

Neutral Citation Number: [2024] EAT 148

Case No: EA-2023-000051-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 September 2024

HIS HONOUR JUDGE JAMES TAYLER

Between:

MR F AMEDZO

Appellant

- and -

BIDVEST NOONAN (UK) LIMITED

Respondent

Mr F Amedzo the **Appellant** in-person
Mr Matthew Bignell (instructed by **Fieldfisher LLP**) for the **Respondent**

APPEAL FROM REGISTRAR'S ORDER

HEARING DATE: 04 July 2024

JUDGMENT

HIS HONOUR JUDGE JAMES TAYLER:

1. The parties are referred to as the claimant and respondent as they were before the Employment Tribunal.
2. The claimant appeals from an Order of the Registrar refusing an extension of time properly to institute this appeal. An appeal from a Registrar's Order is a rehearing.
3. 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. A respondent replies to the claim on form ET3; and often attaches particulars of response.
4. The Judgment, dismissing the claimant's claim of constructive unfair dismissal, was sent to the parties on 16 December 2022.
5. On 26 January 2023, the claimant submitted an appeal. He submitted all the documents that were required at the time except the ET1 and ET3 forms. The grounds of complaint and grounds of resistance were provided. The claimant did not explain why the ET1 and ET3 forms were not submitted.
6. The 42-day time limit for instituting an appeal expired at 4pm on 27 January 2023.
7. On 2 February 2023, the staff of the EAT informed the claimant that the ET1 and ET3 forms were missing. The claimant submitted them the next day, 3 February 2023.
8. The claimant applied for an extension of time to institute the appeal properly on 17 March 2023. He stated:

1. A copy of the Judgement and its reasons was received on the 16th December 2022. This was a week to Christmas break for 2022

2. Soliciting for an appointment date for a professional legal consultation and advise was a challenge in the week to Christmas 2022

3. The earliest date obtained for an initial professional legal consultation was in the new year 13th January 2023. A full advise was then presented to me on 20th January 2023 from the initial legal consultation held.

4. A final writeup was done and submitted my Notice of Appeal on 26th January 2023. The actual grounds for both ET1 and ET3 was submitted **but the forms for ET1 and ET3 was mistakenly missing**

5. I did responded promptly the very day the court replied on 2nd February 2023.

6. In the interest of justice I wish to state that it was not deliberate but again due to the Christmas and the new year holiday break.

7. As I can only appeal on questions of law it was proper to seek advise hampered by the Christmas holiday into the new year. [emphasis added]

9. The respondent objected to the application by letter dated 11 April 2023. The respondent summarised their understanding of the claimant's argument:

The Appellant's ground of his application for an extension are principally summarised as:

(a) Struggling to get legal representation during the Christmas holiday period in 2022; and

(b) **Unintentional and mistaken omission of the ET1 and ET3 Forms** when the Claimant submitted his Notice of Appeal on 26 January 2023. [emphasis added]

10. The respondent summarised their submission:

The Appellant did not submit his Notice of Appeal until the day before the deadline to institute any appeal. The ET1 and ET3 forms were missing. The Appellant's prospective Appeal (properly constituted) has been filed **7 days** out of time.

The Appellant has not provided any information for the EAT to reasonably conclude that the circumstances are exceptional and warrant an extension of time. We submit that the Claimant has not shown a good excuse for the delay at set out in paragraph 4.7 of the Practice Direction. Further, we submit that the test set out in paragraph 38 of *United Arab Emirates v Abdelghafar [1995] ICR 65* has not been met, in particular a full explanation for the delay has not been provided, the Appellant has not provided a good excuse for the default and there are no exceptional circumstances which justify the EAT taking the exceptional step of extending time.

11. The respondent did not rely on a contention that the appeal was obviously hopeless.

12. By a letter sent on 17 April 2023 the EAT gave the claimant an opportunity to make final submissions.

13. The claimant provided his final submissions on 24 April 2023:

1. Firstly I have attached to this communication evidence that demonstrate respondent had requested not once but twice "Extension of Time" all granted by the employment Tribunal in this matter

2. Respondent legal representative are distinguished among the UK top 200 law firm but yet still in the second extension of time requested and its reasons presented to the

tribunal, claimed covid 19 with no supported evidence when as a matter of fact the Government had already lifted covid restrictions at the time but in the interest of justice the tribunal found reason in granting both extensions of time requested

3. The respondent is therefore not candid stating I had not provided evidence to support my extension of time request when as a matter of fact the Christmas and new year holiday breaks are public statutory holidays observed in the UK which hampered timely intervention for legal advice.

