Neutral Citation Number: [2023] EAT 139

Case No: EA-2021-001274-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 November 2023

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

CLAUDIO COSTAGLIOLA DI FIORE **HUMA QADRI**	**Appellants**
- and –	
INTROHIVE UK LIMITED	**Respondent**

- -
- -

Iain Mitchell KC and Alexandra Sidossis (instructed by direct access) for the **Appellants**
Jen Coyne (instructed by Prettys Solicitors LLP) for the **Respondent**

Appeal from Registrar's Order
Hearing date: 5 October 2023

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – time for appealing

The claimants sought to appeal from the reserved judgment and reasons of the employment tribunal, arising from a full merits hearing, dismissing their complaints. When presenting their notice of appeal they attached copies of the amended particulars of claim and the amended grounds of resistance, but not copies of the forms ET1 and ET3. The matter predated the amendments to the EAT's Rules which came into force on 30 September 2023. Accordingly the claimants accepted that the appeal had not been properly instituted until copies of those documents were subsequently sent by them to the EAT, which was more than 42 days after the written judgment and reasons was promulgated. They also accepted that they had not advanced an explanation for the initial omission such as would warrant an extension of time. However, they contended that time for instituting their appeal did not begin to run until the date on which the employment tribunal promulgated its separate written record of decisions on case-management applications that had been adjudicated during the course of the full merits hearing. If so, the appeal was properly instituted in time. Alternatively, they contended that there were other circumstances which warranted an extension of time in this case. The EAT's Registrar rejected both arguments. The claimants appealed from that decision to the EAT judge.

Held: time for instituting an appeal from the judgment ran from when the written judgment and accompanying reasons for it were promulgated, not the later date on which the written record of case-management decisions was promulgated. Accordingly, the appeal had been instituted out of time. This was not a case where there were exceptional circumstances such that time should be extended. In particular the fact that the grounds raised matters said to have affected the fairness of the hearing, did not constitute such circumstances. The appeal was therefore dismissed.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimants in the employment tribunal were both employed by the respondent from 8 October 2019 until they were each dismissed, respectively on 16 and 20 January 2020. Before the employment tribunal they both complained that they had been subjected to detriments because they had made protected disclosures, and that they had been unfairly dismissed for the reason or principal reason of having made protected disclosures.

2. There was a full merits hearing on 11 – 15 and 18 – 21 October 2021 at London Central, by CVP, before EJ Goodman, Ms D Keyms and Mr T Cook. The reserved judgment and reasons were sent to the parties on 8 November 2021. All of the complaints of both claimants were dismissed.

3. The notice of appeal against that decision, with certain accompanying documents, was received by the EAT on 17 December 2021. On 9 March 2022 the EAT's administration wrote to the claimants indicating that the appeal had not been properly instituted because copies of the ET1 and ET3 forms had not been provided. These were thereafter sent to the EAT as attachments to an email sent on 18 March 2022. In the ensuing correspondence the claimants contended that their appeal had in fact been properly instituted in time, or, if not, that time should be extended.

4. In a decision sent on 10 February 2023 Ms A Lewenstein on behalf of the EAT's Registrar decided that the appeal had been properly instituted out of time, and declined to extend time. The claimants appealed from that decision to a judge. In the established way, I have decided the issues entirely afresh based on my consideration of all the materials and arguments presented to me.

Chronology of the litigation

5. In May 2020 a single claim form ET1 was presented to the employment tribunal, which was relied upon by both claimants. In box 8 it referred to an attached particulars of claim document,

which accompanied it. In due course response forms ET3 were entered in respect of the complaints of both claimants. These referred to attached grounds of resistance. There was more than one preliminary hearing in the employment tribunal. At one of these the tribunal decided that the single claim form should be treated as having raised the complaints of both claimants.

6. By the time of the full merits hearing there was an amended particulars of claim document in respect of all of the complaints of both claimants and an amended grounds of resistance document in respect of the grounds of resistance to all of the complaints of both claimants.

