

Appeal No. UKEAT/0619/07/MAA

**EMPLOYMENT APPEAL TRIBUNAL**  
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal  
On 11 June 2008  
Judgment handed down on 10 February 2009

**Before**

**HIS HONOUR JUDGE BURKE QC**

**(SITTING ALONE)**

MR A F SLINGSBY

APPELLANT

GRIFFITH SMITH SOLICITORS

RESPONDENT

Transcript of Proceedings

JUDGMENT

**APPEAL FROM REGISTRAR'S ORDER**

## **APPEARANCES**

For the Appellant	MR D MATOVU (of Counsel) Instructed by: Messrs Martin Searle Solicitors 9 Marlborough Place Brighton BN1 1UB
For the Respondent	MR P GREEN (of Counsel) Instructed by: Messrs Griffith Smith Solicitors 47 Old Steyne Brighton East Sussex BN1 1NW

### **HIS HONOUR JUDGE BURKE QC**

#### **The history.**

1. This is an appeal by the Appellant, Mr Slingsby, against the grant to the Respondents by the Registrar of the Employment Appeal Tribunal, on 1 April 2008, of an extension of time for the

filing of their Answer and Cross-Appeal.

2. The appeal against the Employment Tribunal's decision was considered at the sift stage by HHJ Clarke who decided, on paper only of course, that it had no reasonable prospect of success. As Mr Slingsby was entitled to do, he sought an oral hearing pursuant to Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** (as amended); and that hearing took place before HHJ Reid QC on 20 December 2007. The outcome was that the appeal was set down for a preliminary hearing. Paragraphs 4 and 5 of the order dated 20 December 2007 read as follows:

**“4. The Respondent must lodge with the Employment Appeal Tribunal and serve on the Appellant concise written submissions in opposition for consideration at the preliminary hearing within 14 days of the seal date of this Order, dedicated to showing that there is no reasonable prospect of success for any appeal.**

**5. If the Respondent intends to serve a cross-appeal, it must be served within 14 days of the seal date of this Order, and thereafter such cross-appeals shall be set down for the said preliminary hearing at which the Respondent will be heard.”**

3. As they were required to do, the Respondents put in written submissions to the EAT by way of resistance to the Appellant's case at the preliminary hearing; and pursuant to the order made at the Rule 3(10) hearing they were permitted to be heard and were heard at the preliminary hearing, which took place before me and lay members on 22 February 2008. The result of that hearing was that the appeal was set down for a full hearing on all grounds except part of one of the grounds of the Notice of Appeal. Paragraph 3 of the order made on that occasion was in familiar form, as follows:-

**“3. Within 14 days of the sale date of this Order, the Respondent must lodge with the Employment Appeal Tribunal and file an Answer, and if such Answer include a crossappeal shall forthwith apply to the Employment Appeal Tribunal on paper on notice to the Appellant for directions as to the hearing or disposal of such cross-appeal.”**

That order was sealed on 27 February 2008; and it is common ground that the 14-day period set out in paragraph 3 of the order expired on 12 March 2008.

4. Unhappily, the Respondent's Answer, which included a cross-appeal on one issue only, namely the Tribunal's conclusion that, had fair procedures been adopted, Mr Slingsby would have been fairly dismissed after a 12-week period, was not provided to the EAT by the close of business on 12 March. It arrived on the next day. The reason for that brief delay was that the Respondent's solicitor, Mr James, was aware and made entries in his diary to remind him that the document was to be sent to the EAT on 11 March. When he left the office that day he had not heard from counsel with counsel's draft of the document; he was not in the office on 12 March; his secretary had the document typed up; but she did not appreciate that it had to be lodged with the EAT that day; and Mr James forgot to remind her. So she left it to be checked by Mr James on 13 April. When on 13 April he realised what had happened Mr James made sure that the document was lodged that day with an apologetic letter; but Mr Slingsby's solicitors, as they were entitled to do, took the point that the Answer and cross-appeal, presented one day outside the time provided for by the order, were out of time; and thus the issue as to whether an extension of time should be allowed came before the Registrar.