4. The respondent had not appreciated in its objection that I am still a self litigant and the legal advice sort is as a result of the narrow window on grounds of appeal the EAT will grant consideration hence I did the writeup myself within the limited time and still managed to make a full submission within the 42 days window on 26/01/2023

5. I am respectfully inviting the court to consider the documents attached in its full effect in the circumstances of the two extensions granted earlier by the tribunal to the respondent juxtaposed to my request in the interest of justice in granting me extension of time to this appeal

6. I am respectfully also inviting the court to exercise its discretionary powers in that **although some documents mistakenly missing in the 26/01/2023 filing, immediate steps was taken the very day the court informed me on 02/02/2023 which was remedied and fully constituted.** The respondent respectfully should not rely on this as a reason to deny justice in granting this request. [emphasis added]

14. By Order sealed on 7 September 2023 the Registrar refused the application.

15. On 26 September 2023, the claimant appealed the Registrar's Order focusing on the contention that he had been delayed in obtaining legal advice and that the respondent had been granted extensions of time in the Employment Tribunal.

16. At the time this appeal was instituted, the documents that an appellant was required to submit with the Notice of Appeal were set out in Rule 3 of the **EAT Rules 1993**:

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]

17. With effect from 30 September 2023, the rule was amended to remove the requirement to serve any claim forms and responses with the notice of appeal. That change does not apply to this appeal. At the same time Rule 37(5) **EAT Rules 1993** was introduced that provides:

37(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.** [emphasis added]

18. In **Melki v Bouygues E & S Contracting UK Limited** [2024] EAT 36 Andrew Burns KC, Deputy Judge of the High Court, held that this provision applies whenever considering an extension of time properly to institute an appeal, even if the appeal was submitted prior to the amendment coming into force. Judge Burns considered the approach to be adopted as to whether an error is 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.

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 where 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).

19. In **Melki** the ET1 and ET3 forms were submitted but the grounds of complaint and grounds of resistance were not. Accordingly, the comments made by Judge Burns about the ET1 and ET3 forms were strictly Obiter.

20. In his skeleton argument for the hearing of the appeal against the Registrar's Order, Mr Bignell contended that the claimant had failed to provide any good excuse for his default and that there was no exceptional reason capable of justifying an extension of time. Mr Bignell also contended that the error in failing to submit the ET1 and ET3 forms was not minor for the purposes of Rule 37(5) **EAT Rules 1993**, but that if it was, I should not exercise the discretion to extend time because the claimant had every opportunity to institute his appeal properly, with the benefit of both materials to which he was signposted and legal advice, the 7 day delay was substantial having regard to the importance of finality in litigation, the default was only remedied because of the EAT contacting the claimant and rather than taking responsibility the claimant had sought to blame public holidays for delays in legal advice (which he ultimately received well in advance of the deadline), a narrow appeal window (which is in fact generous) and inconsistent decision-making by the Registrar and Tribunal (when in fact there has been no such inconsistency).

21. After the hearing I referred the parties to a further authority, **Jasim v LHR Airports Limited** [2024] EAT 59, and sought further submissions. In **Jasim** the ET1 and ET3 forms were missing but the grounds of complaint and grounds of resistance were submitted, as in this appeal. Judge Auerbach approved the approach of Judge Burns in **Jasim** and held:

30. What I take from this, and with which I respectfully agree, is that the question of whether the error is minor is to be judged in particular by reference to the significance or not of what has been omitted, for the appeal

in hand, and the issues to which it gives rise. This is a fact-sensitive matter to be decided case by case. It does not follow that in every case a failure to include the ET1 and ET3 forms will be a minor error and Judge Burns himself made some points about that. It will depend upon what is in those forms in the given case, and what issues are raised by the appeal in the given case, as well, possibly, as whether information contained in those forms is also to be found in the submitted documents.

31. In this case Ms Reilly has demonstrated that all of the information contained in the missing ET1 and ET3 was to be found in the documents that were submitted with the Notice of Appeal. I do not need to go through the analysis in detail, because Ms Dervin did not, I think, dispute this, as such. But, in particular, as well as the basic information about the identities of the parties, and so on, being available from the submitted documents, the substance of what the claimant was claiming could be gleaned from the other documents that were provided, including both his Particulars of Claim and also the respondent's Grounds of Resistance, the latter of which also included a summary of what he was claiming. I conclude that, on the particular facts of this case, the error was minor.

22. The respondent accepted in its first further submissions that the failure of the claimant to serve the ET1 and ET3 forms was a "minor error" for the purposes of rule 37(5) **EAT Rules 1993**. The respondent asserted that the discretion should not be exercised in the claimant's favour because (1) the balance of justice and injustice to each of the parties favours the respondent given that the claimant's appeal is obviously hopeless; and (2) the claimant has no good explanation for his default and has not been consistent.

