Neutral Citation Number: [2019] EWCA Civ 5

Case No: A2/2017/1681

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Employment Appeal Tribunal
HH Judge Hand QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2019

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
SIR PATRICK ELIAS

- -

Between:

J	**Appellant**
- and -	
K and another	**Respondents**
Equality and Human Rights Commission	**Intervener**

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- -

Mr Alexander Line (instructed through **the Bar Pro Bono Unit**) for the **Appellant**
Mr Dominic Bayne (instructed by **K's Legal Services Department**) for the **Respondents**
Mr Declan O'Dempsey (instructed by **the Equality and Human Rights Commission**) for the **Intervener**

Hearing date: 28th November 2018

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. This is yet another appeal about extensions of time for appealing to the Employment Appeal Tribunal from a decision of the Employment Tribunal. The circumstances giving rise to the appeal can be summarised as follows.

2. The Appellant brought proceedings against the Respondents in the Employment Tribunal: the details of his claim are immaterial for our purposes. By an order of Employment Judge Jones sent to the parties on 16 March 2016 the claim was struck out. The Respondents thereupon made an application for costs. By a judgment and written reasons, again of Employment Judge Jones, sent to the parties on 19 August 2016 the Appellant was ordered to pay the Respondents' costs in the sum of £20,000.

3. The Appellant wished to appeal. Under rule 3 (1) (a) (i) of the Employment Appeal Tribunal Rules of Procedure 1993 (as amended) he was obliged to institute his appeal by serving on the EAT a notice of appeal and various specified additional documents by no later than 42 days after the date that the ET's reasons were sent – that is, by 30 September 2016. By rule 37 (1A) he was obliged to serve the relevant documents by 4 p.m.

4. At 3:55 p.m. on 30 September 2016, i.e. five minutes before the deadline on the last day for appealing, the Appellant sent an e-mail to the EAT with an attachment containing the notice of appeal and specified documents. The communication failed because the attachment was too large. We do not know how large it was, but the capacity of the EAT's server was 10mb, so presumably it was larger than that. He forthwith re-sent the attachments as a number of smaller files, and they were all received by the EAT by 5 p.m. Since that was after the time required by rule 37 (1A), they were treated as received on the next working day, which was 3 October.

5. The Appellant was accordingly notified that the appeal had been instituted out of time and invited to apply for an extension. He did so. His application was refused by the Registrar on the papers. He appealed to a Judge under rule 21. Such appeals are heard orally by way of rehearing (*Nicol v Blackfriars Settlement* [2018] EWCA Civ 2285). The appeal was heard by HH Judge Hand QC on 5 April 2017. The Appellant appeared in person. The Respondents did not appear but put in written submissions.

6. I will refer later, so far as necessary, to the nature of the case advanced by the Appellant before Judge Hand, but I should say at this stage that it included a submission that he was suffering from serious mental ill-health. There was no medical evidence about his condition, but he said that he had been diagnosed as HIV-positive and that that had led to his suffering from depression, anxiety, stress and suicidal tendencies. He also produced some internet print-outs describing the psychological/psychiatric impact of being diagnosed as HIV-positive. This Court has since received, in connection with the adjournment application to which I refer below, a letter from his GP dated 22 May 2018 in the following terms:

> "This is to confirm that the above named suffers from Cyclothymic Mood Variation Pattern. Although I am convinced that he might suffer from Bipolar Disorder, it has not been

> confirmed because it was not possible to convince [him] to accept the referral for a full assessment with a Psychiatrist. I have been his GP since June 2016 and have got to know him as a friendly, reflective and understanding person. However, there has been a significant deterioration of his mental state during the last year. He is self-neglecting and does not take care of necessary activities of daily life. His mental state does not allow him to communicate directly with people. I have tried to contact him by telephone several times but he will not respond and he will not request a call back. He is in a state where he is locking himself away but does not accept the help we have offered him. His communication with us is by e-mail so that he does not have to see us in person. I cannot comment on his actual mental state because that would require a face to face assessment. However, from the communication I have had with him during the last 2 months it is more than likely that his mental state does not allow him to pull through a Court hearing without further psychiatric decompensation that also might involve admission to a Psychiatric hospital."

On the material before us it is impossible to be specific about the nature of the Appellant's condition, either now or at the time of the hearing before Judge Hand, but I am prepared to accept, as was Judge Hand, that he was at the material times suffering from a degree of mental ill-health.

