Neutral Citation Number: [2022] EAT 179

Case Nos: EA-2021-000315-AT

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 January 2023

**Before** :

**HIS HONOUR JUDGE SHANKS**

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**Between :**

**ALEXANDER HAWKES** **Appellant**

**- and –**

**OXFORD ECONOMICS LIMITED** **Respondent**

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**Alexander Hawkes** the **Appellant** in person
**Laura Gould** (instructed by DWF Law LLP) for the **Respondent**

Hearing date 29 November 2022

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APPEAL FROM REGISTRAR'S ORDER

# JUDGMENT

## SUMMARY

### PRACTICE AND PROCEDURE

The Appellant sought to appeal against a decision of the EJ that the ET had no jurisdiction to consider his claim of unfair dismissal.

He sent all the necessary documents to the EAT by email on the last day for appealing between 15.29 and 16.00. Unbeknown to the Appellant, the email sent at 15.33 which attached his notice of appeal and the EJ's judgment did not arrive at the EAT for technical reasons which may have had to do with his service provider. Those documents were not received by the EAT until ten days later when the Appellant realised that the email sent at 15.33 had not been received.

The Registrar did not consider that the Appellant had a "good excuse" for his late appeal and refused to extend his time for appealing.

On appeal, the EAT judge considered that the Appellant did have a good excuse for failing to appeal in time. In general, in the absence of a "bounce back" it would be reasonable to assume that a properly sent email would arrive at its destination within seconds. The EAT rejected the suggestion that the Appellant should have known there were problems with the server on the relevant day or that he should have noted that there was no acknowledgement of receipt relating to the email in question from the EAT. Although there was no good excuse for leaving things until so late in the day in practice this did not make any difference in this case: if the same thing had happened (say) a week before the Appellant would still not have known about it until after time had expired.

The appeal against the Registrar's Order was allowed: given that there was a "good excuse" for the default this was a case where the circumstances were such as to justify the exceptional step of granting an extension of time.

**HIS HONOUR JUDGE SHANKS:**

1. This is an appeal against a Registrar's Order sealed on 19 April 2022 refusing an extension of time for the presentation of Mr Hawkes's appeal against an adverse decision of the employment tribunal.

2. An appeal against a Registrar's Order takes the form of a full "re-hearing". My findings of fact set out below are based on the documents in the bundle (and the supplementary bundle) prepared for this appeal and on explanations provided by Mr Hawkes (mainly in response to questions I asked) during the hearing of the appeal.

**The facts**

3. Mr Hawkes worked for Oxford Economics Ltd from 5 June 2017 until 14 January 2019 when he was summarily dismissed. While employed by Oxford Economics Mr Hawkes was also a reservist in the Royal Marines.

4. Mr Hawkes brought a claim for unfair dismissal on 26 April 2019. Under the Defence Reform Act 2014 the normal two year qualifying period for bringing an unfair dismissal claim is disapplied in a case where the reason or principal reason for the dismissal is, or is connected with, membership of a reserve force.

5. There was a hearing in the London South employment tribunal before EJ Nash between 12 and 14 October 2020 at which Mr Hawkes was represented pro bono by Ms Churchhouse and Oxford Economics by Ms Gould (who has also represented them at this hearing). For reasons set out in a judgment sent out on 29 December 2020 EJ Nash decided that the principal reason for Mr Hawkes's dismissal was not, and was not connected with, his membership of a reserve force. The tribunal therefore had no jurisdiction to consider his claim for unfair dismissal and it was dismissed.

6. On receipt of the judgment Mr Hawkes immediately decided to appeal to the EAT against

EJ Nash's decision. The deadline for bringing an appeal was 16.00 on 9 February 2021 and in order to bring an appeal it was necessary to deliver to the EAT a notice of appeal, a copy of the judgment being appealed and copies of the ET1 and ET3. Throughout the period from 29 December 2020 to 9 February 2021 Mr Hawkes was staying at his house in Edinburgh; as set out below, there were Covid restrictions in place and Mr Hawkes himself suffered Covid symptoms between 28 January and 10 February 2021.

