Neutral Citation Number: [2024] EAT 15

Case No: EA-2023-SCO-000016-DT

IN THE EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street, Edinburgh EH3 7HF

Date: 6 December 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT)

- -

Between :

MARGARET GALLACHER

Appellant

- v –

T&C BARS LIMITED (1)

First Respondent

MR ARCHIBALD MCFARLANE (2)

Second Respondent

- -
- -

Mr Gallacher (the Appellant's brother-in-law) for the **Appellant**
Mr Dobbin for the **First Respondent**
The **Second Respondent in person**

APPEAL FROM REGISTRAR'S ORDER
6 December 2023

- -

JUDGMENT

Summary

Practice and procedure – appeal from Registrar's order – extension of time

The appellant lodged an appeal 412 days out of time. The EAT Registrar having refused to extend time, the appellant appealed.

Determining the application to extend time afresh (**Muschett v London Borough of Hounslow** [2009] ICR 424 applied), there was no good explanation for the lengthy delay in this case. Although the appellant had received the ET's reasoned judgment shortly after it had been sent out, and had contacted the ET to object to its decision, she had failed to lodge anything with the EAT for nearly a year after this and had then omitted to file the ET1 and ET3, or any explanation for her failure to do so. Although the appellant had sought to suggest that she did not have copies of the ET1 and ET3, that (i) was not consistent with the fact that she was sent copies of the pleadings at an earlier stage; (ii) did not address the failure to provide an explanation for this omission; (iii) provided no account for why she had not lodged a notice of appeal for nearly a year after receiving the ET's decision. This was not a case where the merits of the underlying case were relevant to the question whether time should be extended and there was no exceptional reason for the exercise of the EAT's discretion.

THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT):

Introduction

1. In giving this judgment, I refer to the parties by their titles on appeal. This is an appeal against the Registrar's order, seal dated 19 September 2023, refusing the appellant's application for an extension of time to lodge her appeal. The appellant seeks to appeal against a judgment of the Employment Tribunal sitting at Glasgow (Employment Judge Tinnion sitting alone on 13 January 2022; "the ET"). The ET proceedings were brought by the second respondent to this appeal (the claimant below) against the first respondent and the appellant (the second respondent before the ET). By its judgment, the ET found that the claims against the appellant were well founded and made awards for redundancy pay (£2,677.50), notice pay (£1,652) and unpaid holiday entitlement (£642.61). The ET's judgment was sent to the parties on 1 February 2022. Pursuant to the **Employment Appeal Tribunal Rules 1993** ("the EAT Rules"), any appeal against the ET's decision had to be lodged, with all the necessary supporting documents, within a period of 42 days from the date the ET's written reasons were sent out. In this case, time therefore expired at 4.00 pm on 15 March 2022.

2. By email of 10 February 2022, the appellant contacted the Glasgow ET to complain about the judgment. It appears that shortly after this, on 25 February 2022, the appellant also completed an EAT Form 1. By email of 1 March 2023, the appellant forwarded to the EAT the email of 10 February 2022 that had been sent to the Glasgow ET. The EAT responded shortly afterwards (also on 1 March 2023) providing links to the guidance available in relation to appeals to the EAT (Forms T444 and T440), observing that the ET judgment under challenge was unclear and drawing attention to the 42-day time limit applicable to appeals to the EAT from decisions of the ET. The appellant then sent copies of the Form EAT1, including her grounds of appeal, and of the ET's judgment of 1 February 2022. Copies of the ET1 and ET3s were, however, not included and, by letter of 1 March 2023, the EAT notified the appellant that her appeal had been deemed not properly instituted.

3. The missing documents were eventually submitted on 2 May 2023, which is when the appeal was treated as having been instituted, 412 days out of time. Upon the EAT's invitation, the appellant then filed an application for an extension of time on 11 May 2023. That application was refused by the Registrar for reasons attached to her Order seal dated 19 September 2023. By letter of 21 September 2023, the appellant has sought to appeal against that Order.

4. Prior to this hearing, no bundle had been lodged and the EAT therefore created a bundle from the documents that had been sent previously. During the course of the hearing, Mr Gallacher then referred to other documentation, suggesting he had previously sent this to the EAT (although there is no record of that on the EAT's digital filing system). Notwithstanding the apparent failure to refer to this material earlier, or to provide copies to the EAT, I went through the documents that Mr Gallacher had brought to the hearing and have taken those into account in reaching my decision in this matter.