7. I should add in this connection that the Appellant has throughout the course of this appeal written frequent and lengthy letters to the Court, which, though articulate and intelligent, contain a great deal of offensive, not to say abusive, material about the judges, court staff and former colleagues whom he blames for his present troubles. It appears that he was similarly intemperate in his oral submissions to Judge Hand and in his communications with the ET. I am prepared to assume that this too is a manifestation of mental ill-health.

8. Judge Hand reserved his judgment, which was handed down on 10 May 2017. He dismissed the appeal. Again, I will refer to the details of his reasoning, so far as necessary, in due course, but I should mention at this stage that at para. 36 of his judgment he gave a lengthy summary, in fifteen numbered points, of the principles appearing from the case law about the extension of time limits in the EAT. This referred to the broadly similar summary by HH Judge McMullen QC in *Muschett v Hounslow London Borough Council* [2007] UKEAT 0281/07, [2009] ICR 424, but it is not directly derived from it.

9. The Appellant was given permission to appeal to this Court by Lewison LJ, limited to two grounds which he identified as follows:

> "(1) whether the statements of principle at [36] of the EAT's judgment needs modification to take account of the duty to make reasonable adjustments under the Equality Act 2010; and if so whether reasonable adjustments should have been made for the Appellant;

> (2) whether the combination of (a) the very modest delay of one hour in transmitting the required documents to the EAT and (b) the reason for the delay being the limited size of the EAT's inbox ought to have amounted to exceptional circumstances such as to require an extension of time in order to comply with the overriding objective."

10. Unfortunately the appeal has taken a long time to come on. Initially this was because it was thought necessary to await the decision in *Green v Mears Ltd* [2018] EWCA Civ 751, which re-examined the principles applicable in cases of this kind. That decision was given in April 2018, and the appeal in the present case was listed on 23 May. That hearing had, however, to be vacated at short notice because the Appellant, who was unrepresented, was too ill to appear: it was in that connection that the Court received the letter from his GP which I have quoted above. I was concerned, in the light of what we were told about his mental health, that he remained unrepresented. In the formal order adjourning the hearing I urged him to obtain representation through the Bar Pro Bono Unit, but it was unclear whether that would be possible. Accordingly, and having in mind the first of the two grounds on which Lewison LJ had given permission, I also invited the Equality and Human Rights Commission to apply to intervene in order to assist the Court on the question whether guidance needed to be given about the relevance of a party's mental ill-health in the context of an application for an extension of time for appealing. I am grateful to the Commission for accepting that invitation, and we had the benefit of very useful written submissions from Mr Declan O'Dempsey of counsel, who also attended the hearing.

11. In the event the Bar Pro Bono Unit was also able to assist by procuring the services of Mr Alexander Line of counsel to represent the Appellant. He produced, at short notice, exemplary written submissions; and his oral submissions to us were also of high quality. The Respondents were also well represented by Mr Dominic Bayne of counsel.

12. In the ET and EAT the parties were anonymised, because of the Appellant's HIV-positive status. Judge Hand in his judgment referred to an earlier observation of my own (in the context of a different proposed appeal by the Appellant) querying whether anonymity was really necessary, and the Appellant apparently accepted before him that his condition was "well-publicised in some quarters as a result of his frequent litigation"; but Judge Hand was persuaded that it was indeed justified and I would not seek to go behind his conclusion.

13. It is unnecessary to recapitulate here the general principles about the exercise of the discretion to extend time for appealing in the EAT: the case-law was recently reviewed and confirmed in *Green v Mears*. In bare outline, where there is no good reason for the time limit being missed, even by a very short time, an extension will only be granted in exceptional circumstances, and a strict view is taken as to what constitutes such circumstances.

14. I propose to take in reverse order the grounds for which permission was given by Lewison LJ.

(A) THE LIMITED CAPACITY OF THE EAT's SERVER

BACKGROUND

15. For many years the EAT has been willing to accept, indeed has encouraged, the lodging by e-mail of the documents necessary to institute an appeal. But its server was, at least until the date with which we are concerned, and maybe still is, unable to accept e-mails (and attachments) of more than 10mb. That might seem ample, but one or more of the required documents (most obviously the ET's Reasons) will typically be scanned, and scanned documents use up a lot of memory; it is accordingly not uncommon for the entire package to exceed the limit.

