is no response, in particular where a respondent is appealing against a rule 21 decision granting judgment against it precisely because no response has been entered. Although a case in which there is no claim may be harder to envisage, it could be said that an appeal against a rule 12 decision refusing to accept a claim would fall into that category on the basis that – though it may be something of a linguistic point – an unaccepted claim is not a claim at all.
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> 18. I am not persuaded, therefore, respectfully, that the reasoning in *Carroll* undermines the point made by the Court of Appeal in *Sud*, notwithstanding that Rule 3.1 was not analysed in Sud.
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> 19. Nor, respectfully, am I persuaded that the distinction referred to in *Shah*, between consolidation and claims being directed to be heard together, militates against my reading of the Rules. Whilst, in the civil jurisdiction, the CPR or, at any rate, the commentary in the White Book, refer to, and identify, a formal distinction between a process of consolidation and a process of directing that claims be heard together, there is no counterpart in the Employment Tribunals Rules of Procedure 2013; and indeed, the customary direction in the employment tribunal, as was given in this case, is simply for one or more claims to be heard together, though a lawyer might use the word consolidation to refer to that direction.
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> 20. **For all of these reasons I consider that, insofar as the claimant is seeking to appeal from the decision on the claims brought in the claim form, in respect of which complete copies of the ET1 and ET3, Particulars of Claim and Grounds of Resistance, were included, namely Claim No. 3320062 of 2019, his appeal has been instituted in time**; but, as is accepted by Ms Reilly, it was not instituted in time in respect of Claim No. 3335322 of 2018, because the ET1 and ET3 were not provided, at the time these were required documents, and providing the Particulars of Claim and Grounds of Resistance without those forms was not sufficient to comply with the Rule at the time.

27. In **Jasim** Judge Auerbach decided, having carefully considered the reasoning in **Carroll** and **Shah**, that **Sud** is binding Court of Appeal authority that when there is more than one claim in the

Employment Tribunal it is only necessary, along with the other required documents, to submit the relevant ET1 claim(s) and ET3 response(s) in the claim that is the subject of the appeal. While in certain appeals there may be some difficulty in disentangling which grounds of appeal relate to which claim, that is not a sufficient basis to conclude that the appeal in respect of a claim for which all of the relevant documents have been served is not instituted within time.

28. I agree with the reasoning of Judge Auerbach in **Jasim** and, despite the finding that any means all in the judgments he refers to, and more recently in **Akhigbe v St Edwards Homes Ltd** EA-2021-000505-AS, consider that his analysis is correct because it is consistent with the decision of the Court of Appeal in **Sud**.

29. The issue in this appeal may seem academic now that Rule 3(1)(b) of the **EAT Rules** has been repealed, but there are still a significant number of appeals from Registrar's Orders in respect of the timely proper institution of appeals that are still to be determined. The repeal only applies to appeals submitted after the rule change came into effect, unlike the change to add Rule 37(5) **EAT Rules**, that permits minor errors to be forgiven, which applies to all appeals where an application for an extension of time is considered after the rule change took effect: **Melki v Bouygues E & S Contracting UK Limited** [2024] EAT 36.

30. The construction of the old Rule 3(1)(b) that only requires the relevant ET1 claim(s) and ET3 response(s) to be served in respect of the claim that is the subject of the appeal deals with a number of potentially significant problems. For example; in large scale multiple claims to the Employment Tribunal, such as equal pay multiples, there could be a very large number of ET1 claims and ET3 responses. It is hard to see how in such claims it would be in anyone's interest to require that each and every one of the ET1 claims and ET3 responses must be served in order properly to institute an appeal.

31. The respondents raise a further issue. The ET3 responses were amended after the Preliminary Hearing at which the applications subject of this appeal were refused. This illustrates a further problem that arose from the requirement to serve the ET1 claim and ET3 response when submitting

an appeal. If the ET1 claim or ET3 response have been amended, which version should be served? In this case I can see no basis on which it could properly be asserted that the amended response should have been served in the appeal against the refusal of interim relief as the amendment took place after the refusal.

32. In respect of the refusal of the application to amend to add further claims of discrimination because of something arising in consequence of disability, it is asserted that the amended response was required to allow a proper understanding of how the respondents defend the claim. I consider there is a simple answer to this argument. The refusal of the application to amend was an Order. Rule 3(1)(e) **EAT Rules** does not require submission of the ET1 claim or ET3 response when appealing against an Order. Accordingly, the appeal against the refusal of the application to amend was properly instituted. Further, even if a refusal of an application to amend were to be considered to be a judgment, I cannot see that there would be an error in providing the ET1 claim as it was at the time the application was determined.

33. The problems I have considered above, that arose under the rules prior to their recent amendment, in claims in which there are multiple ET1 claims and ET3 responses (and possibly amended versions) underlines the benefits that have arisen from the amendment to remove Rule 3(1)(b) and to add Rule 37(5) **EAT Rules** in terms of efficient disposal of appeals and access to justice. For many years the EAT has adopted an approach to the proper institution of appeals that is particularly stringent, even in the context of an appellate jurisdiction. The recent rule changes moves the EAT back into the mainstream of appellate courts and tribunals.