

**Neutral Citation Number: [2011] EWCA Civ 995**  
**IN THE COURT OF APPEAL ( CIVIL DIVISION )**

**On Appeal from the Employment Appeal Tribunal**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Thursday 7th July 2011

**Before:**

**LORD JUSTICE LAWS**  
**LORD JUSTICE LONGMORE**  
**and**  
**LORD JUSTICE EHERTON**

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**Between:**

**PB Sud v**

**Appellant**

**- and -**

**London Borough of Ealing**

**Respondent**

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**Mr P Engelman (Pro Bono)** appeared on behalf of the **Appellant**.  
**Mr R Downey** (instructed by **London Borough of Ealing**) appeared on behalf of the  
**Respondent**.

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**Judgment**

## **Lord Justice Etherton:**

### **Introduction**

1. At an oral hearing on 17 February 2011 Elias LJ ordered that the appellant's application for permission to appeal, and an extension of time for appealing, the order of HHJ Ansell in the Employment Appeal Tribunal ("the EAT") dated 21 June 2010 be adjourned for hearing before the full court, with the appeal to follow if permission is granted.
2. By his order HHJ Ansell dismissed the appellant's appeal from the order of the Registrar, Mr P Donleavy, refusing the appellant's application for an extension of time to present her notice of appeal from the decision of the Employment Tribunal ("the ET") on 14 December 2009.
3. The background can be briefly stated.
4. The appellant was employed by the respondent, the London Borough of Ealing, between July 1986 and 30 June 2008. On 20 February 2008 she issued a claim in the ET (3300384/2008) for unfair dismissal and for discrimination on the grounds of sex, race and disability. She claimed in those proceedings that she was a disabled person for the purposes of the Disability Discrimination Act 1995 ("the DDA") by reason of, among other things, clinical depression.
5. On 29 September 2008 she issued a further claim in the ET (3302485/2008) for unfair dismissal and for disability discrimination. She described her disability in the claim form as being, among other things, clinical depression and anxiety disorder.
6. The hearing before the ET took place between 7 and 25 September 2009. Its reserved judgment, extending to 333 paragraphs, was delivered on 14 December 2009. The ET found in favour of the appellant that there had been a failure to make reasonable adjustments in relation to the provision of aids and adaptations to assist her working at home. The other claims were dismissed. In particular, although there was evidence of depression and anxiety, the ET found that the appellant's mental state was not a mental impairment for the purposes of the DDA.
7. The appellant launched an appeal against the judgment of the ET by a notice dated 25 January 2010. That was the last of the 42 days time limit for appealing. She lodged various documents as required by the Employment Appeal Tribunal Rules 1993 ("the Rules"), including the first ET1 and the second ET1. On the same day the Deputy Registrar of the ET wrote to her to say that page 3 of the grounds of complaint in the second ET1 was missing. The appellant denies that it was missing when she lodged the documents.
8. Under cover of a letter dated 27 January 2010 the appellant supplied the missing page. In that letter she said that she could "only now surmise that some of the paper work had somehow gone missing". She also asked for an extension of time. As I said, Registrar Donleavy dismissed that application on 6 April 2010, and the appellant's appeal against that dismissal was dismissed by HHJ Ansell on 21 June 2010.

### **The legal framework**

9. Rule 3 of the Rules provides that an appeal to the EAT from a judgment of the ET shall be instituted by serving various documents on the EAT, including a copy of any claim and response in the proceedings before the ET.
10. Rule 37(1) provides that the time prescribed by the Rules for doing any act may be extended, whether or not it has already expired.
11. Paragraph 2.1 of the Practice Direction (Employment Appeal Tribunal) Procedure (2004) (“the Practice Direction”) provides that a notice of appeal will not be validly lodged if there are not attached to it copies of the judgment, decision or order appealed against and of the ET’s written reasons, together with a copy of the claim (ET1) and the response (ET3), or a written explanation for their absence.
12. Paragraph 3.7 of the Practice Direction provides:

“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 Abdulghafar* [1995] ICR 65 , *Aziz v Bethnal Green City Challenge Co Ltd* [2000] IRLR 111 and *Jurkowska v Hlmad Ltd* [2008] EWCA Civ 231 .”