16. This problem was at the material time addressed in a guide published by HMCTS on the gov.uk website called *I want to appeal to the Employment Appeal Tribunal* (T440). The guide identifies the various methods of lodging an appeal, including by e-mail, and includes, among much else, the following statement:

> "If you use email, the size of any one email, including attachments, should not exceed 10MB. If you attach scanned documents you should check that they do not exceed that size. If they do, you may need to rescan them at lower quality and/or send them in more than one email."

Although T440 will of course only be seen by a would-be appellant if he or she goes online and finds the relevant page on the website, the parties to an ET decision are routinely sent a covering letter which refers them to a booklet called *The Judgment* (T426). This booklet contains a section headed *How can I appeal against the tribunal's judgment?*, which gives the basic information on how to appeal but also says that "further guidance on lodging an appeal can be found in the leaflet *I want to appeal to the Employment Appeal Tribunal* [i.e. T440]" and gives the link. Originally a hard copy of the booklet was enclosed with the covering letter, but some years ago the decision was made simply to include a link to it and to tell parties who were unable or unwilling to access it online that a hard copy would be sent on request.

17. We were referred to two decisions of the EAT about appellants who missed the deadline owing to similar problems to that encountered by the Appellant in the present case – *Desmond v Cheshire West and Chester Council HQ* [2012] UKEAT 0007/12/2006 and *Farmer v Heart of Birmingham Teaching Primary Care Trust* [2015] UKEAT 0896/14/3103. I take them in turn.

18. In *Desmond* the appellant, who was in fact a barrister but was acting in person, tried to submit an over-size e-mail on the 41st day of the appeal period. When it failed to go through he sent the EAT a link to a third-party site ("TransferBigFiles") from which the documents could be downloaded. It appears from paras. 7 and 13 of the judgment of HH Judge McMullen QC that the EAT website – the predecessor to the gov.uk site where T440 now appears – made clear that "large files cannot be accepted", and also that it bore "a stern warning that a document is not validly lodged by sending the EAT a link to its location". Judge McMullen observes (para. 13) that the appellant should have seen that warning. He held that the method used was indeed not effective to institute an appeal (though he observed that "more thought needs to be given to the problem of oversized documents"). However, he continued, at para. 18 of his judgment:

> "The question now is: should discretion be exercised in this climate, which requires exceptional cases? I have heard [the appellant] and accept the facts as he presents them to me. He only has himself to blame for leaving this so late and for there to be glitches in the system, but he was entitled, if he had not seen the notice on the EAT website, to be content that TransferBIGFiles was the solution to the transferring of files too big for the EAT to accept, and TransferBIGFiles' representation to him that the document had been sent, to know that everything was in order. When in fact the EAT notified him in due course that documents were missing, he acted promptly; and so I will exercise discretion in the exceptional circumstances as he has presented them to me …"

Thus Judge McMullen granted an extension notwithstanding his finding that the appellant should have been aware of the limited capacity of the server.

19. In *Farmer* the appellant's solicitors submitted an over-large file in the early afternoon of the 42nd day. They were unaware of the 10mb limit. As to their ignorance Langstaff P observed, at para. 12 of his judgment:

> "That information, as it happens, is not available in the booklet called 'The Judgment' handed to unsuccessful applicants before an Employment Tribunal with the Written Reasons. It is not available from the EAT Practice Direction, nor is it contained in the Rules. It is however, stated for those who access the website and can see it there [i.e. in T440], though I would accept it is not, in particular, highlighted."

He recorded that counsel for the respondent had submitted that, as employment practitioners, the solicitors should have known of the limit, but he himself expressed no view about that either way. The solicitors were told that the documents had not gone through, and they proceeded to send them as a series of smaller e-mails; but the process was interrupted by an internet outage. A parallel attempt to send the missing documents by fax failed because of a clerical error by a third party. Eventually the full documents were received eight minutes after the deadline. Langstaff P extended time. He regarded the missing of the time limit as the result of a highly unusual combination of circumstances. For present purposes I need only note (a) that he evidently did not regard the fact that the 10mb limit was publicised in T440 as fatal to the grant of an extension and (b) that nor did he regard it as fatal that it had been left to the last minute to lodge the documents.

JUDGE HAND'S DECISION

20. The Appellant took a large number of points before Judge Hand, most of which are not live before us. But it was certainly a part of his submissions that he ought to be granted an extension because the immediate cause of his missing the deadline was the limited capacity of the EAT's server, of which he had no prior notice: he relied, inter alia, on *Desmond*. Judge Hand put it to him that the limited capacity of the server would not have been a problem if he had not left it till the very last minute to attempt to lodge the documents: he would then have had time to do before 4 p.m. what he in fact was able to do by 5 p.m. The Appellant advanced various justifications for that, including his mental state and the fact that he was also engaged on seeking to appeal to this Court

against a separate decision of the EAT (HH Judge Peter Clark) rejecting a proposed appeal against the striking-out of his claim in the ET.