23. This was the first time that it was asserted that I should not grant an extension of time because the appeal was obviously hopeless.

24. Shortly after receiving the submissions about **Jasim** there was a further significant development in the caselaw when the Court of Appeal gave its judgement in **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 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). [emphasis added]

25. **Ridley** establishes that there is a significant difference between a failure to submit an appeal

in time and a failure to submit all of the relevant documents with a Notice of Appeal. The guidance in **United Arab Emirates v Abdelghafar and Anor** [1995] ICR 65 does not preclude the EAT having regard to this difference.

26. In **Abdelghafar** 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.

27. I sought further submissions in respect of **Ridley**. In his response Mr Bignell, for the respondent, contended that the claimant has not put forward a good excuse for his default, but has

given inconsistent explanations, the appeal was submitted at the last minute, the appeal is obviously hopeless, the default was significant, being more than the omission of just a page or two of the relevant documents, and that there are no rare or exceptional circumstances that would justify an extension of time.

28. I apologise for the considerable delay that has been caused by seeking submissions on these authorities, but I consider it was unavoidable to ensure that I had full submissions.

29. I will first consider Rule 37(5) **EAT Rules 1993**. The respondent accepts that the error in not submitting the ET1 and ET3 forms was minor. I have considered the manner in which, and the timeliness with which, the error has been rectified. Mr Bignell contends that the claimant did not rectify the problem of his own motion but only did so the day after he was informed of the error by the staff of the EAT. Mr Bignell contends that a 7 day delay was substantial. I consider that the delay objectively was for a short period and it is relevant that the claimant corrected the error swiftly after being told about it. While there might be errors that are even more minor, the respondent has not suggested that there was information in the ET1 and ET3 forms that was necessary properly to understand the appeal. I do not consider that the delay caused any significant prejudice to the respondent.

30. I also have considered the relevant circumstances. Mr Bignell contends that the claimant has sought to blame the Christmas period for delay in obtaining legal advice. He criticises the claimant for suggesting that the period in which an appeal should be submitted is short. Mr Bignell contends that the claimant left submitting his appeal to the last moment and has given inconsistent explanations for his default. I consider that, on a fair analysis, the claimant asserted that he delayed submitting the appeal (as opposed to failing to attach the ET1 and ET3 forms when he did submit the appeal) because of the time it took him to seek legal advice over the Christmas period. While I do not agree with the claimant's suggestion that the period for an appeal is short, I do not consider it is unreasonable for the claimant to assert that seeking advice is more difficult over the Christmas period. However, from the outset the claimant accepted that the failure to submit the ET1 and ET3 forms when he did submit

his appeal was a mistake. In his original application for an extension of time he stated “the forms for ET1 and ET3 was mistakenly missing”. This was understood by the respondent. It was stated in the response that the claimant was asserting “Unintentional and mistaken omission of the ET1 and ET3 Forms”. In his final submission to the Registrar the claimant referred to “some documents mistakenly missing in the 26/01/2023 filing”. I do not consider that the claimant has sought to mislead. The claimant accepted that he made a mistake. In **Ridley** the Court of Appeal noted that will generally be the case where an appeal is not properly instituted because of missing documents.

31. The claimant has asserted that he should be granted an extension of time properly to institute his appeal because the respondent was granted extensions of time in the Employment Tribunal. That is a bad argument because of the different provisions and approach to extension of time at first instance as opposed to on appeal. However, I can see why the apparent disparity of treatment might seem unfair to a litigant in person and do not consider that advancing this argument should be held against the claimant.

32. I have considered the respondent’s assertion that the appeal is obviously hopeless. This is not an argument raised prior to, or at, the hearing I conducted to consider the appeal from the Registrar’s Order. I do not consider it would be fair to allow it to be raised in response to request for further submissions in respect of the two recent appellate authorities. Further, on reviewing the judgment and notice of appeal I do not consider it would be fair to deprive the claimant of the opportunity of the appeal being considered to determine whether there are arguable grounds in the normal way, with the procedural safeguard of the possibility of an application pursuant to Rule 3(10) at which he would be entitled to be heard and might seek assistance under the ELAAS scheme. Overall, I consider it is appropriate to exercise my discretion to extend time to submit the appeal pursuant to Rule 37(5) **EAT Rules 1993**.

33. Having regard to the analysis of the Court of Appeal in **Ridley**, I would also grant an extension of time pursuant to Rule 37(1) **EAT Rules 1993** for essentially the same reasons. The ET1 and ET3 forms were not necessary to understand the appeal, this was a genuine minor error that has not

prejudiced the respondent, the mistake was rectified quickly, the claimant has been straightforward even if some of his legal arguments were not correct, and, most importantly, the balance of justice favours the appeal being accepted and then considered in the usual way.