

# No rigid rules – the correct approach to deciding whether to extend time for appealing to the EAT

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[ ] paragraph number of the judgment of the Court of Appeal in [Ridley & Others v HB Kirtley t/a Queen's Court Business Centre & Others \[2024\] EWCA Civ 884](#)

## Introduction

The Employment Appeal Tribunal ('EAT') has long been known to strictly enforce the time limit for instituting an appeal; its right to do so is one of the first principles recorded by the Court of Appeal in *Ridley & Others v HB Kirtley t/a Queen's Court Business Centre & Others* [2024] EWCA Civ 884 [6]. But what approach must be taken where a notice of appeal is lodged in time but without complete copies of all the required accompanying documents? That was the position in the three appeals considered by the Court of Appeal in *Ridley & Others*. In each case, the Appellant had omitted to include their employer's Grounds of Resistance with their notice of appeal. By the time the Appellants provided the missing documents, the time limit for appealing had expired and the EAT refused to extend time.

## Discussion

Rule 3(1) EAT Rules 1993 required appeals to be 'instituted by serving on the Tribunal the following documents':

- (a) a notice of appeal in, or substantially in, accordance with Form 1, 1A or 2 in the Schedule to these rules;
- (b) in the case of an appeal from a judgment of an employment tribunal a copy of any claim and response in the proceedings before the employment tribunal or an explanation as to why either is not included; and

- (c) in the case of an appeal from a judgment of an employment tribunal a copy of the written record of the judgment of the employment tribunal which is subject to appeal and the written reasons for the judgment, or an explanation as to why written reasons are not included;
- (d) in the case of an appeal made pursuant to regulation 38(8) of the 1999 Regulations or regulation 47(6) of the 2004 Regulations or regulation 35(6) of the Information and Consultation Regulations from a declaration or order of the CAC, a copy of that declaration or order; and
- (e) in the case of an appeal from an order of an employment tribunal a copy of the written record of the order of the employment tribunal which is subject to appeal and (if available) the written reasons for the order;
- (f) in the case of an appeal from a decision or order of the Certification Officer a copy of the decision or order of the Certification Officer which is subject to appeal and the written reasons for that decision or order'. [Emphasis added].

Notably, the appeal deadlines in respect of the three appeals in question were all before 30 September 2023, from which date Rule 3(1)(b) was revoked (by the Employment Appeal Tribunal (Amendment) Rules 2023). However, the Court of Appeal's reasoning is not limited to cases involving a failure to provide the Grounds of Resistance to the EAT along with a notice of appeal (or otherwise before the expiry of the appeal deadline).

Similarly, while it was of no assistance to the Appellants in *Ridley & Others*, from 30 September 2023, Rule 37(5) provides:

If the appellant makes a minor error in complying with the requirement under rule 3(1) to submit relevant documents to the Appeal Tribunal, and rectifies that error (on a request from the Appeal Tribunal or otherwise), the time prescribed for the institution of an appeal under rule 3 may be extended if it is considered just to do so having regard to all the circumstances, including the manner in which, and the timeliness with which, the error has been rectified and any prejudice to any respondent.

The Court of Appeal concluded that the amendments to the EAT Rules from 30 September 2023 were not relevant to the issues before it (see the Postscript to the judgment).

Applying the Rules as they were before 30 September 2023, the Court of Appeal noted that the power in Rule 37(1) to extend time for bringing an appeal provides the EAT with a discretion which on its face 'could not be wider' [16]. Rule 37(1) states simply that:

The time prescribed by these Rules or by order of the Appeal Tribunal for doing any act may be extended (whether it has already expired or not) or abridged, and the date appointed for any purpose may be altered, by order of the Tribunal.