13. Paragraph 5 of the EAT Practice Statement [2005] IRLR 189a also emphasises the consequences of the failure to lodge in time the required documents for instituting an appeal to the EAT. It said:

“5. The reason for this Statement in open court is to re-emphasise these requirements and the consequence of failure to comply with them, namely that an appeal not lodged within the 42 days validly constituted, i. e. accompanied by the required documents, will be out of time, and extensions of time are only exceptionally granted (see paragraph 3.7 of the Practice Direction ).

6. From the date of this Practice Statement, ignorance or misunderstanding of the requirements as to service of the documents required to make a Notice of Appeal within the 42 days valid will not be accepted by the Registrar as an excuse.”

14. *United Arab Emirates v Abdulghafar* [1995] ICR 65 and *Jurkowska v Hlmad Ltd* [2008] EWCA Civ 231 emphasise the strictness with which the EAT approaches the issue of time limits for the lodging of documents on an appeal.

### **The Judgment of HHJ Ansell**

15. The appellant appeared in person before the Judge. The Judge recorded that she (the appellant) had given brief evidence. The respondent was represented by counsel, Mr Raoul Downey, who also appears for the respondent before us today.
16. The appellant did not accept before the Judge that there was a page missing from the second ET1 lodged with her notice of appeal to the EAT. The Judge dealt with that briefly in paragraph 7 of his judgment, as follows:

“7. Ms Sud today has queried whether in fact that document was missing. For what it is worth I have checked all the documents and the document is not in that bundle. This court and the general office are always meticulous in checking these matters.”

17. The Judge set out the reasons given by the appellant for leaving the lodging of her appeal until the very end of the 42 day period. They included that she became very upset and depressed for several weeks on becoming aware of the judgment of the ET; there was the Christmas break and she was not able to contact a number of people from whom she could have got advice in the matter; the weather was bad, and she was not able to leave the house and go to see people who might be able to advise her in the matter; she could not put her mind to preparing the documents until the end of the six-week period.
18. The Judge dealt with the explanation by the appellant as to what had happened in relation to the missing page and recorded her belief that she had checked through all the documents to ensure they were correct. The Judge then went on to explain the philosophy behind the strict application of time limits for appeals to the EAT, and he quoted from the United Arab Emirates case and Jurkowska .
19. The Judge referred to the fact that the appellant had obtained new employment with the London Borough of Hounslow the previous year, and to a helpful letter from Hounslow's employment opportunities officer, which spoke of her outstanding work there, leading to her promotion, and of risk assessment and monitoring of her, as well as to the fact that when the appellant is off work and at home her anxiety levels lead to episodes of depression.
20. The Judge said that, although he took all those facts into account, they could well be applied to many of the litigants in person thinking of filing notices of appeal to the EAT. He said that he had really heard and seen nothing in the case that took it out of the ordinary, making all allowances for the appellant as she was at that time. He summarised his conclusions in paragraph 20 of his judgment, as follows:

“20. I am afraid, at the end of the day, I am left with the conclusion, on the balance of probabilities that Ms Sud just left the whole process too late. She started the preparation too late and left it all too late. She was, of course, at home for much of that period. It seems to me that she could have got on and spread the workload over the six week period. But she did leave it all too late, in my view, and to my mind therefore has not provided a good excuse for the default. I am not saying that she in any sense has been dishonest about the matter, but the fact that remains what she has put forward, I am afraid, is not a good enough excuse and the delay in the preparation of the documents meant that everything was left to the last day. If she had come in two or three days earlier the fault could have been detected and all would have been order. It may seem to the layman this is a harsh rule, but a rule which is needed. Otherwise, as I have indicated already, the system would break down and there will be chaos. For that reason, therefore, I am not prepared to interfere with the Registrar's discretion. It seems to me the Registrar's decision where

she set out the various authorities and heard argument was a correct view on the facts of this case.”