5. I need not go through the correspondence leading up to the hearing before the Registrar; the parties' solicitors were plainly not happy with each other; but the detail does not throw any light on the issues, which I have to decide.

6. The Answer is a substantial document; but the arguments which it puts forward are familiar; for they were, in different terms, for the most part set out in the Respondent's written submissions at the preliminary hearing, which, because that hearing was a bilateral hearing, Mr Green was able orally to develop. The cross-appeal was limited to the one point which I have identified above.

7. The Registrar's reasons for her granting of an extension of time for the Answer and the cross-appeal were set out in writing. The material part is as follows:-

**“Although the EAT take a strict view of time limits it acknowledges that the time limit upon respondents who wish to cross appeal, in that they only have 14 days, is more onerous than that upon appellants who have 42 days. Therefore the EAT takes a more liberal view than the stance upon initial appeal. The mistake made by the respondent's representatives was careless but has been honestly admitted and although more care should have been taken at the end of the limit to ensure that the answer arrived in time, any mistake would have a much greater impact and therefore it would be wrong to deny the opportunity to defend.”**

### **The Rules and Practice Direction**

8. The **Employment Appeal Tribunal Rules 1993** (as amended) by Rule 3(3) require that an appeal to the EAT, in proceedings of the relevant type, must be instituted within 42 days from the date when, in the case of a judgment of the Employment Tribunal with written reasons, that judgment was sent to the parties or, in the case of an order, 42 days from the date of the order. See Rules 3(3) (a) and (b).

9. The EAT Practice Direction of 2004, which applied at the relevant time, but does not, so far as the issues in this appeal are concerned, differ in substance from the terms of the new Practice Direction of 2008, sets out the following in paragraph 3.7 in respect of cases in which an extension of time for the presentation of an appeal is sought:-

**“3.7 In determining whether to extend the time for appealing, particular attention will be paid to whether any good excuse for the delay has been shown and to the guidance contained in the decisions of the EAT and the Court of Appeal, as summarised in *United Arab Emirates v Abdelghafar* [1995] ICR 65, *Aziz v Bethnal Green City Challenge Co Ltd* [2000] IRLR 111 and *Jurkowska v HLMAD Ltd* [2008] EWCA Civ 231.”**

10. Answers and cross-appeals are addressed by Rule 6 of the 1993 Rules, sub-rules 1 to 3 of

which provide as follows:-

**“6 Respondent’s answer and notice of cross-appeal**

**(1) The Registrar shall, as soon as practicable, notify every respondent of the date appointed by the Appeal Tribunal by which any answer under this rule must be delivered.**

**(2) A respondent who wishes to resist an appeal shall, [subject to paragraph (6), and] within the time appointed under paragraph (1) of this rule, deliver to the Appeal Tribunal an answer in writing in, or substantially in, accordance with Form 3 in the Schedule to these Rules, setting out the grounds on which he relies, so, however, that it shall be sufficient for a respondent to an appeal referred to in rule 5(a) [or 5(c)] who wishes to rely on any ground which is the same as a ground relied on by the [employment tribunal] [, the Certification Officer or the CAC] for making the [judgment,] decision[, declaration] or order appealed from to state that fact in his answer.**

**(3) A respondent who wishes to cross-appeal may [subject to paragraph (6),] do so by including in his answer a statement of the grounds of his cross-appeal, and in that event an appellant who wishes to resist the cross-appeal shall, within a time to be appointed by the Appeal Tribunal, deliver to the Tribunal a reply in writing setting out the grounds on which he relies.”**

Thus there is no statutory time limit for an Answer or a cross-appeal in an ordinary case. Rule 16(c) provides for the entering of an appearance within 14 days in the case of a direct application to the Employment Appeal Tribunal as a first instance tribunal made pursuant to specifically identified regulations. There is no such provision in the case of an appeal against a decision of the Employment Tribunal.