21. Another strand in the Appellant's submissions was that he was confused as to whether the deadline for service of the appeal documents was 4 p.m. or midnight. In that connection the Registrar had apparently referred to the terms of *The Judgment*. Judge Hand found at para. 5 of his judgment that the Appellant had never received a hard copy of the ET's decision or, therefore, the covering letter which refers to the booklet: possibly that finding was somewhat generous, but it was made and we must respect it. He acknowledges at para. 28 that the fact that the Appellant was not expressly referred to *The Judgment* might be an answer to the Registrar's point, but he continues:

> "… But as the Registrar also points out using a search term such as '*appeal from the employment tribunal*' will produce results, which include a link to the pages of this Tribunal now residing on the website www.gov.uk. By following the internal link '*How to appeal*', which appears on the page to which the search result link sends the reader a second page opens, which page contains further links to the '*the notice of appeal form*', '*the full practice direction*' and the document entitled '*appeal guidance*'.
>
> 29. … Using the search term '*appealing to the employment appeal tribunal*' produces the same search result."

22. Judge Hand's conclusion, as regards this part of the case, is at paras. 48-49 of his judgment, which read as follows:

> "48. I have come to the conclusion that for whatever reason, and it may have been a wrong assignment of priorities, the Appellant left himself too little time to complete the task of submitting all the necessary papers electronically. I can find no evidence to support his contention that he had tried earlier in the afternoon of 30 September 2016 but I have reached the conclusion that his email timed at 15:55 hours was a conscious attempt to comply with the 16:00 hours deadline and I have reached the further conclusion that he was aware that was the deadline. I have no medical evidence to suggest that he was incapable of complying with deadlines and his ability to appeal in time against the rulings of HHJ Clark to my mind confirms that whatever his disabilities they do not prevent him from assembling material and complying with deadlines when he chooses to do so.
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> 49. He is not the first proposed Appellant to have left it too late to submit electronically. I think there may have been a warning in 2012 as to the size limit on electronic documents and the fact that the barrister in [Desmond] was regarded as not being at fault by the division of this Tribunal dealing with the case is not a basis for concluding that all those who leave it too late, submit to large a file which is then rejected by the email server and then have to re-submit by a series of emails, the receipt of the last of which takes them into the next working day of this Tribunal, will have the same leniency extended to them. As I remarked above it seems to me very likely that the solution adopted in that case

> of placing a large amount of material onto another website, which is prepared to receive it and allow access to it, and forwarding and access link to this Tribunal is now clearly warned against in the documentation available to the public. I do not regard the evidence, which the Appellant has produced, as putting him into a category of somebody who cannot comply with the Rules of this Tribunal or understand the clearly written guidance, which is freely and easily available. On the contrary, it seems to me that he is well able to understand the Rules and the documents and in so far as he has suggested otherwise I do not accept his account."

(The reference in para. 49 to an earlier remark seems to be to para. 33 of his judgment, where he suggests that the final sentence of the passage from T440 quoted at para. 16 above was a response to the decision in *Desmond*. I am not entirely sure that that is correct, but nothing turns on it.)

23. Para. 48 is straightforward: Judge Hand rejected the argument that there were good reasons for the Appellant leaving it to the last minute to institute his appeal. Para. 49 is a little more opaque, but as I read it the essence is (a) that there was guidance "freely and easily available" (i.e. T440) which would and should have alerted the Appellant to the need to break up documents of more than 10mb into smaller parts; and (b) that there was nothing about his particular circumstances, and specifically his mental condition, which excused him from having accessed that guidance. As regards (a), it seems that he regarded *Desmond* as distinguishable, possibly (though this is not clear) on the basis that the notice on the then EAT website was less explicit than that in T440. He does not expand on his description of the guidance as "freely and easily available", but I assume what he had in mind was the Registrar's observations about it being easy to find on an appropriate online search – see para. 21 above.

DISCUSSION AND CONCLUSION

24. It seems to me that the first question is whether the Appellant should reasonably have anticipated that the EAT server might not have been able to accommodate appeal documents of the size that he was sending.