7. At points during the course of the full merits hearing specific applications were made, argued and decided. In relation to each of these, the tribunal gave oral reasoned decisions on the application before continuing with the substantive hearing. One of those applications, considered on day four, was by the claimants' counsel for a witness order to be made requiring the attendance at that hearing of a Mr Faisal Abassi, who was said to have relevant evidence to give on various issues. After hearing oral argument and a break for deliberations, the tribunal gave an oral decision with reasons refusing that application, and the substantive hearing then continued.

8. The tribunal's reserved judgment dismissing all of the complaints, with accompanying written reasons, were signed by the judge on 5 November 2021 and sent to the parties on 8 November 2021 by email. At [11] of the reasons, the tribunal referred to the applications made during the course of the hearing, some of them heard in private. It wrote: "As issues of privilege and anonymity were involved, which are difficult to disentangle, the reasons for the decisions made are set out in a separate case management summary. Reasons were delivered orally at the time."

9. Having received the judgment and reasons the claimants emailed the tribunal on 11 November 2021 asking for the case management order "at your earliest convenience." When asked by the tribunal's administration to clarify what they were seeking, they emailed again that day referring

specifically to the mention of a "separate case management summary" at [11] of the judgment and reasons. On 23 November 2021 the claimants sent the administration a chasing email.

10. On 17 December 2021 the claimants presented their notice of appeal. It identified that they were appealing from the judgment sent on 8 November 2021. They attached a copy of the judgment and reasons. In box 5 they referred to having also attached "the claim (ET1) (as amended)" and "the response (ET3) as amended". But they only attached the amended particulars of claim document and the amended grounds of resistance document. The form ET1 and two forms ET3 were not attached.

11. There were three numbered grounds of appeal. The headline of the first was that the decision to refuse to grant a witness order in respect of Mr Abassi was perverse. The grounds referred to what the tribunal had said at [11] of its reasons, but noted that it had not yet issued the case management summary, despite requests. The claimants sought an order from the EAT requiring the tribunal to do so, and indicated that they might seek to amend the grounds of appeal in light of the summary. The second ground challenged certain findings made by the tribunal as being not supported by the evidence, and unfair or perverse, in particular as they related to Mr Abassi, but, the witness order having been refused, there was no evidence from him. The third ground contended that the tribunal unfairly curtailed the cross-examination of one of the respondent's witnesses.

12. The tribunal's written record of its case management orders and reasons was sent to the parties on 11 February 2022. This showed that it had been signed by the judge on 3 November 2021.

13. On 9 March 2022 the EAT's administration wrote to the claimants indicating that the appeal was deemed not properly instituted because the forms ET1 and ET3 were missing, and noting that the clock would not stop running until the appeal was considered validly lodged.

14. On 18 March 2022 the claimants emailed the EAT. The attachments included a covering letter, copies of the ET1 and ET3 forms and an amended notice of appeal. In the covering letter they

indicated that the failure to provide the ET1 and ET3 forms was an "unfortunate oversight" for which they apologised. The also referred to their counsel having requested written reasons for the case management decisions, to paragraph [11] of the reasons for the judgment, to the reference to this in the grounds of appeal, and to the fact that the reasons for the case management orders had been finally issued on 11 February 2022. They applied to amend the grounds of appeal in light of these, and submitted that time was still running for their appeal. If the EAT took a different view, however, they would "respond positively" to any invitation to make a formal application to extend time.

15. The amended notice of appeal attached to that email identified the appeal as being against both the judgment sent on 8 November 2021 and the case management orders and reasons sent on 11 February 2022. The body of the first ground of appeal was an extensively amended version of the original grounds of appeal, challenging the written reasons for refusing the witness-order application that had been given with the written case management order.

16. In further correspondence the EAT's administration proceeded on the basis that there were now two appeals: the original appeal against the judgment, and a new appeal against the case management order in relation to the witness-order application, to which it gave a separate number.