The History

5. The ET proceedings in issue in this matter date back to 4 November 2020, and were initially brought against the appellant and Mr Dobbin. Mr Dobbin had been the sole director of the first respondent, which ran Kelly's Bar on Main Street, Cleland, where Mr McFarlane had worked since 2017. The claim against Mr Dobbin was subsequently dismissed, with the first respondent being named in the proceedings instead.

6. It was the first respondent's case that Mr McFarlane's employment had transferred to the appellant on or about 16 September 2020, when its lease over the bar ended and a new lease was entered into between the owner of the premises and the appellant, who then began to operate a bar at the same premises under the trading name "Delaney's". The issue for the ET was, therefore, whether Mr McFarlane's employment had transferred to the appellant pursuant to a relevant transfer under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE").

7. As for the claim against the appellant, this had been accepted by the ET (the appellant had

been named as a prospective respondent on an Acas Early Conciliation certificate) and a notice of the claim had been sent to the appellant by the ET on 11 November 2020, along with a notice of final hearing, listed for 27 January 2021. The appellant did not, however, enter any response, albeit there is a record of her having corresponded with the ET on 9 March 2021, "*strongly refuting the content of the 3rd Respondent's correspondence*".

8. Due to issues relating to the identity of the first respondent, the ET proceedings were then delayed and the case was re-listed for hearing for 4 and 5 May 2021 although, as it became apparent that no notice of hearing had been sent to the appellant (who was not in attendance), that was converted into a case management preliminary hearing. The record of the ET's case management decision and orders was sent out to the parties on 6 May 2021, with further communications following.

9. By letter 13 July 2021, the appellant wrote to the ET asking why it was sending her correspondence in relation to this matter and asking that her name "*be removed from the respondent list in this case*". Having considered this correspondence, by letter of 19 July 2021, the ET wrote to the appellant stating that rule 21 Employment Tribunal Rules (schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**) applied such that, the appellant having entered no response in the proceedings, she was only entitled to receive a notice of any hearing and any decisions reached by the ET and would not be sent any other correspondence and would only be entitled to participate in the ET proceedings to the extent permitted by an Employment Judge.

10. Although the appellant would thus have been sent a notice of the final hearing listed before the ET on 13 January 2022 (and, indeed, in the additional documentation provided to me by Mr Gallacher at the hearing today, I can see that a notice of hearing was indeed sent to and received by the appellant), she did not attend and the hearing proceeded in her absence. Considering the question whether Mr McFarlane's employment had transferred to the appellant under TUPE, the ET found (relevantly) as follows:

> "39. …
> k. on about 18 September 2020 there was a transfer of an undertaking and/or business situated immediately before the transfer in the United Kingdom from T&C Bars to Mrs. Gallagher which retained its identity post-transfer falling within the terms of reg. 3(1)(a) of TUPE;
> l. on about 18 September 2020 Mr. McFarlane's employment contract transferred from T&C Bars to Mrs. Gallagher by operation of reg 4(1) of TUPE."

11. As already recorded, the ET thus found the claims against the appellant were well-founded; it dismissed the claim against the first respondent. That judgment was sent out to the parties on 1 February 2022, under cover of the standard letter advising the recipients of the right of appeal and the strict 42-day time limit that would apply; that documentation was plainly received by the appellant on or about 1 February 2022 (and I record that the bundle of documents handed up to me today includes the ET's covering letter and the judgment, with the date of 1 February 2022 marked in manuscript at the top).

12. By email of 10 February 2022, the appellant contacted the Glasgow ET to complain about the judgment.

13. By letter of 17 February 2022, the ET responded to the appellant stating that it had already handed down its judgment and reminding the appellant of her right to lodge an appeal with the Employment Appeal Tribunal, reiterating the strict time limit that would apply. The letter ended by stating that no further action would be taken on the appellant's email of 10 February 2022.

14. Within Mr Gallacher's documentation handed to me today, there is then an email (which he tells me his nephew must have sent to himself), which seems to be dated 17 February 2023 and apparently attached two documents. It is not clear what those attachments were but the next documents in the pile handed up by Mr Gallacher are an ET3 for the appellant and a draft Form EAT 1, dated 25 February 2022, although there is no evidence that these were forwarded to the ET let alone to the EAT. In any event, it would also seem that on 25 February 2022, the appellant wrote again to the ET, objecting to the judgment of 1 February 2022 (I record that that email does not include any attachment).

15. The documents provided by Mr Gallacher then include a schedule from the Sheriff Officers, relating to the ET's judgment, which seems to date from 16 September 2022 and is plainly part of the enforcement process of the ET's judgment against the appellant.