25. Subject to the question of any published guidance, in my view an ordinary layman, knowing that the EAT accepted service of the appeal documents by e-mail, would reasonably expect that its server would be able to accept all the required documents as attachments to a single e-mail (unless, perhaps, they were of truly extraordinary size – but there is no suggestion that that was so here). I am bound to say that I regard it as surprising that that was not the case.

26. Of course the passage quoted from T440 does make it clear that, whatever one might expect otherwise, the EAT server has a 10mb limit. The question, however, is whether it was reasonable to expect the Appellant to be aware of that passage. Judge Hand described the guidance as "freely and easily available". That is in one sense true, but it is not the whole story. T440 is only available if the would-be appellant knows of its existence. Parties to an ET decision are pointed in its direction, albeit somewhat indirectly, by the initial covering letter: this, as I have said, refers to the *The Judgment* booklet, and if a would-be appellant accesses that online (or asks for a hard copy) he or she will find a further reference, and link, to T440. That is probably sufficient, in the

usual case, to put the reasonable would-be appellant on notice that they should read T440, and do so carefully[1]; but the important point in the present case is that Judge Hand found that the Appellant had never received the covering letter or, therefore, been referred to the booklet. I appreciate, of course, that even without the assistance of the covering letter the Appellant might have found T440 if he had thought to go online to look for guidance and had followed the series of links identified by the Registrar in the passage quoted at para. 21 above. But I should be reluctant to hold that would-be appellants are to be criticised for ignorance of information (*a fortiori* rather surprising information) which is only available in a guidance document which they are not advised to consult, even if many or most might in fact find it by their own efforts. (There is also a difference, as Langstaff P noted in *Farmer* (see para. 19 above), between giving information in government guidance and making provision in the Rules and/or the EAT's own Practice Direction, neither of which mention the limited capacity of the EAT server.)

27. Mr Bayne argued that even if the Appellant's ignorance of the 10mb limit was venial parties ought reasonably to allow for the possibility of last-minute hitches and cannot expect any indulgence if they attempt to serve their documents so late that there is no margin of error. He reminded us of the repeated admonitions to this effect in the case-law. I need only refer to *United Arab Emirates v Abdelghafar* [1995] ICR 65, where Mummery J said, at pp. 71-72:

> "Parties who have decided to appeal are also 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 or of the misdirection of mail."

In the present case the Appellant had left it till almost literally the last minute, and Judge Hand had expressly found that there was no good reason for his leaving matters as late as he did.

28. I see the force of that argument. Although there is no absolute rule[2], the fact that an appellant has, without good reason, left it to the last minute to institute his or her appeal will be an important factor in the exercise of the Court's discretion in a case where they encounter an unexpected obstacle; and it might be hard, subject to one point, to say that Judge Hand was not entitled to regard it as decisive in this case. However what is peculiar about the present case is that the obstacle here was not, as it generally is, something extraneous to the EAT – such as documents going astray in the post, or a traffic accident delaying the appellant's arrival at the EAT, or a computer failure at his or her end. Rather, the problem was the limited capacity of the EAT's own system (insufficiently notified to the Appellant). That seems to me to put the case into a rather different category. It is as if the Appellant had arrived at the EAT at 3.55 p.m. on the last day with the documents fully ready to serve but had been unable to deliver them because the doors or letterbox were jammed or everyone was on the street because of a fire alarm. It is inconceivable that in such a case an extension could fairly be refused,

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1 But see para. 31 below.

2 As to this, see, for example, *Jurkowska v Hlmad Ltd* [2008] EWCA Civ 231, [2008] ICR 841, *per* Rimer LJ at para. 48 (p. 858); also the discussion at para. 36 of Langstaff P's judgment in *Farmer*.

even though the problem would have been avoided if he had come sooner. I note that in *Desmond* Judge McMullen granted an extension notwithstanding his finding that the appellant "only had himself to blame for leaving [service] so late".

29. For those reasons I believe that in the very particular circumstances of the present case Judge Hand was wrong to refuse an extension. I am inclined to think that the correct analysis is that the Appellant has provided a satisfactory explanation for missing the deadline, namely his (on the particular facts, reasonable) ignorance of the 10mb limit. But even if the view were taken that he ought to have found T440 for himself, despite not being directed to it, any failing in that regard seems to me to have been venial; and in circumstances where the cause of the problem was the EAT's own system, and where service was correctly effected within an hour of the deadline, I believe that this is one of those exceptional cases where an extension was required as a matter of justice.

