Neutral Citation Number: [2022] EAT 122

Case No: EA-2020-000608-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 January 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

REVEREND J G HARGREAVES	**Appellant**
- v -	
EVOLVE HOUSING + SUPPORT	**Respondent**

- -
- -

Paul Diamond (Direct Access) for the **Appellant**
Catherine Urquhart (instructed by **Keely Russmore Keystone Law**) for the **Respondent**

APPLEAL FROM REGISTRAR'S ORDER
Hearing date: 20 January 2022

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – Time to Appeal

The claimant in the employment tribunal brought a number of distinct complaints. The tribunal's reserved written judgment promulgated following a trial erroneously stated that a particular complaint had succeeded when in fact that particular complaint had failed, as was unambiguously clear from the accompanying written reasons. The tribunal subsequently issued a certificate of correction, correcting the judgment in that regard, together with a further copy of the original decision showing that correction.

Time for appealing from, or seeking a reconsideration of, the tribunal's substantive decision, was not affected by that, and continued to run from the date of promulgation of the original decision. **Aziz-Mir v Sainsbury's Supermarket Plc** UKEATPA/0537/06/JOJ, and authorities following it, distinguished. **Majekodunmi v City Facilities Management UK Ltd** UKEATPA/0157/15 followed and applied.

However, at the same time as it sent out the certificate of correction and corrected copy of its decision, the tribunal also issued a standard letter referring to time to appeal running from 42 days from the date of the judgment. That sent a conflicting message to the claimant, giving rise to uncertainty for which he was not to blame, such that, exceptionally in this case, his time for instituting his appeal should be extended.

HIS HONOUR JUDGE AUERBACH:

Introduction and history of the litigation

1. I shall refer to the parties as they were in the employment tribunal, as the claimant and the respondent. The claimant was a supported housing night concierge employed by the respondent. In relation to the matter with which I am concerned, he was a litigant in person in the employment tribunal. He brought **Equality Act 2010** claims by reference to the characteristics of religion or belief and race, which were resisted by the respondent. The respondent was represented by solicitors.

2. There was a hearing in the employment tribunal in February 2020. The claimant was in person. The respondent was represented by Ms Urquhart of counsel. The reserved judgment and reasons was sent to the parties on 19 May 2020. These were contained in a single document which had an initial section headed "Judgment" and four numbered paragraphs and then the heading "Reasons" with the numbering beginning again and setting out the tribunal's extensive reasons.

3. In those reasons, the tribunal referred to an agreed list of issues which were set out in an annexe. They included issues under the heading of "**Equality Act**, **section 26 and section 40: harassment related to religious belief**" [*sic*]. These included at 1.2:

> "Did John Deakin carry out the investigation into the claimant's grievances in a biased and partial or otherwise detrimental manner, including by him questioning the claimant, during the grievance process, about social media posts by the claimant about religious matters; by not speaking to witnesses the claimant had asked to be spoken to as part of the investigation into his grievance; and in relation to the grievance outcome?"

4. Further on, under the subheading "**Equality Act 2010**, **section 13; Equality Act 2010, section 39 direct discrimination because of religious belief; detriment**", there followed a section including at paragraph 5.2 precisely the same wording as in 1.2.

5. The reasons include findings of fact that both the claimant and a colleague, Ms Akano, raised grievances about each other and that Mr Deakin was appointed to investigate them both. The tribunal made findings of fact about how those investigations unfolded and their outcomes.

6. After directing itself as to the law, the tribunal turned to its conclusions. When considering the complaints of harassment relating to religion concerning Mr Deakin's investigation, it noted at [91] that there were three aspects. The first of these was alleged harassment by questioning the claimant during the grievance process about social media posts by the claimant about religious matters. The tribunal went on to find that this factually did happen and that, in respect of it, the ingredients of harassment by effect were made out. It concluded that that complaint of harassment succeeded.