11. However, the Practice Direction by paragraph 10.1 provides as follows:-

**“10. RESPONDENT’S ANSWER AND DIRECTIONS**

**10.1 After the sift stage or a PH, at which a decision is made to permit the appeal to go forward to an FH, the EAT will send the Notice of Appeal, with any amendments which have been permitted, and any submissions or skeleton argument lodged by the appellant, to all parties who are respondents to the appeal. Within 14 days of the seal date of the order (unless otherwise directed), respondents must lodge at the EAT and serve on the other parties a respondent’s Answer. If it contains a cross-appeal, the appellant must within 14 days of service (unless otherwise directed), lodge and serve a Reply.”**

12. Thus a 14-day time limit from the EAT’s sealing of the order which permits an appeal to go

forward to a full hearing is imposed upon a Respondent's Answer and upon a cross-appeal by the Practice Direction. The Practice Direction does not, in relation to Answers or crossappeals, repeat what is set out in relation to the presentation of an appeal at paragraph 3.7 of the Practice Direction.

13. Finally, it is necessary to set out Rule 26 of the EAT Rules, which is as follows:-  
"Default by parties

**26 If a respondent to any proceedings fails to deliver an answer or, in the case of an application made under section 67 or 176 of the 1992 Act, section 33 of the 1996 Act, regulation 20 or 21 of the 1999 Regulations, regulation 33 of the 2004 Regulations or regulation 22 of the Information and Consultation Regulations, a notice of appearance within the time appointed under these Rules, or if any party fails to comply with an order or direction of the Appeal Tribunal, the Tribunal may order that he be debarred from taking any further part in the proceedings, or may make such other order as it thinks just."**

### **The Submissions**

14. Mr Matovu's submissions, in summary form, were as follows:

- (1) The time limits for presenting an appeal are strictly applied; the EAT in **United Arab Emirates v Abdelghafar** [1995] ICR 65 and the Court of Appeal, approving **Abdelghafar**, in **Aziz v Bethnal Green City Challenge Company Ltd** [2000] IRLR 111, established that an extension of time would only be granted in rare and exceptional cases where the Appellant provided a full, honest and acceptable explanation and excuse of and excuse for the delay. See per Mummery J in **Abdelghafar**. See **Aziz** per Butler-Schloss LJ at paragraphs 10 and 11 and Pill LJ at paragraph 18.
- (2) Administrative oversight is insufficient. See **Abdelghafar** page 71E.
- (3) Absence of prejudice is not enough. Even if the delay has given rise to no prejudice an extension may still be refused.

- (4) The recent decision of the Court of Appeal in **Jurkowska v Hlmad** [2008] IRLR 430 did not lower the very strict standards or thresholds established by the above authorities.
- (5) The same limits and principles apply to the presentation of an Answer and a cross-appeal as to the presentation of an appeal.
- (6) In this case:-
  - (i) There was no acceptable or good explanation; Mr James made an error, which should not have been made after the Respondents had, in reality, much more than 14 days in which to prepare and present their Answer and cross-appeal.
  - (ii) There were no exceptional circumstances. The Respondents had plenty of time to put their Answer and cross-appeal into writing, at the latest since the Rule 3(10) hearing on 27 December 2007; and their Answer in substance reproduced the written submissions, which they produced for the preliminary hearing.
  - (iii) In any event, the Answer did not need to take the form of a detailed written argument drafted by counsel, which the Respondents had chosen to adopt in this case, and could have been a much simpler and more speedily drafted document.

15. Mr Green submitted, again in summary form:

- (1) The position of a Respondent in putting in an Answer and cross-appeal should not be equated to that of an Appellant lodging a Notice of Appeal. There were substantial differences between the two positions, in particular:
  - (i) The time for lodging an Answer and cross-appeal is set out in the Practice Direction and in the orders made by the Employment Appeal Tribunal at a

preliminary hearing and not in the Rules or otherwise by Statute, in contrast to the position in relation to the lodging of an appeal.

(ii) An Appellant is given by statute the very substantial period of 42 days in which to lodge an appeal; a Respondent is only given by the Practice Direction 14 days in which to lodge an Answer and a cross-appeal.

(iii) A Notice of Appeal initiates an appeal; without it there is no appeal. In contrast an Answer is an expression of resistance to an existing appeal. The two situations are not the same. If an Answer is out of time and no extension is given, in effect the appeal will proceed unopposed with the risk of an erroneous reversal of the Employment Tribunal's decision, which decision is of course binding between the parties absent a successful appeal.