30. That reasoning does not depend on any other particular circumstances of the Appellant's case, including his mental health; and it is accordingly unnecessary to express a view on element (b) in Judge Hand's reasoning as analysed at para. 23 above.

31. I am bound to say, finally, that if, as the present case and the others to which I have referred suggest, it is common for the EAT server to be unable to cope with quite standard documentation that is not satisfactory. The best thing would obviously be for its capacity to be increased. But unless and until that is done consideration should be given to drawing attention to the problems rather more emphatically than is done at present. In particular:

    (a) It might be better if the covering letter accompanying the judgment referred directly to T440 rather than leaving it to be found via T426, and made it clear that it *ought* to be read.

    (b) T440 itself might point out (if this is indeed the case) that the 10mb limit is very easily exceeded if scanned documents are included. As Langstaff P says in *Farmer*, the problem is not really "highlighted" in the current draft.

    But that is not intended to undermine my observation at para. 26 above that the information given to would-be appellants in the ordinary case is probably sufficient to alert them to the problem.

(B) THE RELEVANCE OF THE APPELLANT'S MENTAL ILL-HEALTH

32. Since I would allow the appeal on the first ground it is not necessary to decide the second. I ought, however, to say something about the general approach to the relevance of mental ill-health in this context, particularly in the light of the Commission's intervention. I will also address the question whether Judge Hand erred in his reasoning or conclusion, though in the circumstances I will do so very briefly.

GENERAL APPROACH

33. I start by saying that it was common ground before us, and I would myself emphasise, that where mental ill-health, or indeed any other disability, has contributed to a would-be appellant failing to institute an appeal in time that will always be an important consideration in deciding whether an extension should be granted under rule 37 (1A)

of the 1993 Rules. That is not as a result of the Equality Act 2010, since, as was also common ground, judicial decisions are excluded from the scope of the Act: see paragraph 3 of Schedule 3 to the Act. But as a matter of general law the exercise of a judicial discretion must take into account all relevant considerations, and in such a case the party's mental condition or other disability would plainly be a relevant consideration.

34. That has in fact been the consistent approach of both the EAT and this Court in the past. We were referred to *Hakim v Italia Conti Academy of Theatre Arts* [2009] UKEAT 1444/08/2005 (a dyslexia case); *Franks v Board of Governors of Churchmead Church of England School* [2011] UKEAT 070810/2005 (multiple debilitating conditions); and *O'Cathail v Transport for London* [2012] EWCA Civ 1004, [2012] IRLR 1011 (depression). In *O'Cathail* Mummery LJ said in terms at para. 27 (p. 1013):

> "… [t]he appellant undoubtedly suffers from a recognised disability. Its effects are relevant factors in deciding whether he had a good excuse for not complying with the time limit and whether there were exceptional circumstances justifying an extension of time."

(I should say, however, that he went on to endorse the Judge's finding that the appellant's depression had not been the cause of his missing the deadline.) This is in line with other statements of the importance of recognising the impact of mental ill-health on parties' abilities to conduct litigation: see most notably the discussion by the Northern Ireland Court of Appeal in *Galo v Bombardier Aerospace UK* [2016] NICA 25, [2016] IRLR 703.

35. Mr O'Dempsey submitted that the same or similar obligations also arose by a variety of other routes. He referred specifically to articles 6 and 14 of the European Convention on Human Rights, *via* section 6 of the Human Rights Act 1998; articles 21 and 47 of the EU Charter of Fundamental Rights, taken with article 9 of Council Directive 2000/78; and articles 2, 5 and/or 13 of the United Nations Convention on the Rights of Persons with Disabilities ("the UNCRPD"), read with General Comment 6 of the Committee on the Rights of Persons with Disabilities. He also referred to the common law right of effective access to justice, most recently affirmed by the Supreme Court in *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] ICR 1037. Mr Line likewise referred to most of the same materials, and also to the terms of the over-riding objective as stated at rule 2A of the 1993 Rules.

