Neutral Citation Number: [2024] EAT 133

Case No: EA-2022-001186-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 August 2024

Before:

His Honour Judge James Tayler

- -

Between:

(1) Ms M Hewer
(2) Mr E Martin

Appellants

- and –

(1) HCT Group
(2) CT Plus CIC
(3) LC Transport (UK) LTD (In Liquidation)

Respondents

- -
- -

Andrew Carter (instructed by Summit Law LLP) for the **Appellants**
No attendance for the **Respondents**

APPEAL FROM REGISTRAR'S ORDER

Hearing date: 17 May 2024

- -

JUDGMENT

Practice & Procedure

His Honour Judge James Tayler:

1. A claim to the Employment Tribunal is commenced by submitting an ET1 ("ET1"), which is a standard form to which particulars of the complaint are often attached. I will refer to the ET1 and any attached particulars as the "ET1 claim". A respondent replies to the claim on form ET3 ("ET3") and often attaches particulars of response. I will refer to the ET3 and any attached particulars as the "ET3 response".

2. Five claimants brought claims in the Employment Tribunal. Each claimant submitted an ET1 claim and each claim was assigned a different number. Separate ET3 responses were served in each claim.

3. A written judgment was sent to the parties on 16 September 2022, determining preliminary issues about the effect of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** on the employment of the claimants. The written reasons for the Judgment were sent to the parties on 11 October 2022.

4. Two of the claimants ("the claimants") sought to appeal from the decision of the Employment Tribunal. The other claimants in the Employment Tribunal did not appeal ("the other claimants").

5. The appeal was received by the EAT on 23 November 2022. The ET1 form, grounds of appeal, written reasons for the Judgment, ET1 claims and ET3 responses for the appellants were submitted. The written judgment was not submitted. The ET1 claims and ET3 responses for the other claimants were also not submitted. The appeal was submitted by the claimants' solicitors by e-filing. The record of the filing includes the following comment from the claimants' solicitors:

> We enclose the Appellants Appeal against the written judgement of the Employment Tribunal, the Appellant's Forms ET1 and ET3s, **the Employment Tribunal's initial judgment** and the **Employment Tribunal's full written reasons**. [emphasis added]

6. This note suggests that the claimants' solicitors were aware that the written judgment should be lodged in addition to the written reasons and it appears they thought that it had been lodged.

7. The claimant was informed on 23 November 2022 that the appeal was not properly instituted in time because and ET1 claims and ET3 responses for the other claimants were not submitted. The letter did not refer to the missing written Judgment. The ET1 claims and ET3 responses for the other claimants were provided on 24 November 2022. The claimants' solicitors explained that they were only acting for the claimants, not the other claimants whose ET1 claims and ET3 responses had not been provided.

8. On 24 November 2022, the EAT wrote to acknowledge the ET1 claims and ET3 responses for the other claimants and stated:

> Our preliminary checks indicate that this appeal has been lodged properly instituted. It will now be referred to your case manager who will ensure that it has been lodged in accordance with Rule 3 of the Employment Appeal Tribunal Rules 1993 (as amended). This includes checking to ensure that all necessary supporting documents have been received and whether the appeal has been received within 42 days.

9. On 15 February 2023 at 14.51 the EAT wrote asking for the written judgment.

10. The written judgment was sent to the EAT by the claimants' solicitors at 15.56. Steven Eckett, Partner and Head of Employment, wrote:

> Further to your email of today's date, please see the attached which is an email from the Employment Tribunal which attaches the short Judgment dated 16 September 2022.
>
> We believe that this is the document that you have requested.
>
> In our appeal we attached the Tribunal's full written reasons, which detailed their decision and full rationale relating to the identity of the employing entity. This is the point we are appealing against, and we would argue that this is the relevant document that the EAT needs to review.
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> **We would respectfully suggest that we have submitted the Appeal and relevant supporting documentation in time.** [emphasis added]

11. This is not consistent with the original filing in which it appears to have been appreciated that the written judgment was required, in addition to the written reasons.

12. On 16 February 2023, the EAT wrote stating that the delay in providing the written reasons meant that the appeal had been properly instituted 85 days out of time. The letter explained the process

for seeking an extension of time.