7. When it turned to the complaints of direct discrimination because of religion, the tribunal once again identified the factual strands in relation to issue 5.2 in the same way at [113]. But at [114] it noted that the definition of "detriment" for the purposes of section 39, found in section 212 of the **Equality Act 2010**, stipulates that such detriment does not include conduct which amounts to harassment. The tribunal went on to conclude at [117] that this complaint of direct discrimination would have succeeded were it not for it having already succeeded as a harassment claim.

8. The judgment recorded at paragraph 1 that certain claims of harassment succeeded, included that the claimant was questioned during the grievance process about the claimant's social media posts about the Scottish Christian Party. At paragraph 2, it stated that the claim for direct discrimination because of religious belief, **Equality Act 2010** sections 13 and 39, "succeeds in respect of the allegation that the claimant was questioned during the grievance process, about the claimant's social media posts about the Scottish Christian Party." After dealing with another

complaint at point 3, at point 4 it wrote: "All of the other harassment and direct discrimination claims, and the claims for victimisation … do not succeed."

9. A telephone case management discussion took place on 11 June 2020. It appears that the principal purpose was to consider the next steps in relation to remedy for those complaints that had succeeded. The employment judge indicated that a correction to the judgment would be issued, as paragraph 2 had been included in error, given that the tribunal had found that the direct discrimination claim in question had failed for the reasons set out in its reasons at [114]. That same day, a document was sent to the parties headed "Certificate of Correction". It read:

> "Under the provisions of Rule 69, the judgment dated 18 May 202018/05/2020, is corrected by the deletion of paragraph 2 in the judgment section, to reflect the reasoning in paragraph 114 of the judgment."

10. This was signed by the judge, dated 11 June. Under the judge's signature it was dated as sent to the parties also on 11 June 2020. Underneath that was the following:

> "**Important note to parties**:
> Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing."

11. A further document was sent to the parties on the same date. This was in substance the same as the judgment and reasons document that had previously been sent to the parties, but with the following changes. Firstly, the four paragraphs of the judgment, instead of being headed, as previously, "Judgment", were now headed "Corrected Judgment". Secondly, what was paragraph 2 of the original judgment appeared, but struck through with a black line superimposed on each of its lines of text to show that it had been struck through.

12. Thirdly, at the end of the reasons and before the appendix setting out the issues, underneath the judge's signature, the original date of 18 May 2020 remained, but underneath that the words were added, underlined: "Corrected judgment dated 11 June 2020". Underneath "Sent to the parties

on" where there was a space in the original document for the administration to insert the date of sending, additional words had been typed: "Corrected judgment sent to the parties on 11 June 2020".

13. On the same date, the tribunal sent to the parties its standard letter headed "Employment Tribunal Judgment" dated 11 June 2020 and beginning with the standard words: "A copy of the Employment Tribunal's judgment is enclosed. There is important information contained in 'The Judgment' booklet which you should read, including guidance about enforcement." It included the standard wording providing a link to that booklet and also informing the reader that a paper copy could be obtained by telephoning the tribunal. The letter continued with the standard wording that "An application for reconsideration must be made within 14 days of the date the decision was sent ot you. An application to appeal must generally within 42 days of the date when the decision was sent to you and no later than 4 pm on the final day." It also stated, further on: "For further information, it is important that you read the Judgment booklet", and it gave information about where to find more about the EAT online.

14. On 24 June 2020 the claimant sent to the employment tribunal a document headed "Application for corrected judgment to be reconsidered". This document started by noting what had been said at [114], quoting its words: "A claimant cannot succeed in relation to both a harassment claim and a direct discrimination claim on the same set of facts." He stated, "I understand this point clearly and accept it as a matter of law", but he then went on to state that there were in fact two sets of facts in play: "(1) me being questioned by John Deakin. (2) John Deakin searching my personal online material."

15. He went on to assert in so many words that the determination of the harassment claim in relation to the former did not resolve or dispose of the question of whether he had been directly discriminated against in relation to the latter; and he asserted that this was a live issue, because the

list of issues gave only three examples of what was being complained of, which were not exhaustive. He therefore invited the tribunal to reconsider its correction.