36. I am very willing to accept that in many or most cases those will indeed be alternative sources of the same or similar obligations as would arise as a matter of general law; and the EAT made a similar acknowledgment in *Rackham v NHS Professionals Ltd* [2015] UKEAT 0110/15/1612 (see per Langstaff P at para. 32). But I am not at present persuaded that anything useful is achieved by referring in detail to these other sources, because, at least in the context of the present appeal, they appear to add nothing to the domestic jurisprudence. I understood Mr O'Dempsey to submit that the international law sources were valuable inasmuch as they explicitly incorporated the concept of reasonable accommodation. But that concept is very familiar in our domestic jurisprudence, and not only in the specific context of the 2010 Act (see, again, *Rackham*, esp. at para. 36), and most cases will turn on what was required by way of reasonable accommodation in the particular circumstances of the case. We were not referred to any statement of principle which suggested that a different approach to that

assessment was required under the international instruments relied on than would be required in domestic law.

37. At one specific point in his written submissions Mr O'Dempsey did appear to submit that the requirements of the UNCRPD are more stringent than those of the domestic law. Specifically, he asserted that where under the Convention a "procedural adjustment" is required in order to permit a disabled party to participate in litigation such an adjustment is mandatory and there is no question of balancing their right to access to justice against the interest of the respondent in finality. I am not sure, however, that that was consistent with his overall submissions, still less that it was supported by the references given; but the structure of the hearing did not permit any real exploration of this point, and since it cannot be decisive of the present appeal I need not consider it further.

38. Both Mr Line and Mr O'Dempsey submitted that it would be of value if the Court gave general guidance of a structured character as to how the EAT should approach the exercise of its discretion in cases where a would-be appellant claims to have missed the deadline as a result of mental ill-health; and both proposed terms for such guidance. I do not think that it is necessary to set out their respective formulations or subject them to any critique. I should, however, say that an unhelpful feature of Mr O'Dempsey's suggested guidance is that it was directed specifically to cases where the applicant suffered from a disability in the sense defined by the 2010 Act - though I appreciate that that approach may have been forced on him by the specific scope of the Commission's statutory functions. That is an artificial limitation because the statutory definition incorporates a requirement that the impairment in question is likely to last, or has lasted, more than twelve months (see paragraph 2 of Schedule 1 to the Act). In my view a serious episode of mental ill-health may be a very relevant consideration in the exercise of the discretion even if it cannot be shown to constitute a disability in that sense.

39. I am hesitant about prescribing any kind of detailed guidance for the Registrar and Judges of the EAT about the exercise of what is inevitably a broad discretion which will fall to be exercised in a wide variety of circumstances. But I am persuaded that there may be some value in making the following few, very general, points:

    (1) The starting-point in a case where an applicant claims that they failed to institute their appeal in time because of mental ill-health must be to decide whether the available evidence shows that he or she was indeed suffering from mental ill-health at the time in question. Such a conclusion cannot usually be safely reached simply on their say-so and will require independent support of some kind. That will preferably be in the form of a medical report directly addressing the question; but in a particular case it may be sufficiently established by less direct forms of evidence, e.g. that the applicant was receiving treatment at the appropriate time or medical reports produced for other purposes.

    (2) If that question is answered in the applicant's favour the next question is whether the condition in question explains or excuses (possibly in combination with other good reasons) the failure to institute the appeal in time. Mental ill-health is of many different kinds and degrees, and the fact that a person is suffering from a particular condition – say, stress or anxiety – does not necessarily mean that their ability to take and implement the relevant decisions is seriously impaired. The

EAT in such cases often takes into account evidence that the applicant was able to take other effective action and decisions during the relevant period. That is in principle entirely acceptable, and was indeed the basis on which the applicant failed in *O'Cathail* (though it should always be borne in mind that an ability to function effectively in some areas does not necessarily demonstrate an ability to take and implement a decision to appeal). Medical evidence specifically addressing whether the condition in question impaired the applicant's ability to take and implement a decision of the kind in question will of course be helpful, but it is not essential.[3] It is important, so far as possible, to prevent applications for an extension themselves becoming elaborate forensic exercises, and the EAT is well capable of assessing questions of this kind on the basis of the available material.

(3) If the Tribunal finds that the failure to institute the appeal in time was indeed the result (wholly or in substantial part) of the applicant's mental ill-health, justice will usually require the grant of an extension. But there may be particular cases, especially where the delay has been long, where it does not: although applicants suffering from mental ill-health must be given all reasonable accommodations, they are not the only party whose interests have to be considered.

40. I emphasise that that guidance, if such basic propositions deserve that label, is not intended to be comprehensive. The facts of particular cases are likely to be infinitely variable, and it is not desirable to seek to resolve all possible issues in the abstract.