16. The next document in the documents provided by Mr Gallacher would seem to be an email of 3 November 2022 from the appellant to the ET, again objecting to the ET's judgment of 1 February 2022, asking that it be stayed, and asking for a copy of the final judgment. In reply, on 4 November 2022, the ET again sent the appellant a copy of its judgment of 1 February 2022. In addition, on 8 November 2022, the ET refused to stay its judgment, making plain that any such application would need to be made to the Employment Appeal Tribunal, again suggesting that the appellant might wish to seek legal advice.

17. On 10 November 2022 a notice of attachment was delivered to the appellant by the Sherriff Officer.

18. Having thus considered the complete documentation provided by the appellant, it is apparent (as Mr Gallacher acknowledged) that nothing was filed with the EAT until 1 March 2023; even then, the appeal documentation was incomplete and the appeal was not properly instituted until 2 May 2023.

19. In subsequently applying for an extension of time for lodging the appeal, the appellant (through the documents filed with the Employment Appeal Tribunal) sought to explain her position as follows:

(1) She had not known of the existence of the ET1 and ET3 documents until requested from the Glasgow ET for the purposes of the appeal.

(2) She had requested copies of all documents from the other parties but those had not been provided and so she had had to approach the ET.

(3) In any event, as the ET's letter of 19 July 2021 had recorded, correspondence other than notices of hearing and decisions were not sent to the appellant pursuant to the ET Rules.

(4) The appellant took issue with the ET's finding that there was a relevant transfer.

(5) The appellant accepted that Acas early conciliation had taken place and a relevant EC certificate issued.

20. Before me today Mr Gallacher has said that the reason for the delay was because the appellant had understood that she had been dismissed as a respondent; he says that was her understanding from the ET's letter of 19 July 2021. Accepting that the appellant received the ET's judgment sent out on 1 February 2023, Mr Gallacher says that the appellant still did not accept that she ought to have been a respondent and communicated to the ET to that effect during the course of 2022. He says that the appellant only lodged an appeal to the EAT when that process reached its conclusion.

The approach

21. The 42-day time limit for presenting an appeal against a judgment of the ET is both generous and clear. Notwithstanding the generous six-week period for lodging an appeal to the EAT, there is a discretion to extend time, as provided by rule 37 of the **EAT Rules 1993**. The Registrar has declined to exercise that discretion but, as was explained by the EAT at paragraph 6 of **Muschett v London Borough of Hounslow** [2009] ICR 424, appeals from the Registrar's decision in this regard entail a fresh decision by the EAT Judge as to whether to extend time; it is not a decision as to whether the Registrar erred in law (and see **Nicol v Blackfriars Settlement** [2018] EWCA Civ 2285 at paragraph 8).

22. The approach I should adopt in deciding whether or not to exercise the discretion afforded by rule 37 is well-rehearsed in the case-law. In **United Arab Emirates v Abdelghafar and anor** [1995] ICR 65, subsequently approved by the Court of Appeal (for example in **Aziz v Bethnal Green City Challenge Co Ltd** [2000] IRLR 111 CA) the EAT identified the relevant questions on an application for an extension of time in this context as follows: (1) what is the explanation for the default? (2) does that amount to a good explanation? (3) are there circumstances which justify the EAT taking the exceptional step of granting an extension of time? As was further observed in

Abdelghafar at p 69H: "*An extension of time is an indulgence requested from the court by a party in default.*" Moreover, an explanation in this regard may not be sufficient unless it explains why the notice of appeal was not lodged throughout the entirety of the period; see **Muschett** paragraph 5(vi). Even where a party is unrepresented, the requirement to comply with the time limit is clear; there is no excuse even in the case of an unrepresented party for the ignorance of time limits (see **Abdelghafar** at p 71C-D).

23. These principles were summarised by Bourne J at paragraph 16 **Griffiths and Griffiths v Cetin** UKEATPA/1150/19 and UKEATPA/1151/19, as follows:

(1) Given the interest in finality of litigation, especially at appeal stage, compliance with time limits is fundamental.

(2) Extensions will be granted only in rare and exceptional cases.

(3) In general, it makes no difference whether the litigant is represented.

(4) Neither ignorance of the time limit nor failure within the limit to assemble the papers justifies a relaxation.

(5) The EAT must first be satisfied that it has been given a full, honest and acceptable explanation for the delay.

(6) The EAT will have regard to the length or shortness of the delay, but the crucial issue is the excuse or explanation, and that means an explanation covering the full period from the original decision to late submission.

(7) The merits of the appeal are rarely relevant.