16. The claimant sent the EAT a notice of appeal on 20 July 2020, but after 4 pm, so that it was deemed received on 21 July. In box 3 relating to the judgment decision or order from which the appeal is brought, he wrote:

> "In the London Central Employment Tribunal, Case No:2202654/2019, on 11 June 2020 the judgment dated 18 May 2020, was corrected by the deletion of paragraph 2 in the judgment section, to reflect the reasoning in paragraph 114 of the judgment."

17. There were three numbered grounds. I do not need to reproduce the full text, but ground one covered the same territory as the reconsideration application. The order sought was for the EAT to hold that the ET should have found that the claim for direct discrimination because of religious belief succeeded "in respect of the allegation that John Deakin carried out the investigation into the claimant's grievances in a biased and partial and otherwise detrimental manner in that John Deakin searched the claimant's personal online material."

18. Ground two challenged findings made by the tribunal about the reason why Mr Deakin did not speak to certain witnesses and contended that this was contrary to the evidence that the majority of witnesses had given on this point and was perverse. Ground three sought to challenge the content of the reasons relating to words that the claimant was found to have uttered at [101] and the tribunal's statement at [102] that the making of a remark such as the claimant was found to have made at [101], in a work context, could well amount to harassment related to sexual orientation. An order is sought from the EAT that the tribunal should delete the sentence to that effect at the end of [102].

19. Subsequent to this in point of time, the employment tribunal sent a decision to the parties

on 28 July 2020 refusing the application for reconsideration. For the reasons there set out, the judge concluded that there was no reasonable prospect of the decision being revoked.

20. The EAT wrote to the claimant on 16 October 2020, stating that for the purposes of his proposed appeal, time ran from the date when the original employment tribunal decision was sent to the parties, so that the proposed appeal was 21 days out of time, and asking the claimant whether he wished to apply for time to be extended.

21. The claimant wrote to the EAT with an application dated 29 October 2020 maintaining that it was reasonable for him to rely on the letter of 11 June 2020 referring to the judgment booklet and to time limits for appealing, as indicating that his 42 days to appeal ran from that date. He noted also in his submission that no suggestion had been raised that his reconsideration application was out of time, which it would have been had time run from the date of the original decision. He maintained that in all the circumstances it was reasonable for him to have taken the approach that time ran from the later of the two dates.

22. In the usual way, submissions were invited from the respondent and they wrote to the EAT opposing the application. The claimant responded by a letter of 27 November maintaining that the letter of 11 June 2020 was a document he reasonably relied upon, given that there were two contradictory documents issued by the employment tribunal: the certificate of correction with its footnote to the effect that the date had not changed, and what he described as "the comprehensive letter dated 11 June 2020 clearly informing me that I had 42 days to appeal with a link to a booklet". He made submissions about his Article 6 rights and various authorities of the European Court of Human Rights relating to cases in which it was said that there was a lack of clarity about time limits that resulted in Article 6 issues being in play.

23. The EAT's Registrar's decision was sent to the parties on 30 June 2021. She decided that

time had run from the date when the original judgment was sent, but that in all the circumstances time should be extended so that the appeal could proceed. The respondent has appealed that decision and that appeal has been heard by me today. It is well-established and common ground that in such matters, the judge conducts a completely fresh hearing and determination of the issues and, in keeping with that, Ms Urquhart acknowledged and accepted at the start of the hearing today that both questions are live for fresh determination by me. Firstly, when did time begin to run in relation to this appeal? If I decide it is the later of the two dates, then no extension would be required, but if the earlier of the two dates, then secondly I must decide whether to extend time afresh.

24. I had the benefit of skeleton arguments and oral submissions from Ms Urquhart and from Mr Diamond of counsel, who has appeared for the claimant today.