17. The email of 18 March 2022 attaching the forms ET1 and ET3, having been received after 4pm that day, was treated as having been received on the next working day, 21 March 2022. The original appeal against the judgment was treated as having been properly instituted at that point, on 21 March 2022, and as being out of time. As I have described, the claimants maintained in further correspondence that that appeal was properly instituted in time, or alternatively that time should be extended, but the Registrar in due course decided against them on both points.

18. Meantime, the appeal against the case management order was deemed to have been properly instituted in time. It was subsequently considered by a judge on paper not to be arguable. The

claimants then requested a rule 3(10) hearing. At that hearing further directions were given by HHJ Martyn Barklem, in view of it being part of the claimants' grounds that the case management reasons did not accurately record oral submissions that had been made on the application. These included a direction for the judge to be requested to provide her notes, and comments, on the points being raised.

19. Following compliance with those directions, the second appeal was referred back to an EAT judge. By that time, the Registrar's decision on the time point in relation to the first appeal had been issued, and the present hearing was awaited. As envisaged by HHJ Martyn Barklem it was directed that the second appeal should be stayed pending further developments in relation to the first appeal.

Was the appeal instituted in time?

20. I start by noting that amendments to the **Employment Appeal Tribunal Rules 1993** (the "EAT rules"), made by SI 2023/967 came into force on 30 September 2023. It was confirmed at the hearing before me that it is common ground that, having regard to the timeline, those amendments have no bearing at all in this case. References in what follow are, accordingly, to the EAT rules, as earlier amended, but as they stood immediately prior to the amendments made by that 2023 SI.

21. For the claimants Mr Mitchell KC (leading Ms Sidossis, who co-authored the skeleton) acknowledged that, pursuant to rule 3(3) of the EAT rules, in a case such as the present, where the written reasons for a judgment were reserved to be given in writing, the period within which an appeal may be instituted is "42 days from the date on which the written reasons were sent to the parties."

22. The respondents' position is that time began to run when the written judgment and reasons were promulgated on 8 November 2021, so that the last day for instituting an appeal in time was 20 December 2021. The ET1 and ET3 forms were essential documents, and they were not provided until 18 March 2021 – and deemed provided on 21 March 2021. The appeal was therefore properly instituted some 91 days out of time.

23. Mr Mitchell KC confirmed that the claimants accept that, under the EAT rules as they stood at the time, the ET1 and ET3 forms were essential documents, and that the appeal was not properly instituted until they were provided to the EAT, and therefore that it was only properly instituted on 21 March 2021. But he contended that, until the reasons for the case management decisions were provided, the reasons for the judgment were incomplete. Accordingly, he submitted, the complete written reasons for the judgment were not provided until 11 February 2022; and so the final date for the appeal to be properly instituted was 25 March 2022. As all of the required supporting documents were provided before that date, the appeal from the judgment was properly instituted in time.

24. Mr Mitchell KC sought to draw support from what the employment judge had written when responding to the order of HHJ Martyn Barklem made in relation to the second appeal, against the case management order. He submitted that this showed that, when the judge was drafting them, the reasons for the judgment and for the case management orders had started life as a single document, which was split into two only because of some of the case management orders having been made in private. It also confirmed that the judge had originally envisaged and intended that the two final documents would be promulgated at the same time, and this did not happen as a result of error.

25. The claimants, he argued, had correctly taken the view that the case management reasons were needed, in order to understand the full reasons for the judgment, which was why they had chased for the latter document when it was not sent alongside the judgment and reasons. When it was not forthcoming, the notice of appeal had been presented within 42 days from the date of the judgment and reasons, out of an abundance of caution; but, on a correct analysis, time was not yet running.

26. I reject this analysis. My reasons follow.

27. The starting point is that the reasons which accompanied the judgment sent to the parties on 8 November 2021, dismissing the complaints, were the whole of the reasons for that decision.