(2) This essential difference is reflected in the decision of the EAT in **ASDA Stores Ltd v Thompson** [2004] IRLR 598.

(3) If the **Abdelghafar** and **Aziz** principles apply at all in this case, they can apply only to the cross-appeal, which can be seen juridically as the presentation of a new appeal, but not to the Answer. Policy and justice should not prevent a Respondent who genuinely wishes to oppose an appeal from doing so.

(4) Insofar as the principles in **Abdelghafar** and **Aziz** apply, especially in the light of **Jurkowska**, they have the effect that time may be extended if there is a full and honest explanation, which substantially excuses the delay. In the present case there was a full and honest explanation, the delay was of the briefest possible nature and it was permissible for the Registrar to exercise her discretion as she did.

- (5) As a separate freestanding point, in relation to the Answer there was a general discretion, rather than the very limited one if the above principles applied, arising under Rule 26 of the EAT Rules.

### **Conclusion**

16. There is a substantial and clear line of authority as to the principles which apply to the grant of an extension of time for the presentation of an appeal to the EAT. Those principles, derived essentially from **Abdelghafar** and **Aziz**, were recently considered in detail by the Court of Appeal in **Jurkowska**; and in the circumstances of this case it is neither necessary nor appropriate for me to revisit them. In paragraph 19 of his judgment in **Jurkowska**, with which Hooper LJ in substance agreed, Rimer LJ, as it appears to me amplified those principles by the following valuable propositions, that:

- (1) The overriding objective incorporated into the EAT Rules by amendment in Rule 2A of those Rules does not play any additional role when an extension of time for institution of an appeal is being considered.
- (2) Even if the explanation for the delay does not amount to a good excuse, there may be exceptional circumstances which justify an extension of time.

17. In my judgment there is however a manifest juridical difference or difference of a legal nature between the institution of an appeal and the lodging or delivery (Rule 6(2) uses the word “deliver”; the Practice Direction at paragraph 10.1 uses the word “lodge”; there has been no suggestion the two words do not have the same meaning) of a Respondent’s Answer. In **Abdelghafar** at page 70E-G Mummery J said:

“(3) The approach indicated by these two principles is modified according to the stage which the relevant proceedings have reached. If, for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or

give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice to the other party, justice will usually favour the action proceeding to a full trial on the merits. The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. An extension may be refused, even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.”

18. That paragraph was set out in and applied by Rimer LJ in **Jurkowska**; see paragraph 4. It lays emphasis on the fact that, when the employment tribunal’s judgment is promulgated, the trial process in the Employment Tribunal is complete and constitutes a definitive resolution of the issues between the parties, unless one of the parties initiates further proceedings by the institution of an appeal. It is for that reason that the time limits for appealing to the EAT are strictly enforced - as are the Rules as to what constitutes sufficient institution of such an appeal (see Rule 3(1) and Practice Direction paragraph 2.1).

19. A Respondent’s Answer, in contrast, does not involve the institution of further proceedings; the strictness, which applies to the latter, does not as a matter of policy need to be similarly applied to the former, to which, in my judgment, the first rather than the second half of the paragraph from Mummery J’s judgment in **Abdelghafar** which I have just set out should apply.

20. It is common ground that there appears to be no clear reported authority on the principles to be applied where an extension of time to lodge an Answer is sought; I doubt whether it is truly surprising that is so. The reason is, as I see it, that the application of general discretionary principles to an extension of time for the delivery of an Answer has been generally accepted and does not merit wider publication.

21. The decision of the EAT in ASDA Stores v Thompson and others (No. 2) [2004] IRLR 598 does not address that question.

22. Having regard to:

- (1) The difference in nature between the institution of an appeal and the lodging of an Answer to it, to which I have referred.
- (2) The fact that, no doubt so that the prospective Appellant has ample time in which to decide whether or not to initiate further proceedings by way of appeal, the unusually lengthy period of 42 days is provided by the Rules for such institution, whereas the Practice Direction provides only 14 days for a Respondent to deliver his Answer.
- (3) The fact that in the absence of an Answer and of the presence of a Respondent to resist the Appellant's arguments in favour of the appeal (assuming that the Respondent has not chosen not to resist the appeal, for which special provision is made by Rule 6(4)) there must be a risk that a judgment of the Employment Tribunal, which does not contain any error of law, may be erroneously overturned by an appeal argued only on one side.