The Law

25. A number of relevant authorities date from a time when the relevant rules of procedure were the **Employment Tribunal Rules of Procedure 2004**. Rule 37 of those rules, headed "Correction of judgments, decisions or reasons", read as follows:

> "(1) Clerical mistakes in any order, judgment, decision or reasons, or errors arising in those documents from an accidental slip or omission, may at any time be corrected by certificate by the chairman, Regional Chairman, Vice President or President.
> (2) If a document is corrected by certificate under paragraph (1), or if a decision is revoked or varied under rules 33 or 36 or altered in any way by order of a superior court, the Secretary shall alter any entry in the Register which is so affected to conform with the certificate or order and send a copy of any entry so altered to each of the parties and, if the proceedings have been referred to the tribunal by a court, to that court.
>
> (3) Where a document omitted from the Register under rules 32 or 49 is corrected by certificate under this rule, the Secretary shall send a copy of the corrected document to the parties; and where there are proceedings before any superior court relating to the decision or reasons in question, he shall send a copy to that court

> together with a copy of the entry in the Register of the decision, if it has been altered under this rule.
>
> (4) In Scotland, the references in paragraphs (2) and (3) to superior courts shall be read as referring to appellate courts."

26. The current **Employment Tribunals Rules of Procedure 2013** deal with the same matter in rule 69, and that provides as follows:

> "An Employment Judge may at any time correct any clerical mistake or other accidental slip or omission in any order, judgment or other document produced by a Tribunal. If such a correction is made, any published version of the document shall also be corrected. If any document is corrected under this rule, a copy of the corrected version, signed by the Judge, shall be sent to all the parties."

27. It will be observed that the old rule 37 covered some matters other than correction of clerical mistakes and accidental slips, but it is the parts of that earlier rule concerned with that subject that are relevant to the matters I have to consider.

28. The EAT considered the position under those rules on three occasions, so far as I and counsel are aware. The first of these was in **Aziz-Mir v Sainsbury's Supermarket Plc** UKEATPA/0537/06/JOJ a decision of Burton J of 15 December 2006. In that case a decision was promulgated after a lengthy tribunal hearing but then there was a correction on a later date. The original decision had given two different case numbers but in fact only related to the first of those cases. The EAT records that what happened was that a certificate of correction was signed that referred to rule 37 and in which the chairman (as employment judges were then known) stated:

> "I hereby correct the clerical mistake in the decision hearings sent to the parties on 23 March 2006 by deleting the reasons thereto and substituting [therefor] the reasons attached hereto."

The EAT observed:

> "There was attached to that certificate the entirety of the old Judgment, but this time with only one case number recorded in the top left hand corner rather than two."

29. In his conclusions, Burton J said at the start of [9]:

> "I have no doubt at all that, in the ordinary course of a correction, such a correction does not make time run afresh, and that the Registrar's decision would ordinarily be correct…"
> …

30. But he continued at [10] that that was not what occurred in this case:

> "What occurred in this case was that the certificate of correction was in the terms which I have quoted, which positively deleted the entirety of the reasons, and substituted an entirely fresh judgment. In those circumstances, the consequence, in my judgment, is that that meant that there was a complete substitution of a fresh Judgment, and that time ran from the promulgation of the new Reasons …"
> …

31. He found that in the alternative he would have extended time. In the final paragraph [11] of his decision, he recommended that in the event of some future tribunal decision requiring correction, tribunals :

> "… should not adopt this course of sending out a certificate of correction which purports to delete the entirety of the reasons and substitute corrected reasons. What they should do is, as I have earlier indicated, simply send out the corrected page or pages under cover of a certificate of correction. It may well be appropriate additionally, for the avoidance of any doubt, to accompany this with a statement that the date of promulgation remains unaltered; if so advised, they could further add words to the effect that the time for appeal, if any, continues to run from the original date."

