When will errors in submitting appeals be fatal? The EAT sets down guidance.

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Background

In the case of *AB v University of East London and others* [2024] EAT 157, the President of the EAT looked at five cases in which the Appellant had failed to provide all the documents necessary to correctly constitute an appeal, only providing the correct documents outside of the 42-day time limit. All cases were rejected by the Registrar and, in line with normal EAT procedure, the Appellants appealed to a Judge of the EAT.

Correctly constituting an appeal is a perennial problem for both lawyers and litigants in person, both of whom may rarely be involved in appeals. As a reminder, the documents that need to be provided with the grounds of appeal are:

i) A copy of the judgment or order being appealed
ii) A copy of the written reasons of the judgment or the order being appealed (if they exist and are separate to the judgment)

Note that this is a change brought in by the Employment Appeal Tribunal (Amendment) Rules 2023 ('the Amendment Rules'). Previously, it was necessary to attach the ET1 and ET3, which was the source of numerous examples of rejected appeals (e.g. failure to attach multiple ET1s or all pages of the ET1).

The Amendment Rules also changed the guidance for rejection of an appeal when the error is *'minor'* and it is rectified outside the 42 day time limit. The new rule 37(5) EAT Rules means that the time limit will 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'.[1]

As to what 'minor' means, the EAT referred back to the case of *Melki v Bouygues E and S Contracting UK Ltd* [2024] EAT 36 in which the EAT found that a minor error would be one in which one or more pages of a document had been omitted. However, omitting a whole document or a substantial or important part of a document would not be a minor error, unless it could be said that the omitted document was irrelevant to the appeal.

The Court noted that *Jasim v LHR Airports Ltd* [2024] EAT 59 followed much the same logic. HHJ Auerbach found that '*whether the error is minor is to be judged in particular by reference to the significance or not of what has been omitted*'. In that case, the ET1 and ET3 had been completely omitted but all the relevant information from those documents could be gleaned from other documents that were submitted. Therefore the error was deemed 'minor'.

Even if the error is not deemed to be minor, the EAT must go on to consider the longstanding power under Rule 37(1) of the EAT Rules 1993 as clarified in *United Arab Emirates v Abdelghafar* [1995] ICR 65.

Suggested Approach

The EAT set out its suggested approach to dealing with appeals in which there has been a failure to lodge all the documents:

i) Has the Appellant provided an honest explanation for the omission of any document that does not seek to mislead?
ii) Is the error 'minor' and has the error been rectified?
iii) If so, should time be extended pursuant to Rule 37(5) 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?
iv) If discretion under Rule 37(5) is not exercised, should discretion be exercised under Rule 37(1)? This should be done in an 'even-handed' way.
v) Why was the error was made and is it a *'good'* explanation?

[1] Note that if the error is rectified within the 42 day limit, the appeal will be deemed properly constituted and there will not be an issue.

vi) How long did it take to rectify the omission? An explanation may not be sufficient if it does not cover the entire length of the delay but if the Appellant was not aware of the omission, this is relevant.

vii) Given the public interest in finality of litigation, discretion under 37(1) will be exercised rarely and exceptionally. However, a rare and exceptional case can lead to time being extended even without a good explanation. All relevant factors must be weighed, taking into account the interests of both parties.

Real Examples

In three of the five cases it was considering in the present hearing, the EAT extended time:

AB: The Appellant failed to include the ET1s and ET3s for her claims but did include the particulars of claim and grounds of resistance. She had her own health difficulties. Her sister had been representing her and had cancer so could no longer do so. The sister had the relevant documents. When the EAT pointed out the error, AB provided the documents within 5 days with the help of her brother-in-law.

The EAT held that the error was not minor but that, under 37(1), the Appellant both had a good explanation and exceptional circumstances, giving two reasons to extend time. Further there was little prejudice to the Respondent.

Shina: The Appellant omitted the ET1 for his first claim and the grounds of resistance for his second. He rectified this within two days and said it was an oversight.

The error was not minor. There was no good explanation for the default. The fact of such an oversight was not rare or exceptional. However, there was medical evidence to corroborate stress at the time, he had been trying hard to get legal assistance without success, there was a very prompt rectification and there was no prejudice to the Respondent.

Adams: The Appellant did not include the ET3 for his first claim, mistakenly sending both Word and PDF version of the grounds of resistance. He did not include an ET3 for his second claim as there was none, and he explained this. The EAT administration also made some errors.

The error was minor under Rule 37(5). It was rectified promptly (within 24 hours of the EAT pointing it out). There was no prejudice to the Respondent. Therefore discretion under 37(5) was exercised. Discretion was also exercised under Rule 37(1) as exceptional.

In two cases, discretion to extend time was not exercised:

Rehman: The Appellant omitted the grounds of resistance. She said in her witness statement she was not aware she needed to do this, but the EAT did not accept that evidence and it did not help that she did not attend to give evidence. The EAT told her she had failed to include this document, but she did not rectify the error for 3 months. She said that she had not received the EAT's email.

The error was not minor so 37(5) did not apply. The grounds of resistance were key. As for 37(1), the EAT did not accept her explanation was a good one. She did not do anything for three months (even chase up the EAT) and that three months delay also caused prejudice to the Respondent.

Samuels: The Appellant omitted the grounds of resistance. This was pointed out and he explained over a month later that he had never received them, albeit they had in fact been sent to him by the ET.

The Appellant had tried to mislead. The error was not minor. There was not a good explanation and, in any event, there was prejudice to the Respondent in the delay.

Comment

This case provides a useful recap of where the law is now, providing a 7-stage suggested approach to extending time which sets out the new Rule 37(5) together with the longstanding Rule 37(1). Whilst the Court was at pains to point out that each case needs to be considered on its own facts, the five cases it decided are of some use in predicting where discretion might be exercised in future.

A long delay or any attempt to mislead appear to be looked upon unfavourably by the EAT. A failure to attend to give evidence will not help either. In contrast, medical evidence of illness, a lack of prejudice and quick rectification did help convince the EAT to extend time.

As for what is ‘minor’, four out of five of the cases did not fall under 37(5) as they were not considered minor. Only an omission to include the ET3 form when the grounds of resistance were included was minor enough. This confirms the position in *Jasim* that the question is the relevance to the appeal of the documents omitted.

The case also provides a useful summary of the case law to date and therefore is a very helpful reference tool for those asking for an extension of time from the Registrar or appealing a Registrar’s decision. Note that this decision was made just after, and took into account, the judgment of the Court of Appeal in *Ridley v HB Kirtley and others* [2024] EWCA Civ 884, which disapproved of a strict approach to these scenarios.

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