I conclude that the strict principles, which apply to the grant of an extension of time for the institution of an appeal, do not apply to the grant of an extension of time for the delivery of an Answer.

23. That is, of course, not to say that the time for delivery of an Answer should be extended lightly or as a matter of routine; general discretionary principles apply, including the need to consider the length of any delay and the existence and nature of any prejudice to the other party.

24. I am fortified in this conclusion by the terms of Rule 26 of the EAT Rules, as set out in

paragraph 12 above.

25. Although, as Mr Matovu pointed out, those words address the consequence of default rather than, expressly at least, the circumstances in which an extension of time for failure to deliver an Answer within 14 days may be granted, they appear to provide to the EAT a general discretion not to debar a Respondent who has failed to deliver an Answer from taking any further part in the proceedings. While pursuant to such a discretion it would be, at least in theory, open to the EAT to permit a Respondent to appear at, and present arguments at, the hearing of an appeal without an Answer, it is in reality far more likely that, if the EAT were to exercise this general discretion in favour of the Respondent, it would do so on terms that the Respondent presented an Answer within a specified period so that the EAT and the Appellant knew and understood the basis of the Respondent's resistance to the appeal in advance of the compilation of skeleton arguments. Without such an Answer issues as to further evidence, notes of evidence and the like might arise too late.

26. If Rule 26 does not of itself provide such a general discretion, it must, in my judgment, be taken to support the general discretion in the case of an extension of time for the delivery of an Answer, which I have earlier described.

27. On an application of such a discretion for the facts of this case, I have no doubt that the Answer, lodged one day out of time, should be permitted to stand and the time should be extended to allow it to have effect. The delay was minimal; it was immediately recognised and rectified; it has not been suggested that Mr Slingsby has suffered any prejudice by reason of that delay. Although the explanation proffered for that delay necessarily involves what Mr Green correctly accepted was a "schoolboy howler" on the part of his instructing solicitors, who had appropriately diarised the

importance of delivering the Respondent's Answer on time yet failed to achieve it, the inadequacy of the explanation could not in justice have the effect, applying ordinary discretionary principles, of depriving the Respondents of the opportunity to resist Mr Slingsby's appeal.

28. Nor am I persuaded that the fact that the proposed Answer reproduced in substance the Respondent's written submissions put before the EAT at the preliminary hearing or that an Answer does not need to contain the detail of the Respondent's arguments by way of resistance to the grounds set out in the Notice of Appeal, which the Answer in this case contains, should cause me to reach a different conclusion. There was no order for an Answer or call to draft an Answer before the preliminary hearing; and while the Answer is not required by the Rules to do more than set out substantially the grounds of resistance relied upon (rule 6(2)) it is for the Respondent's advisers to decide how much detail they regard it as appropriate to include within the Answer; it is not to count against a Respondent in terms of the exercise of the discretion if his advisers choose to put in (within reason) fuller arguments and take time to do so. In any event it is not contended that the Respondents could not have delivered their Answer in time.

29. For these reasons I concluded that the appeal against the grant of an extension of time for the delivery of the Respondent's Answer should fail.

30. However, I have reached the opposite conclusion in relation to the cross-appeal. The juridical nature of a cross-appeal to the EAT is, as I see it, the same as that of an appeal. It attacks and seeks to have erased, reversed, or modified, a part of the Employment Tribunal's judgment, which is not criticised by the Appellant, and which, in the absence of an appeal or, if there is an appeal, in the absence of a cross-appeal would constitute on the relevant issue a final judgment between the parties.

The policy reasons set out in the paragraph of Mummery J's judgment in Abdelghafar, which I have earlier set out, for applying strict principles to an extension of time for the institution of an appeal in my judgment apply equally to the case of cross-appeal.