7. Mr Hawkes was apparently under the impression that he would need a note of the evidence given before the tribunal in order to bring the appeal and he made a "subject access request" to the tribunal for "notes relating to [the] case" on 29 December 2020. He followed up this request with emails throughout January 2021, stressing in emails on 28 January 2021 (at pp 17-19 of the supplementary bundle) that he was under time pressure to collate information ahead of his appeal and that he required the judge's notes and the tribunal "recording" before the end of the month. On 3 February 2021 he was informed that the deadline date for dealing with his request was 26 February 2021 (see p17 supplementary bundle). On 1 February 2021 he also wrote to Oxford Economics's solicitor at DWF asking for all notes taken by her and their counsel at the hearing. There were email exchanges up to 9 February 2021 but DWF were unwilling to supply the notes.

8. Early on 9 February 2021 Ms Churchhouse sent Mr Hawkes three documents she had prepared: one set out very brief grounds of appeal based on the proposition that the tribunal's conclusion was perverse; the second was an 11 page "permission skeleton argument" which gave further details of the allegation of perversity and was obviously designed to be used by the EAT on the "sift"; the third was an application for the Respondent's and the EJ's notes of the hearing which stated that such notes would be necessary to argue the appeal based on perversity and that the Respondent's had refused to agree a note of evidence. Mr Hawkes told me and I accept that he had been in touch with Ms Churchhouse over the weeks following his receipt of the judgment and that she had told him on 8 February 2021 that the documents would be coming early the following day; I

also accept that she was busy in court on 9 February 2021 and that they could not speak about the documents until the afternoon.

9. At 15.29 on 9 February 2021 Mr Hawkes sent an email to the EAT which stated that it attached (a) a notice of appeal, (b) grounds of appeal, (c) skeleton argument, (d) an application for notes and (e) witness statements. It seems that that email made it to the EAT but Mr Hawkes accepts that he did not in fact attach the notice of appeal or grounds of appeal documents to the email.

10. At 15.33 Mr Hawkes sent another email which stated that it attached the notice of appeal (which incorporated Ms Churchhouse's brief grounds) and the judgment; it also stated that he would send "the bundle" (by which he clearly meant the bundle used at the employment tribunal hearing) in "Zip file" and then follow up with the PDF due to size issues. It is clear from the print-out at p59 of the bundle that this email did indeed attach the notice of appeal and the judgment. However, it is common ground that the email, although sent, was never received by the EAT. There was no evidence before me of either of a "bounce back" email or an acknowledgment of receipt email relating to it. I accept that Mr Hawkes did not know at the time that this email had not been received by the EAT.

11. Mr Hawkes then sent a series of further emails to the EAT attaching the employment tribunal bundle. It is accepted that the ET1 and ET3 were part of that bundle and that they were successfully delivered to the EAT before 16.00.

12. Although for some reason the EAT's email was not in my bundle it seems that the EAT emailed Mr Hawkes on 17 February 2021 informing him that they had not received a notice of appeal or a copy of the judgment appealed against. He responded to this in a series of emails sent on 18 and 19 February 2021 which attached the emails sent at 15.29 and 15.33 on 9 February 2021 and supplied the missing notice of appeal and judgment. In the course of these emails Mr Hawkes stated "My understanding was that all the emails I sent had been received so not sure what happened here" and later he stated " … but there appears to have been a computer issue meaning that one of the documents

did not arrive."

13. On 6 April 2021 the EAT wrote to Mr Hawkes formally telling him that his appeal was out of time and that he could apply to extend time and that the application must be accompanied by "reasons for the lateness".

14. Mr Hawkes responded by email on 19 April 2021 (p55 of my bundle). He referred to the fact that it seemed that some documents had not arrived though they had been sent in time. It referred to the fact that he had been stuck in Edinburgh under lockdown and had not been able to travel to London to hand in the documents in person as he had intended and that he had been ill with Covid like symptoms. It stated that he had therefore sent the documents by email but that he had been experiencing issues with his internet service provider.

15. Attached to this email was an email from the service provider EE dated 9 April 2021 which stated that the writer had been asked for information about a connectivity issue on 9 February 2021. The EE email stated that an issue was logged and an engineer sent to Mr Hawkes's property on 1 February 2021 and that the issue was addressed the following day. The email goes on:

> **"The line then went through an expected stabilisation period between 2nd of February and the 14th of February. Significant drops in connection are observed between the 6th and the 14th February 2021.**
>
> **On the 9th February it is evident that the service was still unstable, resulting in inconsistency in sending and receiving data on that date."**

This may provide the explanation for the fact that the email sent at 15.33 on 9 February 2021 did not get through to the EAT. Mr Hawkes told me (and I accept) that he was told by an engineer on 2 February 2021 that there would be a "stabilisation" period after the issue was addressed but that he did not know that it would last until 9 February 2021 or that the line was still unstable at that stage.