13. On 16 February 2023, Mr Eckett sent an email attaching a letter seeking an extension of time stating:

> 2**. When navigating the e-file Portal it was not too clear in terms of how to upload the relevant documentation that was requested. It was quite challenging and was not user-friendly**.
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> 3. The information that we were informed to upload at that time, were the ETl's and ET3's, the Notice of Appeal and the written judgment. We duly uploaded all of the documentation required. We attach an image showing the documentation that we uploaded including the full written reasons which we maintain is the relevant judgement for the purpose of the appeal.
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> 4. **At the time of making the appeal on the e-file portal it was only possible to file one written judgment.** We therefore submitted the judgment containing the Employment Tribunal's full written reasons dated 1 1 October 2022 and this is what we have referred to in our Notice of Appeal. The original Tribunal judgment dated 16 September 2022, did not contain the Employment Tribunal's full written reasons and we genuinely believed that the EAT would need to see the full written reasons as opposed to the short judgment which did not contain those written reasons. **We also attach both of these judgements which clearly show that the full written judgment dated 1 1 October 2022 is the one that the EAT will need to view to determine the appeal. …**
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> 6. It is correct that the EAT requested the original short judgment from us on 15 February 2023 and this was promptly provided to the EAT on the same day and as soon as we were notified. …
>
> In summary we would urge the EAT to allow the appeal to proceed on the basis that we provided our client's ETl's and ET3, the Notice of Appeal, and the judgment of the Employment Tribunal containing their full written reasons in time on 16 November 2022. **The e-file portal also only allowed us to upload one judgment and we took the view that the judgment containing the full written reasons would be the relevant version that the EAT needed to view.** The original short judgment does not contain the full written reasons of the Employment Tribunal.
>
> Accordingly, we would respectfully request that the EAT allow the appeal to proceed as we have provided all of the documentation in time and in good faith with the intention of fully assisting the EAT. This includes the relevant judgment containing the Employment Tribunal's full written reasons.
>
> We sincerely hope that common sense can prevail.

14. By an Order sealed on 30 November 2023, the Registrar refused an extension of time.

15. The claimants appealed from the order of the Registrar on 5 December 2023. In the "Grounds

of Appeal" it was stated:

> 4. **The solicitor with conduct of the appeal for the Claimant's gave a frank and clear explanation that "the e-file Portal was not too clear in terms of how to upload the relevant documentation that was requested. It was quite challenging and not user-friendly**." He went on to explain that **it was only possible to upload one written judgment** and took the decision to upload the written reasons for judgment, which were most relevant on appeal. Notwithstanding the essential nature of the written record of judgment to the appeal, the e-file Portal permitted the appeal to be lodged. …
>
> 6. By reason of recent amendments to the EAT Rules, the EAT has power to extend time for compliance with the rules relating to the institution of appeals under r37(5) …
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> 10. The failure to include the written record of judgment has been frankly explained by the solicitor with conduct of the appeal and remedied immediately on notice from the EAT. …
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> 11. The appeal is at least reasonably arguable and the obligation to deal with the case justly strongly tends in favour of dealing with the appeal on its substantive merits.
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> 12. There are important consequences in particular for Mr Martin. It is the Claimants' contention that it is R1 who is liable to them as their employer by reason of TUPE, not R2 as found by the ET. Mr Martin has outstanding claims of discrimination to be brought against his employer, whether R1 or R2. Both R1 and R2 are in Administration, but it is believed that the prospects of R1 successfully exiting administration are higher than for R2, which seems destined to exit Administration into insolvent liquidation. The outcome of this appeal will effectively determine whether Mr Martin will be able to pursue his claims of discrimination at all.

16. Mr Carter, Counsel for the claimants advanced these grounds in his skeleton argument and oral submission, and added in his oral submissions that if the error was that of the claimants' solicitors that should not be visited on the claimants.

17. An appeal from a Registrar's order is a rehearing, so I will consider the matter afresh.

18. At the time that this appeal was submitted Rule 3 of the **EAT Rules 1993** provided that:

> 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–
>
> (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**; 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**; … [emphasis added]

19. It is clear from the rule that there is an absolute requirement to submit the written judgment. It is not possible to provide an explanation for the absence of the written judgment as it is in the case of the written reasons, ET1 claim and ET3 response.

20. In **Ikeji v Office of Rail and Road & Others** 2024 EA-2023-000113-JOJ, I concluded that to institute an appeal properly it was only necessary to provide the ET1 claim(s) and ET3 response(s) in respect of the claim(s) subject of the appeal. In this appeal, I do not consider it was necessary for the claimant to submit the ET1 claims and ET3 responses for the other claimants. Accordingly, the claim was not improperly instituted in that regard.

21. The appeal was not properly instituted because of the absence of the written judgment, although the reasons were submitted.