28. As was discussed in **Ameyaw v PricewaterhouseCoopers Services Limited**, UKEAT/0292/18/LA, 11 December 2019, where a tribunal decides a case-management application, with oral reasons, during the course of a full merits hearing, it is not automatically obliged to give written reasons for that decision. If it does, these may be incorporated into the written reasons for the judgment arising from the full merits hearing, or they may be given separately. If they are given separately, the time for appealing in respect of the decision on the case-management application in its own right will run from when the separate written reasons for that decision were sent to the parties.

29. In **Ameyaw** the written reasons for the case-management decision were promulgated ahead of the written reasons for the judgment. In the present case it was the other way around. But the analysis is the same, and the fact that this delay was unintended does not alter that. The two sets of reasons were and are, on their face, separate. Nor is the position affected by the mechanics of how the judge went about drafting and producing the final documents, of which she has, incidentally, chosen to provide a glimpse in the correspondence relating to the second appeal. Nor is it, or could it be, affected by what the claimants may have thought. The reasons accompanying the judgment sent on 11 November 2021, objectively, were the whole of the reasons for that judgment.

30. The fact that the tribunal referred, at [11] of the reasons for that judgment, to there being separate reasons for the case-management decisions, set out in a written case-management summary, does not alter that. Occasionally, where a derogation from open justice is properly deemed necessary, for example in relation to a particular aspect of the factual subject matter, a tribunal's reasons may include a confidential annex, which is omitted from the published version. In such cases the whole reasons are the version including the confidential annex. But this was not such a case, or analogous to it. The written reasons for the case-management decisions were not part of the fact-finding. They did not form a confidential annex to the reasons for the judgment, nor were they described at [11] or elsewhere, as forming part of those reasons. The tribunal promulgated them entirely separately.

31. For these reasons, I conclude that time for appealing the judgment sent on 11 November 2021 ran from that date, and accordingly this appeal was not properly instituted in time.

Should Time Be Extended?

32. Mr Mitchell KC confirmed that the claimants were not claiming that the reason for their failure to send the EAT copies of the ET1 and ET3 forms when submitting their notice of appeal amounted to an acceptable or good excuse which would warrant an extension of time. But they contended that there were circumstances in this case which warranted an extension nevertheless being granted, that is, what tend to be referred to as "exceptional circumstances", though exceptionality is, not, as such, a test. See the discussion in **United Arab Emirates v Abdelghafar** [1995] ICR 65 and, per Rimer LJ in **Jurkowska v HLMAD Limited** [2008] EWCA Civ 231; [2008] ICR 841.

33. Mr Mitchell KC relied upon six features of the present case as exceptional circumstances individually or cumulatively warranting an extension on that basis. I will take each of them in turn.

34. First, he submitted that the missing ET1 and ET3 forms were not material for the determination of the appeal. While the appeal was not properly instituted until they were provided, regardless of their contents, consideration could be given to their contents when deciding the question of whether to extend time. He referred to **Fincham v Alpha Grove Community Trust** UKEATPA/0993/18, citing in turn, **Hine v Talbot** UKEATPA/1783/10, in both of which accidental omission of material, the content of which was not significant to the appeal, was forgiven by the grant of an extension. In the present case, he submitted, all of the significant information was in the amended particulars of claim and amended grounds of resistance, copies of which *had* been provided.

35. I do not accept this argument. In **Hine** and in **Fincham** the document in question had been provided, but one page was missing, because of errors in scanning or copying. In the present case what were, as the EAT's rules then stood, essential documents were omitted altogether. Strictly, it

could be said, as the particulars of pleaded case *were* provided, the *whole* documents were not missing. But the forms themselves were essential requirements of the tribunal process and, at the time, for the inception of the appeal to the EAT, and they did also contain some basic information. It cannot be maintained that time should be extended on the basis that the contents of the forms themselves were not in practice material to the appeal.