41. As we have seen, Lewison LJ referred to modifying the statements of principle at para. 36 of Judge Hand's judgment in order to incorporate specific reference to the need to have regard to problems arising from mental ill-health; and Mr O'Dempsey in his written submissions loyally went through Judge Hand's fifteen points suggesting various amendments. With respect, however, I do not think that that specific exercise is necessary or useful. The passage in question has no canonical status: it was not directly derived from any decision of this Court or the EAT (though, as noted, it covers much of the same ground as the similar exercise in *Muschett*[4]), and the judgment has not been reported or been cited in subsequent decisions. The foregoing discussion is ample to make clear to the Registrar and the Judges of the EAT that it is always necessary to take into account any claim that an applicant's failure to institute their claim in time was the result of mental ill-heath health during the material period – though I do not in fact believe that any such reminder is necessary.

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3 That is in line with the approach of the EAT, albeit in rather different contexts, in *Vicary v British Telecommunications Plc* [1999] UKEAT 1297/98/2308, [1999] IRLR 680, (see para. 15) and *Rackham* (para. 50).

4 I would add that the summary in *Muschett*, although it is very commonly referred to, should not be treated as a comprehensive statement of the applicable principles; nor. I am sure, was it so intended. It fulfils a useful purpose as a compendium of points made in the case-law about commonly occurring situations, but the basic underlying principles remain as authoritatively stated in *Abdelghafar* (as recently confirmed in *Green v Mears*). The case-law has in any event inevitably been amplified since 2009.

THE PRESENT CASE

42. It was, as I have said, the Appellant's case before Judge Hand that his ability to make rational decisions during the relevant six weeks was seriously impaired by stress and depression, and in particular that towards the end of the period he had suffered a complete "melt-down". Judge Hand rejected that case both on the basis that it was unsupported by any medical evidence specific to his case and because there was evidence that during the period the Appellant had in fact been very active in pursuing his appeal against Judge Clark's order in his other appeal and in taking other steps preparatory to the present appeal; and of course he had in fact managed to submit the appeal in time, subject only to the problem with the EAT server.

43. I can see no error of law in Judge Hand's reasoning or conclusion. Mr Line submitted that he erred by treating the absence of medical evidence as decisive. I do not think this is a fair criticism. Judge Hand was indeed, rightly, troubled by the absence of any medical evidence specific to the Appellant's case; but, as I understand it, he was willing to accept – on the basis of a combination of the Appellant's evidence, the internet materials and the way the Appellant conducted himself at the hearing – that he suffered mental ill-health at the material time. A stricter judge might not have gone that far without better evidence, but I would not criticise him for doing so. However, that only got the Appellant to first base. As I have noted above, a finding that an applicant suffers from a degree of mental ill-health does not establish that they were materially impaired in their ability to take and implement a decision to appeal. There were strong indications that the Appellant was not so impaired, and in that context it was entirely legitimate for Judge Hand to refer to the fact that there was no medical evidence to support his case.

44. Mr Line also submitted that if Judge Hand regarded the absence of medical evidence as fatal to the Appellant's case the only fair course was to adjourn the hearing to enable him to seek such evidence: it appears that the Appellant did in fact at some point in the hearing make such an application. Mr Line observed that there was no published guidance to applicants for an extension that if they wished to rely on a medical condition they should provide independent evidence.

45. I do not accept that Judge Hand was wrong to decline to adjourn the hearing. In most cases it might be thought sufficiently obvious, even to a litigant in person – and the Appellant is both an intelligent and an experienced litigant – that evidence from a doctor should be provided in such a case. But I accept that there may be cases, particularly where an applicant for an extension is evidently still suffering from serious mental ill-health, where justice requires that a hearing be adjourned in order to enable them to obtain evidence which a litigant who was well would be expected to have provided. However, I do not believe that this was such a case. As I have shown, Judge Hand did not dismiss the application solely because of the absence of medical evidence, and in my view he was fully entitled to take the view that retrospectively obtained evidence was unlikely to have assisted in the particular circumstances of this case.

46. If, therefore, the outcome of the appeal had depended on this ground I would have dismissed it.

DISPOSAL

47. I would allow the appeal and grant a sufficient extension to render the Appellant's appeal to the EAT in time. I have not for the purpose of that decision formed any view on the merits of that appeal, and it will have to be considered under the EAT's sift process in the usual way.

Lord Justice Baker:

48. I agree that the appeal must be allowed for the reasons given by Underhill LJ. I endorse the guidance given in paragraph 39 of his judgment.

Sir Patrick Elias:

49. I agree.