32. I note that in **Aziz-Mir** there clearly was no alteration to the substantive content of the judgment and reasons, merely a correction of the mistaken inclusion of a second case number. Indeed, Burton J made the point that, if there had been a substantive change to the decision, that would have been a matter for review, not for the issue of a certificate of correction. I note also, however, that the starting point was that the issuing of a correction does not alter the date of promulgation of the original decision. However, because a completely new decision had been substituted in that case, that had the effect of making time run from the date of promulgation of the new and substituted decision.

33. The next decision in chronological order is **Kennaugh v Lloyd-Jones**, UKEATPA/0710/07, a decision of HHJ Peter Clark on 14 May 2008. In that case, following the promulgation of the original decision, a query was raised about a section number of the **Employment Rights Act** given in a particular paragraph. The wrong section number had been given and the judge issued a certificate of correction. This read:

> "Under the provisions of rule 37 of the Employment Tribunals Rules of Procedure 2004, I hereby correct the clerical mistake in the judgment sent to the parties on 13 April 2007 by deleting the judgment thereto and substituting therefor the judgment attached hereto."

34. Attached to the certificate was a further copy of the judgment and reasons with the typographical error in the section number, wrongly given in the original as section 282, altered to refer to the correct section number, 212. HHJ Peter Clark agreed with the submission that, following **Aziz-Mir**, the effect of substituting the fresh judgment and reasons for the old, was to start the time for appeal running from the new date. He also respectfully endorsed the suggestions that Burton J had made in the final paragraph of his decision in **Aziz-Mir**.

35. Next chronologically is the decision of Supperstone J in **Patel v South Tyneside Council** UKEATPA/0917/11, 28 November 2011. In that case it transpired that the date recorded as the date of sending of the original decision was incorrectly recorded. A second decision was then sent out a few days later correcting that earlier date. Some time after that, the judge signed and dated a certificate of correction which stated:

> "Under the provisions of Rule 37(1), I hereby correct the clerical mistake or error in the Reserved Judgment re-sent to the parties on 12 May 2011, by deleting 9 April 2011 and substituting therefore the 9 May 2011 attached, as per the amended judgment."

36. The certificate of correction also contained words to the effect that the dates for applying for appeals or reviews were not altered and time limits still ran from the date of the original decision. Supperstone J held that the second decision was not a correction to the first decision, but was an

entirely fresh judgment and that, in light of **Aziz-Mir**, it followed that time began to run for service of the notice of appeal from the date of the second decision.

37. There is one decision of the EAT of which I am aware that has considered this point subsequent to the 2013 Rules coming into force. This was the decision of HHJ Eady QC (as she then was) in **Majekodunmi v City Facilities Management UK Ltd** UKEATPA/0157/15, 25 September 2015. There, a certificate of correction was issued correcting the name of the claimant's representative. That certificate also included a note to the effect that time limits still ran from the date of the original decision. **Aziz-Mir** was cited in the course of submissions.

38. In a section of her decision headed "The Approach", at [25] HHJ Eady QC said:

> "As for when time starts to run, unless so substantive as to effectively replace the original Judgment, in the normal course a correction will not mean that time starts to run afresh (see per Burton J in **Aziz-Mir**)."

39. In her conclusions at [29] and [30] she concluded that no substantive change was made in the case before her. The issue of a certificate of correction obliged the judge to correct the reserved judgment and reasons and to send the corrected version to all parties; but it was made clear that this did not change the relevant date for the purpose of any appeal and it did not give rise to any new date. Nor could any party have been misled as to the position.

Arguments

40. In summary, Ms Urquhart submitted that in the present case the second judgment was not a new or significantly different decision. It was merely a document properly issued under rule 69, the purpose of which was to correct an error in the way the judgment had been set out in the original decision, because that wrongly stated that the complaint referred to at paragraph 2 had succeeded when, as the reasons made clear, it had failed.