31. I appreciate that the Practice Direction provides, normally, only for 14 days for the delivery of an Answer and/or cross-appeal from the seal date of the order sending the appeal to a full hearing; but the Respondents will have had by that stage a much longer time to consider whether they wish to put forward an appeal or, in the event of an appeal by the other side, a cross-appeal. In those circumstances the restriction of time set out in the Practice Direction cannot be taken as an indication that a cross-appeal is to be treated differently from an appeal.

32. In my judgment the decision of the EAT in ASDA Stores does not support the argument put forward by Mr Green that a cross-appeal should not be so regarded. The EAT was, at paragraph 26-27 of its judgment, considering a different, and highly unusual, situation in which it might have been thought that the Respondents were seeking, albeit in the form of a crossappeal, to appeal against a different order of the EAT made on a different day from that which was the subject of the appeal. As the EAT said, at paragraphs 25-26, such a cross-appeal would have to be treated as a separate appeal with its own time limit.

33. Mr Green relied on the words in paragraph 26:

**“26 The course in our judgment would and should have been that consideration should have been given, or would be given, in an ordinary case, to whether a "cross-appeal" in respect of a different order was in time, addressing its own time limit, namely the time running from the order complained of in the 'cross-appeal'. If such a 'cross-appeal' is out of time, it may be that the existence of an appeal against a different Order on the same topic may well be a good justification for allowing an extension of time, and it may well be, in an appropriate case, that the extremely strict consequences of being out of time on such an appeal, such as are laid down in *United Arab Emirates v Abdelghafar* IRLR 243 and *Aziz v Bethnal Green City Challenge Co Ltd*. [2000] IRLR 111, where of course without the appropriate time limit being complied with by an appellant there would be no appeal at all, would not be applied to a time-limit on such a cross-appeal.”**

But, in my view, those words cannot be construed as indicating, still less deciding, that the strict principles to which they refer do not apply to any cross-appeal. The EAT was indicating only that, if in the case of an independent appeal presented by way of a cross-appeal against a different order made on a different day from that which was the subject matter of the Appellant's appeal, there was already in existence an appeal on the same topic, that might be an exceptional circumstance such as would allow of an extension of time within the normally strict principles set out in **Abdelghafar** and **Aziz**. That is why reference is made in paragraph 27 to the existence of such an appeal on the same topic amounting to "an exceptional reason in an appropriate case".

34. That situation did not exist in the present case. Accordingly, without resorting to Mr Matovu's argument, strictly correct as it was - although it would be wrong to regard the words of Burton P as constituting anything other than important guidance - that those paragraphs of the EAT's judgment in **ASDA Stores** were *obiter dicta*, I do not regard that judgment as providing support to Mr Green's argument, or as persuading me that the principles in **Abdelghafar** and **Aziz**, as modified to a very limited degree in **Jurkowska**, do not apply to a cross-appeal; and I hold that they do so apply.

35. I have already set out my view that **Jurkowska** modifies those principles by explaining, insofar as necessary, that the discretion to extend time within those principles may be exercised if there are exceptional circumstances even if the explanation put forward for the delay does not amount to a good excuse; but in the present case, reaching my own conclusion (which I appreciate differs from that of the Registrar so far as the cross-appeal is concerned):

- (1) The explanation given for the delay was full and honest but was not a good excuse; it

involved an obvious oversight or error on the part of the Respondent's solicitors.

- (2) In any event the circumstances were not exceptional. The EAT regularly deals with cases in which an appeal is instituted only one day out of time or which is instituted within time but improperly because a required document is omitted. Such a situation of itself does not normally give rise to prejudice; but neither the absence of prejudice nor the brevity of the delay ordinarily amount without more to exceptional circumstances. In truth there was, in my judgment, nothing exceptional about the circumstances of this case which, in my experience, were not in any way untypical. The Registrar did not define the exceptional circumstances on which she relied; I am satisfied that there were no such circumstances.

36. For these reasons I concluded that the appeal against the Registrar's extension of time, in the case of the cross-appeal only, should be allowed.

### **Result**

37. The appeal against the extension of time for the delivery of the Answer is dismissed; the appeal against the extension of time for delivery of the cross-appeal is allowed.