16. It was part of Mr Hawkes's case that he had Covid between 28 January and 10 February 2021. In his skeleton argument prepared for this hearing he says that he was "extremely unwell"

during this period. He has produced a letter from his GP dated 21 May 2021 which was designed to provide evidence of this; as I pointed out at the hearing it was of no evidential value since it simply repeated what Mr Hawkes had told the GP in a later phone call. Nevertheless I accept that Mr Hawkes had some Covid symptoms during this period which would have made it impossible for him to leave Edinburgh although I have the impression that it may be a bit of an exaggeration to say he was "extremely unwell". In any event, it is plain (and he has not suggested otherwise) that his symptoms did not prevent him addressing himself to the issues, communicating with the tribunal, DWF and Ms Churchhouse and attempting to institute his appeal on 9 February 2021 as I have described above.

## The legal framework

17. Mr Hawkes accepts that his appeal was not properly constituted until 19 February 2021 and that he therefore requires an extension of time if it is to proceed.

18. There are numerous (some would say far too many) authorities relating to the exercise of the EAT's discretion to extend time for appealing and I have been provided with a bundle containing no fewer than 15 of them. I think it is quite sufficient in this case to remind myself of these few propositions from the leading "familiar authority" of **UAE v Abdelghafar** [1995] ICR 65 (see pp71/2):

> **"The … discretion will not be exercised unless the appellant provides the tribunal with a full and honest explanation of the reason for non-compliance. If the explanation satisfies the tribunal that there is a good excuse for the default, an extension of time may be granted.**
> **…**
> **If an explanation for the delay is offered, other factors may come into play …**
> **Parties who have decided to appeal are … strongly advised not to leave service of the notice of appeal until the last few days of the 42-day period. If they do, they run the risk of delay in the delivery of post … The merits of the appeal may be relevant, but are usually of little weight …**
> **…**
> **Thus, the questions which must be addressed by the [EAT], the parties and their representatives on an application for an extension of time are: (a) what is the explanation for the default? (b) does it provide a good excuse for the default? (c) are there circumstances which justify the [EAT] taking the exceptional step of granting an extension of time?"**

**What is the explanation for the default?**

19. The explanation for what happened is plain from my findings of fact above. The reason Mr Hawkes found himself emailing the necessary documents to the EAT from Edinburgh at 15.30 on the last day of the 42-day period was that he had spent the weeks preceding 9 February 2021 in a somewhat misguided and unnecessary quest for notes of the hearing and then only received documents from Ms Churchhouse in the morning of 9 February 2021 and spoke to her later in the day, and by that stage he was no doubt "stuck" in Edinburgh on account of Covid and therefore had no choice but to use email. But it seems to me that the immediate and main explanation for the default was the fact that, unbeknown to Mr Hawkes, the crucial email sent at 15.33 failed to get through to the EAT for some technical reason which was probably to do with EE.

20. Ms Gould reminded me that the onus is on an appellant to provide the EAT with a "full and honest" explanation for the default. She submitted that Mr Hawkes had not satisfied this requirement: she said he had not been completely honest and his position had changed and developed even during the hearing. In this connection she noted that he did not initially refer to suffering ill health during the relevant period; she threw doubt on the notion that he had ever intended to hand in the documents personally at the EAT, only to be prevented by lockdown and his symptoms; she reminded me that he had said in May 2021 that he had tried to telephone the EAT several times on 9 February 2021 but that this was unsupported by other evidence (and she further suggested that this was not true, a suggestion I would reject); and she rightly said that he did not mention until the hearing before me that he had waited to speak to Ms Churchhouse on 9 February 2021 before starting to send the documents to the EAT that afternoon.