41. In any event, she said, on a proper analysis the appeal that this claimant is seeking to bring is by way of a challenge to various aspects of the original decision, not to the decision of the judge to issue a correction. She submitted that the Registrar was therefore right to hold, and I should hold, that time still ran from the date of the original decision. **Patel** could be distinguished because it was plainly a case where a wholly new decision had been sent out replacing the old decision. Indeed, in **Patel**, the certificate of correction was only issued some time later. Under the **2013 Rules**, when a decision is corrected, it is mandatory to send out a corrected copy and to substitute a corrected copy on the register, but that does not cause the date of promulgation of the decision to be changed. Although the new rules no longer expressly refer to a certificate of correction, it was not wrong to issue one, as this tribunal did.

42. As to extension of time, the Registrar was wrong to extend time and I should decline to do so. At the best for the claimant, he was well aware from the documents that he had been sent, that one of them was saying clearly that the date from which time began to run had not altered. If he considered that the other document – the judgment covering letter – conveyed a different picture, he ought to have taken proactive steps to make enquiries as to the position. Citing from a phrase used in **Carroll v Mayor's Office for Policing and Crime** [2015] ICR 835, she said that as someone seeking an extension of time, he owed a duty to act with extreme diligence in a situation where, at best for him, it appeared that he was on risk that he might be out of time if he relied on the later date.

43. Ms Urquhart suggested that the claimant was also like the appellant in **Green v Mears Ltd** [2019] ICR 751, who was described by the EAT as "seeing what he wanted to see". The claimant had chosen, as it were, not to see or pay attention to the very clear warning on the certificate of correction. If he had read the judgment booklet, he would have seen how he could get in touch with

the EAT, which he could and should have done; or he could and should have sought some advice before going ahead and relying on the later date. He had not properly explained to the EAT why he had simply relied upon the later date without doing that.

44. She also submitted that there was no inconsistency with regard to how the reconsideration application was treated, as that application on its face purported to apply for a reconsideration of the corrected judgment. She submitted that no Article 6 issue arose here. The EAT rules and practice regarding time are not unclear. The underlying position was not unclear and the EAT is entitled to regulate its own procedure.

45. She also submitted that this was a case in which I could take into account the merits of the proposed underlying appeal because it was apparent, readily, that they were very weak. They all, one way or another, purported to be challenges to findings of fact that had been made by the tribunal; and that is not a proper basis for an appeal.

46. Mr Diamond submitted that the change that the tribunal had made by the second decision was not suitable for a rule 69 correction at all. It was patently not by way of correction of a typographical error or anything of that sort; it was a substantive change to the outcome, changing a judgment which recorded that a complaint had succeeded to one which recorded that that complaint had failed. This was effectively a reconsideration by the tribunal of its earlier decision, not a correction under rule 69 and, as such, the later date of the reconsideration decision applied. Alternatively, if this was properly regarded as a correction falling within the scope of rule 69, the **Aziz-Mir** line of authorities indicated that time did begin to run from the new date in this case, because a completely new decision had been issued by the tribunal alongside the certificate of correction. Those authorities continue to be applicable to the 2013 rule as much as to the 2004 rule, and it was clear that this was not dependent on the correction itself being one of

substance, nor on the subject matter of the proposed appeal.

47. If all of that was wrong, then I should extend time. A situation of some confusion and uncertainty had been created by the tribunal, on the one hand issuing a certificate of correction stating that the date from which time limits ran was unaffected, but on the other, issuing a letter referring the claimant to the attached judgment, stating that time ran for 42 days from the date of the judgment and referring to the judgment booklet for further details of that .

48. Mr Diamond said that this did indeed raise significant Article 6 issues. He referred to a number of authorities of the European Court of Human Rights. **De Geouffre De La Pradelle v France**, was a decision of 16 December 1992, in which it was said that procedures relating to the time limit for challenging a planning decision in France were not clear and coherent and that the applicant could not have been expected to understand from which date time in fact began to run. He also referred to **Vacher v France,** a decision of 17 December 1996 in the criminal jurisdiction, where it was held that putting the onus on convicted appellants to find out when an allotted period of time starts to run or expires was not compatible with Article 6.