### **The appeal to this court**

21. The appellant needs an extension of time for appealing to this court. She did not file her notice of appeal until 1 September 2010. The reasons for that delay are set out in section 9 of the notice of appeal. They include the fact that the appellant did not receive a copy of the judgment of the Judge until 21 August 2010. Having regard to all the circumstances, including the various matters in CPR 3.9 and the Overriding Objective, I consider that it would be right to extend the time for appealing.
22. Turning to the merits of the appeal itself, as matters have developed during today's hearing, there is only one point which I need to address in this judgment, and that is this. As I have indicated, the appellant made two applications to the ET, namely 3300384/2008 and 3302485/2008. As I have mentioned, the former was for sex, race and disability discrimination. The latter was for disability discrimination, among other things. The judgment of the ET has both claim numbers at the top right hand corner, and both claims are mentioned in the first two paragraphs of the ET's judgment. Both ET1s were lodged in support of the appellant's appeal to the EAT, but there was a page missing only in respect of the second ET1. It has been pointed out by Mr Engelman, on behalf of the appellant, that the missing page in fact added nothing of substance at all to what was contained in the first ET1 and its supporting material.
23. The appellant's principal point of law on the appeal to the EAT appears to be whether her mental condition was such as to bring her within the DDA. That was, as I have said, raised in relation to both ET1s.
24. Mr Engelman submits that in the circumstances the appeal in relation to the first ET1 was properly and fully constituted. No leave accordingly is needed in relation to the appeal in respect of the ET's judgment on the matters raised in that ET1.
25. Bearing in mind, Mr Engleman submits, that the appeal from the ET's judgment on the second ET1 was properly made only two days late, and that the missing page of the second ET1 added nothing of any significance whatever to what was already contained in the first ET1, certainly in relation to the disability claim, not only was the exercise of the discretion by the Registrar and the Judge in relation to the application of extension of time wrongly exercised, but the discretion could in reality only properly be exercised one way, namely by granting the extension of time of two days.
26. Mr Downey, who appears today on behalf of the respondent, submits that this would be a wrong approach and a wrong analysis. He submits that the way that the two ET1s were managed by the ET was in practical terms, if not in technical terms, to consolidate the two claims so that they were dealt with together, with issues ranged across the two of them identified and then decided by the ET in its single judgment. He submits that it would be impossible in the present case to disentangle from the single judgment of the ET those conclusions and decisions of the ET which relate only to the first ET1 and those that relate to the second ET1. In that connection he emphasises that, for example, the unfair dismissal claim,

which features in both ET1s, could only properly be brought in the second ET1 since, at the time of the first ET1, the appellant remained employed by the respondent; and again, in relation to various discrimination matters and detriments that were suffered, those also could only properly be considered and determined under the second ET1, bearing in mind that the period to which they related occurred only after the first ET1 had been completed.

27. He submits, as a matter of principle, procedure and substance, that there was here a single judgment or decision in relation to both ET1s, and a single appeal which cannot be dissected between the two claims; and that, since both claim forms were a necessary part of any appeal and had to be lodged in their entirety, therefore it was right that an extension of time was required to constitute the appeal as a whole, even though the default in submitting full documents only arose in relation to the second ET1.
28. I cannot agree with that analysis. It seems to me, first of all, perfectly clear that at all times there were two separate claims before the ET. They are identified separately by the ET, both in the endorsement on each page of the ET's decision and in the decision itself. Indeed, at the appeal stage, in acknowledging receipt of the documents lodged for the purpose of the appeal by the appellant, the EAT explicitly recognised that there were two ET1s, both of those being identified separately on the document receipt form which was issued by the EAT's officers.
29. There is no principle of common law causing those two claims to become a single claim. Nor has, Mr Downey been able to point us to any specific rule either of the ET or of the EAT which would have had the effect of merging the two claims for all purposes into one. In those circumstances it seems to me perfectly clear that an appeal was properly and fully constituted on any footing in relation to the first ET1. That being so, the discretion of the Registrar was exercised without taking into account that vital feature. Furthermore, it seems to me that, bearing in mind that the appeal in relation to the first ET1 was fully constituted and required no extension of time, there are exceptional circumstances in the present case, which inevitably would result in an extension of time being given in relation to the second ET1.
30. Mr Downey's submission that it is in practical terms impossible to deconstruct, if I can put it that way, the ET's judgment, so as to allocate certain findings in relation only to the first ET1 and others to the second ET1, cannot result in the consequence that there can be no appeal in relation to either ET1. The consequence, it seems to me, of substantially the same matters being covered in both ET1s including, in particular, the question of whether or not the appellant's mental state fell within the DDA is that it is just and right, in accordance with the Overriding Objective, that the two-day extension should be granted in relation to the second ET1 so as to constitute that also a proper appeal.
31. As I have said, this issue turns on the particular facts of this case which I have mentioned, and they include the fact that the missing page added nothing whatever of substance to the first ET1.
32. For those short reasons I would grant permission to appeal, and I would allow the appeal, and, without remitting the matter to the ET, I would grant the extension of time of two days.

**Lord Justice Laws:**

33. I agree.

**Lord Justice Longmore:**

34. So do I.

**Order:** Application granted; EOT granted; appeal allowed