22. In **United Arab Emirates v Abdelghafar and Anor** [1995] ICR 65 the then President of the EAT, Mummery J, provided guidance on extension 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 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 stated

that an extension may be refused even though the default in observing the time limit has not caused any prejudice to the other party. Mummery J stated that an extension of time is an indulgence to be requested. There is no right or legitimate expectation that an extension of time will be granted. There is a strict time limit. The parties are informed of the time limit in a booklet that is sent together with the judgment. Therefore, even for a litigant in person, lack of knowledge is no excuse. The Tribunal will expect a full and honest explanation for the delay and will also consider whether there are any other circumstances which justify the exceptional step of granting an extension of time. Mummery J suggested that the EAT should consider the explanation for the delay, whether it provides a good excuse for the default and whether there are circumstances that justify the tribunal taking the exceptional step of granting an extension of time.

23. The authorities relevant to 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.

24. In **Carroll v Mayor's Office for Policing and Crime** [2015] I.C.R. 835 His Honour Judge Hand QC considered the approach to be adopted where an appeal is improperly instituted either wholly or partially because of an error on the part of a legal advisor:

> 67. Finally I need to consider whether the conduct of the claimant and his legal adviser should be separated out and considered separately. **In *Muschett v Hounslow London Borough Council* [2009] ICR 424 Judge McMullen QC referred to *Chohan v Derby Law Centre* [2004] IRLR 685 (see paras 34 and 35(xv) above) as providing a basis in para 16 of that judgment for the fault of the legal adviser being a consideration in the exercise of the discretion to extend time. I think it worth pointing out that the Chohan case was concerned with an extension of time for submitting a complaint in a discrimination case under the statutory formulation of it being "just and equitable" to grant an extension.** Clearly those concepts are considerations that any judge or tribunal would wish to bear in mind in the exercise of any discretion, but **I think it should also be recognised that the exercise of discretion in respect of the commencement of proceedings at first instance might be somewhat different to the exercise of discretion in relation to extending the time limited for appealing** and, apart from the judge having identified it as a factor, so far as I am aware there is no further authority on the point in the present context.

> 68. **I agree with Judge McMullen that it can be considered as a factor but much may depend on the nature and degree of responsibility and I think it would be unwise for this appeal tribunal to attempt to investigate these matters in cases where allocation of responsibility is not immediately obvious**; the intervention of legal professional privilege, even though I recognise it can be waived by the client, might make that very difficult and, in any event, my instinct is that it should not be undertaken, unless absolutely necessary. **Consequently, I do not think that, generally speaking, very much weight should be given to such a factor in the exercise of discretion in the present context unless it can be clearly seen that the entire responsibility lies with the legal advisers. Even then I find it difficult to think of circumstances where legal advisers were at fault should tip the balance in favour of an extension.**
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> 69. **I think considerations as to whether the claimant might have a remedy against his legal advisers in separate proceedings are of very marginal significance** and I give no weight to that in this case, although I do not exclude the possibility that in some cases it might be a relevant consideration, although I suspect such cases will be few and far between. Also I am unable to accept Mr Crawford's proposition that the claimant should not suffer any disadvantage if the error might be thought to lie with his legal advisers. It does not strike me as a sound proposition that a claimant whose legal advisers may be thought to be at fault could be in a better position than a litigant in person who has made the mistakes himself, herself or itself.
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> 70. In short it would take a very clear case before fault on the part of the legal adviser could be regarded as a factor and in my judgment this is by no means a clear case on the evidence.

25. I consider the approach in **Carol** is to be preferred to that of HHJ Mc Mullen in **Muschett** for the reason given by HHJ Hand QC. The reference to the marginal importance of a possible remedy against a legal advisor is consistent with that of the Court of Appeal, when considering strike out because of the conduct of a representative, in **Phipps v Priory Education Services Ltd** [2023] EWCA Civ 652, [2023] I.C.R. 1043.

26. This judgment was delayed because I became aware that the Court of Appeal was due to consider whether a different approach should be adopted depending on whether there is a failure to institute an appeal within time at all, or whether an appeal is not properly instituted because a document or part of a document was missing. The Court of Appeal has now given a single judgment in the joint appeals; **Ridley** [2024] EWCA Civ 884 in which it held:

> 143. **The principles and guidance set out in *Abdelghafar* [1995] ICR 65**

concerning the EAT's approach to applications to extend the time limit for appeals have been approved by this Court on several occasions. **It is perceived as being a strict, perhaps 'hard-hearted', approach. But it is not inflexible. It involves the exercise of a discretion in a way which is 'judicial', 'even-handed' and, above all, fair.**

144. We conclude that the exercise of the discretion involves recognising a material distinction. **There is a legally significant difference between the case of an appellant who lodges a notice of appeal and nearly all of the documents required by rule 3(1) inside the time limit, and an appellant who lodges nothing until after the time limit has passed. The first such appellant has not fully met the requirements of rule 3(1), but has, nevertheless, substantially complied** with them. **How substantially depends on what document/documents is/are missing, how much of any document is missing, and how important the document is to the appeal.** That appellant has also, on the face of it, complied with the time limit in rule 3(3). That difference is obviously material to the exercise of the discretion to extend time. It follows that that difference should, in principle, be reflected in the EAT's approach to the exercise of its power to extend time. We accept that the authorities about cases in which documents were missing do not refer to this distinction, and, it follows, do not consider it whether or not it is material to the exercise of the discretion. But we see nothing in the reported decisions in this Court to suggest that we are wrong to hold that the distinction we have identified is material to the exercise of the discretion.