21. Although Ms Gould's detailed points are valid I do not consider that her overall criticism that Mr Hawkes has failed to provide a full and honest explanation is a fair one. As I have said, the main explanation for the default was plainly, as stated by Mr Hawkes from the outset on 18/19 February 2021, that unbeknown to him the email he sent at 15.33 on 9 February 2021 did not arrive

at the EAT because of a technical issue. I think that any change or development in his position in other respects results, as often happens with these applications to extend time in the EAT, from the fact that the Appellant feels driven by the process (and often by questions from the EAT or a judge at an appeal hearing) to do his or her best to explain what has happened over the whole period of six weeks within which an appeal must be brought, without always focusing on the essential issue. It seems to me that Mr Hawkes has, over the last 22 months, been doing his best to reconstruct events so as to give such an explanation for what happened and that it is quite wrong to suggest that he has been dishonest in the way he has done so (and I say this even though I have formed the impression he may have somewhat exaggerated the effect of his Covid symptoms).

**Does the explanation for the default provide a good excuse?**

22. There was no good excuse in my view for the fact that Mr Hawkes did not start sending the necessary documents to the EAT until only half an hour before the time for appealing expired. As I have said, the quest for the notes was misguided and unnecessary; there was no suggestion that there was a good reason for him not being provided with the necessary documents by Ms Churchhouse somewhat earlier; he was not so ill that he could not take the necessary steps to institute the appeal; and the fact that he was stuck in Edinburgh for reasons connected with Covid was in my view of no significance given that nowadays documents are routinely and can easily be served electronically.

23. However, the immediate and main explanation for the default was that the email sent at 15.33 simply did not arrive at the EAT. The reason for the non-arrival was clearly a technical one which was not the fault of Mr Hawkes and I am satisfied he did not know anything about it until he heard from the EAT on 17 February 2021. It seems to me that whatever happened is unusual these days: in general I would consider that in the absence of a "bounceback" email it is reasonable to assume that an email which has been properly sent will be received by the addressee in a matter of seconds.

24. Ms Gould submitted nevertheless that this explanation did not amount to a good excuse

because (a) Mr Hawkes knew or should have known there were problems with his server and (b) he should have noted that there was no acknowledgement of the email sent at 15.33 and taken steps to re-send it (and she pointed out by reference to the print-out at p 59 in the bundle that he must have received such an acknowledgement in relation to at least one of the other emails he sent before 16.00 that afternoon and so must have known that he should be looking out for an acknowledgement) and (c) that the problems really resulted from Mr Hawkes leaving service of the relevant documents until half an hour before the deadline when it may well have been too late to sort matters out.

25. I confess I have wavered on the question whether the non-arrival of the email at the EAT amounts to a good excuse and I have (unusually) reserved judgment in this case. In the end I have come to the view that Mr Hawkes does have a good excuse for his default.

26. The crucial point it seems to me is that Mr Hawkes had in fact sent all the relevant documents to the EAT by email about half an hour before the deadline. What happened thereafter was, as I have said, unusual and in normal circumstances it would have been reasonable to assume that the email sent at 15.33 would have arrived well before 16.00. I have rejected the suggestion that Mr Hawkes should have known there were continuing problems with his server on 9 February 2021. I take the point that there may have been one or more (automatic) acknowledgement emails from the EAT between 15.30 and 16.00 but I do not consider that any lack of an acknowledgement to the one sent at 15.33 (even assuming it had been possible to say which acknowledgement related to which email) should have alerted him at that stage to the fact that it had not been delivered. The fact that he had left things until late in the day does not seem to me of any real significance in this case since, although there was no good excuse for doing so, in practice it did not make any difference: if the same thing had happened (say) a week before the likelihood is that he would still not have known until after time had expired that the documents had not arrived at the EAT and his appeal would still have been out of time.

**Are there circumstances that justify an extension?**

27. I have decided that Mr Hawkes has a good excuse for his failure to appeal in time. There is no evidence of procedural abuse, questionable tactics or deliberate default on his part. The length of the delay was a matter of ten days. Oxford Economics were well aware from the outset that Mr Hawkes intended to appeal. There is no suggestion of any forensic prejudice to them. As to the merits of the appeal, from what I have seen it is clearly not bound to succeed but, on the other hand, at the moment I do not consider it to be hopeless (although I recognise that it is an appeal based on perversity and this will need to be considered again on the sift).

28. Having regard to all those circumstances, it seems to me that this is a case in which the EAT should take the exceptional step of granting an extension of time to appeal.

**Disposal**

29. I therefore allow the appeal and extend Mr Hawkes's time for appealing until 19 February 2021.

30. Since I now have some familiarity with the case I will proceed to sift it as soon as possible.