(8) Lack of prejudice to the other party is usually not relevant, but any prejudice to them is relevant.

(9) These guidelines are not to be treated as a fetter. The Registrar, or the Judge re-taking such a decision, must exercise a judicial discretion in the matter.

Discussion and conclusions

24. Following the guidance in **Abdelghafar**, the first question I have to ask is a factual one: what is the explanation for the default in this case? To the extent that the appellant says that she was unable to submit all the relevant documents in time because she did not have these in her possession, I can neither accept that proposition on its face nor can I see that it would provide an explanation for the delay in any event.

25. First, it is apparent that the appellant had been sent the ET1 when the proceedings were first commenced. This would not have been entirely out of the blue because, on her own account, she had had a lengthy conversation with Acas regarding the claim, in which she had denied having any liability for Mr McFarlane's employment, and was aware that an EC certificate had been issued. Moreover, after being sent the ET1, although the appellant did not submit an ET3, it seems that she had been sent the ET3 that had been entered by Mr Dobbin and/or the first respondent, as it was in response to what had been said in Mr Dobbin's/the first respondent's defence to the claim that the appellant contacted the ET on 9 March 2021 to state her position, that there had been "*no TUPE agreement*". Although the appellant subsequently wrote to the ET on 13 July 2021 to protest about being sent continued correspondence relating to this case and asking to be removed as a respondent, the letter from the ET of 19 July 2021 made clear that she was still being treated as a respondent but that, given that she had not entered an ET3, she would only be entitled to be sent notices of hearings and copies of decisions.

26. Even if the appellant did not have copies of the ET1 and/or each of the ET3s when submitting her appeal, the EAT Rules in force at the time expressly allowed that an explanation might be provided for that omission. When seeking to file her appeal, the appellant provided no explanation as to why these documents were not included.

27. Yet further, these points are all ultimately academic as, even if the appellant had lodged all the required documentation when she filed her Form EAT1, the appeal would still have been submitted nearly a year out of time. The simple point is that time for lodging the appeal expired on 15 March 2022 and the appellant filed nothing with the EAT until 1 March 2023. There has simply

been no explanation for that delay. The appellant can have been under no illusion that she had been dismissed from the ET proceedings when she received the judgment against her on or about 1 February 2022, with a covering letter making clear her rights of appeal to the EAT (and the strict time limit that would apply) should she wish to challenge that judgment. It is apparent that Mr Gallacher must have then looked up the EAT procedure because a Form EAT1 was downloaded and completed in draft on 25 February 2022 but still no appeal was lodged with the EAT. Thereafter, although further communications were sent to the ET, the responses from the ET made plain that the proceedings before it were at an end and that any challenge to its decision needed to be made to the EAT.

28. Even if I accepted that some kind of explanation had been provided to me (which I do not), I do not accept that there is any *good* explanation, given that: the appellant had plainly received the ET's reasoned judgment by 10 February 2022, when she emailed the ET to complain about its findings; was aware of her right of appeal to the EAT, and the relevant time limit; had clearly looked into the EAT process and downloaded the Form EAT1; and received clear communications from the ET that she would need to pursue any challenge by way of appeal – the final communication in that regard being in November 2022, some months before the appellant finally made contact with the EAT.

29. In her various submissions as to why she should be granted an extension of time, the appellant focuses on what she contends to be the merits of the underlying claim. In summary, the appellant does not accept there was any transfer of an undertaking between the first respondent and her, and she considers that she made that point to the ET when asking to be removed as a respondent to the proceedings. Having thus taken no part in the ET hearing, the appellant does not consider that she should be held liable in respect of Mr McFarlane's claims.

30. As I have already observed, the merits of the underlying claim or defence are generally not relevant when determining whether or not time should be extended in this context. Inevitably, it is very difficult to form a view as to what the strengths or weaknesses of the potential defence might

have been had the appellant participated in the ET proceedings: the time for that assessment to be carried out was at the hearing before the ET; by not entering a defence to the claim in those proceedings, the appellant effectively opted not to be heard. The points now raised by the appellant do not suggest to me that she had anything like a good defence to the claims against her – the arguments she has presented fail to engage with the approach that an ET would be bound to adopt in determining whether or not there has been a relevant transfer for TUPE purposes – but I do not weigh that in the balance against the appellant. Having carefully considered all the matters raised by the appellant, however, I am unable to see that this is an exceptional case in which time should be extended by the requisite 412 days.

31. For all the reasons given, therefore, I refuse the application to extend time for the lodgement of this appeal and duly dismiss the appeal against the Registrar's order.