In *Ridley & Others*, the Court of Appeal acknowledged that its judgment was ‘very long’ [7]; this is largely due to the number of authorities which deal with the principles applicable to the exercise of the power to extend time for appealing. The Court of Appeal discussed the following:

*United Arab Emirates v Abdelghafar* [1995] ICR 65 [23-28]

*Aziz v Bethnal Green City Challenge Co Limited* [2000] IRLR 111 [29-33]

*Kanapathiar v Harrow London Borough Council* [2003] IRLR 571 [34-41]

*Woods v Suffolk Mental Health Partnership NHS Trust* [2007] EWCA Civ 1180 [42-47]

*Jurkowska v Hlmad Limited* [2008] ICR 841 [48-63]

*Sud v Ealing London Borough Council* [2011] EWCA Civ 995 [64-70]

*O’Cathail v Transport for London* [2012] EWCA Civ 1004 [71-80]

*Green v Mears Limited* [2019] ICR 771 [81-88]

*Nicol v Blackfriars Settlement* [2018] EWCA Civ 2285 [89]

*J v K* [2019] ICR 815 [90-97]

The Court of Appeal considered that it was bound by the guidance in *Abdelghafar* [145]. It acknowledged that the *Abdelghafar* guidance is perceived as being a strict and perhaps hard-hearted, but it held that the exercise of the discretion to extend time is not inflexible; it must be exercised in a ‘judicial’, ‘even handed’ and above all ‘fair’ way [143]. It follows that the discretion requires material distinctions to be recognised. ‘There is a legally significant difference between the case of an appellant who lodges a notice of appeal and nearly all of the documents required by rule 3(1) inside the time limit, and an appellant who lodges nothing until after the time limit has passed’, the first such appellant has substantially complied with the requirements whereas the second has not [144]. This difference should in principle be reflected in the EAT’s approach [144].

Moreover, the Court considered that the key principles in *Abdelghafar* are as follows. The grant or refusal of an extension of time is a matter of discretion which must be exercised on a principled manner in accordance with reason and justice; it involves weighing and balancing all the relevant factors. The result is not dictated by any set factor; discretions are not programmed responses [146]. It is necessary to consider two conflicting principles (neither of which are absolute): first, that rules of the court must be observed (they are devised in the public interest to promote the expeditious dispatch of litigation) and are not merely targets to be aimed at or expressions of pious hope; but, second, a claimant should not ordinarily be denied an adjudication of his claim on the merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate [146].

The further specific guidance in *Abdelghafar* is just that; the guidelines are not rigid rules or intended to dictate the outcome of the exercise of discretion [145].

The Court of Appeal also emphasised that where an appeal is lodged in time but with documents or part of a document missing, it is very likely the appellant has made a mistake [147]. The mistake is the reason for invoking the discretion to extend time and cannot therefore be used as a reason for barring the exercise of discretion. An understandable or reasonable mistake cannot necessarily be discounted on the basis that it may have been picked up and corrected before the expiry of the time limit, had the appeal been lodged earlier [147]. A clear understanding of an appellant's mistake is necessary to determine whether the explanation is satisfactory or not [147]. And while the EAT has no duty to correct an appellant's mistakes, the relevant period of delay is the period between when the EAT informs the appellant of her mistake and when the mistake is corrected [147].

## Conclusion

After further discussion, the Court of Appeal allowed all three of appeals under consideration: Mrs Ridley [159-161]; Ms Kostrova [162-164]; Ms Taylor [165-167].

The two over-arching reasons for the Court of Appeal's judgment are as follows.

First, the Court held that the EAT had failed to recognise that the Appellants' incomplete but nevertheless *substantial* compliance with Rule 3(1) was a relevant factor in the exercise of the discretion conferred by Rule 37(1) [6].

Second, ‘the broad power to extend time has become “encrusted by authority” in a way which has led to the emergence of rigid sub-rules which are not justified by the broad terms of rule 37(1), or by the reasoning in the important relevant cases. As a result, some judges have tended to rely on those sub-rules for automatic answers, rather than to consider the exercise of the discretion afresh in each case, by looking at the facts of each case, and not relying on generalisations’ [6].

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