49. He also referred to **Miragall Escolano and Others v Spain**, a decision of 25 January 2000, where again the court found that Article 6 applied to the interpretation of procedural rules such as time limits. There is a risk of infraction where the rules will cause confusion to a litigant as to the position in that regard. So, here, he submitted, the contradictory documents issued by the employment tribunal created a situation of confusion and the matter must be resolved in the claimant's favour by extending time in order not to result in an infringement of his Article 6 rights.

50. Against that background, the submissions of Ms Urquhart that the claimant should have been proactive in seeking to make enquiries to clear up this confusion, or taken other proactive action, wrongly put the blame on him for a situation that was not of his making. In any event,

further enquiries could not be expected to have assisted him. The EAT would not have been in a position through a telephone call to give him any definitive answer on this question and the judgment booklet did not address the question either.

Discussion and Conclusions

51. I will take the issues raised in the following order. Firstly, I consider that the matter identified by the judge and addressed in the certificate of correction in this case, was properly dealt with by way of the rule 69 procedure. At first blush, Mr Diamond's point that it cannot be an appropriate use of this procedure to alter a judgment upholding a complaint to a judgment dismissing a complaint might seem attractive. But in this case, it is clear from the tribunal's reasons that it had decided that the particular complaint of direct discrimination referred to at [117], had failed; and it had set out that it had failed because the consequence of its finding that the same factual conduct amounted to unlawful harassment meant that the element of detrimental treatment necessary to the direct discrimination complaint was absent by virtue of section 212.

52. It plainly was therefore erroneous for the tribunal to have recorded in the judgment that that complaint had succeeded. That was not what had happened, as was clear from the reasons; and the tribunal was correcting what must have been an accidental or unintentional framing of the judgment which was not faithful to what it had actually decided. The reasons are not in any way ambiguous in this respect. The judgment plainly did not correctly reflect the reasons, and the use of rule 69 was an appropriate and proper way to address this.

53. I turn next to the question of whether time for appealing ran in this case from the date of promulgation of the original decision or from the date on which the certificate of correction and further copy of the decision were sent out.

54. I start by returning to the authorities under the old rule. As I have noted, **Aziz-Mir** holds that the starting point is that a correction does not alter the date of the original decision. **Kennaugh** and **Patel** take their lead from **Aziz-Mir** as to the law. What all of these three cases have in common, is that the conclusion that the later date applied came about in each of them because it was found that there had been a complete re-issue of a fresh decision in substitution for the old decision. In **Patel** indeed, that came about without a certificate of correction being issued at the same time, albeit that one was issued later. In **Aziz-Mir** and **Kennaugh** it was something done additional to and over and above the issue of the certificate of correction.

55. It is clear that in **Aziz-Mir**, the certificate referred to the original decision being deleted and the new decision being substituted for it: see [6]. In **Kennaugh** at [13], again it can be seen that it was stated that the new decision was issued in substitution for the old. Again in **Patel**, there was no certificate at first, but simply the issue of a new decision; and when the certificate did come, it again used the language of substitution.

56. It seems to me, therefore, that in all of these cases, it was the stating in terms, one way or another, that the new decision was being issued in substitution for the old, and replacing it entirely, that was the crucial feature, not merely the republication of the original decision, corrected in accordance with the need for correction identified by the judge.

57. I am not entirely sure, with respect, as to whether the solution of merely attaching a single corrected page was viable or would have made a difference under the old rule, given the wording of the old rule requiring any entry in the register to be altered, and a copy of the entry so altered to be sent to each of the parties; although there is even there some ambiguity as to how an alteration to a judgment or the reasons on the register might be brought about. But, be that as it may, it does not follow from that, that in every case the issuing of a new corrected copy of the whole decision

must lead to the new date applying in substitution for the old. These authorities all turned on the new decision itself being issued by way of a complete replacement of, or substitution for, the old decision.