36. The second factor relied upon is that this was a case of genuine error. Ms Coyne submitted that the claimants had not in fact, as required by the **Abdelghafar** guidance, given a "full and honest" explanation for the default, as, over the course of their communications with the EAT, they had given various differing accounts of how they came to overlook, or fail to understand, that copies of the ET1 and ET3 forms were required. As to that, however, I accept that this was, one way or another, a case of genuine mistake, and, given that it is not claimed to amount to a good excuse, I do not think anything turns in this case on precisely how the error came about. However, the fact that the omission was the result of a genuine error, which, it is rightly conceded, would not provide a good excuse to warrant an extension of time, cannot then be relied upon as nevertheless constituting, or contributing to, an exceptional reason to do so.

37. Thirdly, Mr Mitchell KC refers to what he says was the prompt compliance by the claimants in providing the missing documents once the problem was drawn to their attention by the EAT. He also says that they had shown diligence, when the minute of the case management orders and reasons was not originally provided at the same time as the judgment, in chasing the employment tribunal, and, when they presented their appeal, they asked the EAT to direct the tribunal to promulgate it.

38. As to the former, Ms Coyne submitted that the claimants did not in fact act promptly. Even in real time the documents were only provided nine days after the EAT alerted them to the issue. Mr Mitchell KC told me that this was because they were seeking advice; but I do not see why they could not simply have provided the documents straight away at that point. In any event, in my judgment,

even if they had provided them the same working day it was raised, that could not possibly be treated as a feature warranting an extension of time, despite the lack of good excuse for not having done so within the original time limit. The steps the claimants took to chase the promulgation of the case management orders also appear to me to be beside the point. They cannot constitute reasons for extending time in relation to the inexcusable failure to provide timely mandatory documents.

39. Next, Mr Mitchell KC argued that time should be extended in this particular case so as to obviate what he described as an anomaly that would otherwise give rise to a potential injustice to the claimants. This relates to the fact that they have instituted an in-time appeal against the case-management decision refusing the witness order. It remains to be seen whether that appeal will be directed to proceed to a full appeal hearing, and, if it is, whether it will succeed. But, if it does succeed, that would, said Mr Mitchell KC, in practice be of no benefit to the claimants, because the judgment dismissing their substantive complaints would still stand. The success of the case-management appeal would not itself enable the EAT to set the judgment aside. The only way to obviate that potential injustice would be to extend time in respect of the appeal against the judgment.

40. I also reject this argument. That is because, even if the EAT could not, consequent upon upholding the appeal against the case-management decision (were it to do so), make an order disturbing the judgment, I do not accept that this would mean that there would be no route by which the claimants could not thereupon seek to have the judgment reopened. It would, it appears to me, at least be open to them, if they considered in light of any such decision of the EAT that there were good grounds to do so, to apply to the employment tribunal out of time for a reconsideration of the judgment on the basis that it was necessary in the interests of justice to do so. Of course, it would be for the tribunal then to decide any such application, but it is an application that could, in principle, be made.

41. The fifth strand of this part of the claimants' argument is that the respondent would not suffer any prejudice if the extension of time were to be granted. Mr Mitchell KC acknowledged, as he was

bound to, that in **Abdelghafar** the EAT observed that this is generally "a factor of little or no significance". But he submitted that this is not necessarily so in every case; and noted that in **Jurkowska** Hooper LJ observed that he had doubts about, and had difficulty following, this part of the EAT's reasoning in **Abdelghafar**.

42. As to that, notwithstanding Hooper LJ's misgivings, the **Abdelghafar** guidance holds good, having been approved by the Court of Appeal repeatedly, most recently in **Green v Mears** [2018] EWCA Civ 751; [2019] ICR 771, without this strand having been qualified. If time is extended the respondent would be at risk of having to defend an appeal which it will not otherwise have to defend. That appeal also seeks to raise matters not raised in the appeal against the case-management order. Even if the respondent has not been materially prejudiced by the delay in properly instituting the appeal, as such, that cannot constitute, or contribute to, a good reason for extending time in this case.

