Absence of bounce back email saves Claimant's appeal – *Hawkes v Oxford Economics Limited* [2022] EAT 179

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Introduction

1. This case concerns an appeal against a Registrar's order from April 2022 in which an extension of time to present an appeal was refused.

2. The Claimant/Appellant worked for Oxford Economics from 5 June 2017 to 14 January 2019. He brought a claim for unfair dismissal on 26 April 2019. He was a reservist for the Royal Marines.

3. Under Defence Reform Act 2014 the two-year qualifying period of service for bringing a tribunal claim is not applicable in circumstances where the reason or principal reason is, or is connected with, membership of a reserve force.

4. Following a hearing at London South, the Claimant's claim of unfair dismissal was dismissed due to want of jurisdiction as the Tribunal found that the principal reason for the Claimant's dismissal was not and was not connected to his membership of the reserve force. The judgment was sent to parties on 29 December 2020.

5. The deadline for bringing an appeal was 4pm on 9 February 2021. Between 29 December and 9 February, the Claimant was staying at his property in Edinburgh and suffered with COVID symptoms between 28 January and 10 February 2021.

6. In order to bring his appeal, the Claimant was required to produce the pleadings (ET1, ET3), the Notice of Appeal and the copy of the Judgment being appealed. The Claimant was under the misunderstanding that he needed to produce a note of the evidence. The Claimant made various attempts to obtain documents from the ET and the Respondent's solicitors in January and early February 2021.

7. Early on 9 February 2021 (deadline day) the Claimant's pro bono representative sent the Claimant a grounds of appeal document, a "permission" skeleton and an application for notes from the Tribunal and Respondent. The appeal grounds were formulated on a perversity challenge.

8. At 15:29 on 9 February 2021 the Claimant emailed the skeleton argument, application for notes and witness statements. He didn't in fact attach the notice of appeal and grounds of appeal, despite stating that he had attached them.

9. At 15:33 on the same day the Claimant sent the notice of appeal and judgment. He said he would "send the bundle" in a zip file and follow up with the PDF due to size issues. That email was never received by the EAT; there was no evidence of a bounce-back or acknowledgment of that email. The Claimant didn't know at the time that the notice of appeal and judgment hadn't been received by the EAT.

10. The ET1 and ET3 was successfully delivered before 4pm on 9 February 2021.

11. On 17 February 2021 the EAT wrote to the Claimant stating that they hadn't received the notice of appeal nor judgment. He replied over the next few days, attaching the 15:29 and 15:31 emails and the missing notice of appeal and judgment

12. On 6 April 2021 the EAT wrote to the Claimant telling him his appeal was out of time and he could apply to extend time. On 19 April, the Claimant explained the reasons for the issue as follows:

> *"it seemed that some documents had not arrived though they had been sent in time. [The application to extend time] 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" (para 14 EAT judgment).*

13. HHJ Shanks identified that the leading authority of *UAE v Abdelghafar* [1995] ICR 65 (para 18 EAT judgment):

"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?"

14. The EAT found that there was no good excuse for the fact that the Claimant had only started sending the relevant documents to the EAT half an hour before the deadline. The Judge found, however, that the reason for the non-arrival of the notice of appeal or judgment was a technical one (the Claimant having adduced evidence from his service provider EE). The Claimant had not received a bounce back email and the EAT found that the Claimant did have a good excuse for his default.

15. The Judgment found as follows:

"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" (para 26)

16 The appeal was allowed, and time extended as required. The substantive appeal would therefore proceed to the sift.

Comment

16. This case is a useful one for practitioners on both sides of the aisle; it suggests that the absence of a bounce back email, where there is a clear proof of sending, may be of assistance to Claimants. It is also helpful for Respondent practitioners in circumstances where a bounce back email has been received as it serves as a reminder that the EAT is likely to look at these sorts of challenges in a practical way and that clearly, had a bounce back email been received, the Claimant would have been on notice that the appeal hadn't been properly instigated. The case also serves as a useful reminder to not leave actioning an appeal until 30 minutes before the deadline – a fact which didn't end up influencing the outcome but nevertheless was rightly criticised by the EAT.

March 2023

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