145. The express recognition of the importance of that distinction is consistent with, and does not conflict with, the guidelines in *Abdelghafar*, by which we are bound. The basis of those guidelines is that the EAT takes a strict view of the importance of submitting an appeal within the time limit in rule 3(3). The three appeals with which we are concerned, however, are all cases in which an appellant has substantially complied with that rubric. Moreover, the guidelines are just that. They are not rigid rules of thumb. Rather, they are intended to guide the exercise of a very wide discretion, not to dictate the outcome of that exercise, as Mummery J made clear in *Abdelghafar* and as Rimer LJ repeated in *Jurkowska* (see paragraphs 24-28 and 53, 57 and 61-63, above). …

147. **Three further points follow**. **First, a case in which an appeal is lodged in time but a document or part of a document is missing is very likely to be a case in which the appellant has made a mistake.** The mistake is the reason for invoking the discretion conferred by rule 37(1). **The fact that a mistake has been made cannot, therefore, be used as a reason for barring the exercise of that discretion** (and see paragraph 152.ii., below). **An understandable or reasonable mistake about the documents cannot necessarily be discounted simply on the basis that, had the litigant filed the papers earlier, the mistake might have been picked up and corrected before the expiry of the time limit.** That would be to exercise the discretion in a 'programmed' way. **Second, before it can lawfully consider the exercise of its discretion in such cases, the EAT must clearly understand the appellant's explanation for her mistake,** because, unless it does so, it cannot properly consider whether that explanation is satisfactory or not.

> Third, while the EAT has no duty to correct an appellant's mistakes, **when the EAT in due course tells the appellant the she has made a mistake, the delay which is relevant to the exercise of the discretion to extend time is the delay between when the EAT tells the appellant of her mistake, and when she corrects it**, a point recognised by Judge 1 (see paragraph 109, above).

27. With effect from 30 September 2023, the rules were amended to add Rule 37(5) **EAT Rules** which permits a minor error in submission of the necessary documents to be waived:

> 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.

28. That rule was considered by Andrew Burns KC, Deputy Judge of the High Court, in **Melki v Bouygues E&S Contracting UK Ltd**. [2024] EAT 36, in which he held that the new rule 37(5) **EAT Rules** applies to all appeals whenever instituted if an extension of time is being considered after the new rule came into effect. Judge Burns also considered what is meant by the word "minor".

> 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**.
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> 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)). …

> 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**. …

29. I do not accept that the failure to provide the written judgment was a minor mistake. The written judgment is a required document that must be provided. The **EAT Rules** do not permit an explanation to be given for failing to submit the written judgment. It is the judgment against which an appeal is brought. It is generally necessary to consider the precise terms of the judgment when considering the grounds of appeal. Accordingly, I do not consider it appropriate to grant an extension of time pursuant to Rule 37(5) **EAT Rules**.

30. I consider that the failure to upload the written judgment was as a result of an error on the part of the claimants' solicitors. I am not aware of any issue that prevents uploading more than one judgment to CE-File. Parties routinely submit both a written judgment and written reasons. Even if there were a problem in naming two documents as judgments the written reasons could be described as such. If there was a problem in submitting all of the required documents they could have been sent by email. The original email correspondence suggests that the claimants' solicitors understood that the written judgment should be uploaded together with the written reasons. I have taken account of the fact that the written judgment is required and an explanation cannot be provided for the omission. In this case having reviewed the written judgment and written reasons I consider that the reasons provided the material necessary to understand the appeal, albeit that a judge would be likely to want to check the judgment before sifting an appeal. The administrators for the two Respondents currently in administration while objecting to the grant of an extension has not pointed to any specific prejudice and appear to agree that if an extension is granted the appeal should move forward. The other respondent has been liquidated. To the limited extent that it is relevant I consider that the mistake was entirely that of the claimants' solicitors as it is clear they had both the written Judgment and written reasons and should have been able to upload both. As soon as the claimants' solicitors were informed

that the written judgment had not been submitted it was provided. Just on balance, I am persuaded that it is appropriate to grant an extension of time so that the appeal is properly instituted within time. The appeal will now be passed for sift.