43. The final strand of this part of the claimants' case is the contention that time should be extended in order secure compliance with Article 6 ECHR. Mr Mitchell KC submitted that the exercise of the discretion to extend time under rule 37(1) of the EAT rules is subject to an obligation upon the EAT under section 3(1) **Human Rights Act 1998** to interpret and apply that discretion so as to secure such compliance. He acknowledged that it is established that the setting by member states of limitation periods is not contrary to Article 6 as such (see **Stubbings v UK** [1996] 23 EHRR 213). He confirmed that he was not arguing that the general law relating to the time limit for appealing to the EAT, or its general approach to extension of time, inherently failed to comply with Article 6.

44. However, he referred to **Delcourt v Belgium** (1979) 1 EHRR 355 as authority for the proposition that, while Article 6 does not oblige signatory states to provide an appeal mechanism from first-instance trial decisions, where such a mechanism is in fact provided, it must conform to Article 6 principles. That case concerned a criminal appeal to the French Court of Cassation, but he argued, it equally applies to appeals to the EAT.

45. In the present case, Mr Mitchell KC explained, this strand of the claimants' argument turns on the particular feature that they contend, as part of their grounds of appeal, that the proceedings *before the employment tribunal* were not themselves fair, in particular because, *per* ground 3, cross-examination of one of the witnesses was unfairly curtailed, as well as being unfair in relation to the absence of the witness in respect of whom a witness order had been sought. He contended that what he called the "proper role of the EAT in securing an Article 6-compliant procedure overall" means that, in *this* case, an extension of time should be granted so as to secure compliance with Article 6.

46. Ms Coyne, as part of her submissions, contended that the very premise of this strand of the challenge is defective, because the grounds of appeal do not, in fact, invoke Article 6. Mr Mitchell KC's reply was that the grounds raise what are in substance an Article 6 type challenge, because they contend that aspects of the process were unfair and impaired the fairness of the hearing. He said that, if time is extended, the claimants will, if necessary, apply to amend the grounds to make that explicit, but cannot do so unless or until it is. On that point, I am prepared to proceed on the footing that the grounds of appeal include what amounts in substance to a challenge that enters Article 6 territory. But I do not accept that this warrants an extension of time. That is for the following reasons.

47. Firstly, **Delcourt** does not support the proposition of law for which Mr Mitchell KC contends. It held that the nature of the appeal proceedings in that case was such that they must be Article 6-compliant. That could at best only get Mr Mitchell KC so far as the proposition that appeals to the EAT are also proceedings of a kind, such that hearings before the EAT should conform to Article 6 principles. It does not support the proposition that, where the grounds of appeal are said to raise an Article 6 issue concerning the proceedings before the employment tribunal, the EAT must for that reason modify or relax its approach to limitation, so as to ensure that the merits of the appeal have the chance to be substantively considered.

48. Secondly, I do not agree that the mere fact that the grounds of appeal in a given case are said to raise, or include, an Article 6 point, in and of itself must, in every such case, constitute exceptional circumstances warranting an extension of time. As Ms Coyne pointed out, if this proposition at its highest were correct, it would potentially mean that in every case where some such issue was raised, the EAT would be obliged to extend time. That cannot possibly be right. Nor do I think that any modified version of the argument, such as that at least a more generous approach to extension should be taken, whenever an Article 6 type argument is raised, is sustainable or correct.

49. Rather, there is no special general rule for cases in which the grounds are said to include an Article 6 type contention. Each case must be considered on its own facts, within the general framework of principles established in the **Abdelghafar** to **Green v Mears** line of authorities. In the present case, whatever their merits might be, the nature of the particular challenges raised by these grounds of appeal does not amount to exceptional circumstances warranting an extension of time in respect of an appeal that was properly instituted late for reasons that do not amount to a good excuse.

50. I therefore conclude that the circumstances relied upon by the claimants do not, separately or cumulatively, amount to exceptional circumstances warranting an extension of time in this case.

Outcome

51. For all of these reasons I conclude that this substantive appeal was not properly instituted in time, and I decline to extend time. The appeal from the Registrar's order is therefore dismissed.