58. The current rule 69 does not refer specifically to the need for a certificate of correction to be the mechanism by which a judge may correct a clerical mistake or other accidental slip. The rule does require any published version of the decision to be corrected and a copy of the corrected version signed by the judge to be sent to the parties. But it does not follow from **Aziz-Mir**, **Kennaugh** or **Patel** that the consequence of doing that must be that a new date for time to run for an appeal or reconsideration application is thereby set. That would only be so, in my judgment, under the new rule, just as under the old rule, if the new decision was issued by way of substitution or replacement for the old decision in its entirety. The decision in **Majekodunmi** is consistent with that approach. It takes as its starting point, just as **Aziz-Mir** did, that the process of correction under what is now rule 69, does not ordinarily in and of itself lead to the substitution of a new date for the old.

59. The reference to substantive change may potentially be ambiguous as to whether it is referring to the change made by the certificate of correction itself, which, under rule 69, of its nature cannot be used substantively to alter a decision, or the question of whether the new decision has in substance replaced the old decision in its entirety. But reading the decision as a whole, I cannot see that **Majekodunmi** involves any novel or different approach from that set out in the earlier authorities, being to the effect that it is only when the new decision substitutes for and replaces the old decision in its entirety, that a new date for time to begin to run will be established.

60. Pausing there, I therefore conclude that the current rule does not, any more than the old rule, mean that the exercise of the power of correction by itself must result in a new date being

established. Nor does the new rule, any more than the old rule, mean that the issuing of a corrected version of the decision pursuant to the exercise of that power, results in a new date being established. It is only if the new decision is issued by way of substitution for, and replacement of, the old decision that that consequence would ensue. However, I cannot see why ordinarily that would be an appropriate course to take when the rule 69 power is exercised; and indeed it would appear to me that ordinarily it would be the wrong course to take.

61. Accordingly, ordinarily, if the rule 69 power is exercised in the correct way, there will be no substitution of the old decision by the new and the date from which time runs for any challenge by way of appeal or application for reconsideration will not be affected.

62. Under the new rule, there is no express stipulation than the correction should be brought about by the judge issuing a certificate of correction, but in any event, I consider that, whatever mechanism is used, the re-issued copy of the decision should make clear on its face that it has been issued because the correction power under rule 69 has been exercised; and the issuing of a certificate to that effect may also assist to spell out and make clear that that is what has happened. I also consider that the continued use of a warning alerting parties to the fact that the date from which time begins to run for appeal and reconsideration purposes is not affected by the exercise of the rule 69 power is desirable.

63. As I will discuss further in a moment, it appears to me to be not appropriate, when the rule 69 power is exercised, for the tribunal to issue a further standard letter giving guidance on the judgment and referring to the judgment booklet for a second time. The tribunal will or should of course have sent out that letter accompanying the sending out of the original decision. In all events, any further letter that is sent out with the corrected copy of the decision, making any reference to the possibility of appealing or seeking a reconsideration, should make clear that time for doing so

still runs from the date of sending of the original decision.

64. I turn then to what happened in the present case. Firstly, I agree with Ms Urquhart's submission that the claimant was in this case not in fact seeking to challenge the issuing of the correction as such, but was and is seeking to challenge the original decision. It is clear that the claimant does not take issue as such with the tribunal having identified per section 212 that where, in respect of a particular factual matter, a harassment claim of detrimental treatment during employment has succeeded, a direct discrimination claim in relation to the same factual matter must fail because detriment will not be made out.

65. He does not, it seems to me, seek to challenge this aspect of the tribunal's decision, as such, nor its decision to correct the judgment in respect of this aspect, as such. It seems to me that the claimant's real point of challenge as per ground one of his appeal, is that his case is that the tribunal erred by failing in its decision to dispose of a discrete complaint of direct discrimination, which was about the respondent having looked at his social media posts. He says that was a discrete complaint from the complaints that there had been harassment or discrimination by him being questioned about those posts in the grievance interviews.

66. I make no observation about the merits of that challenge. The judge plainly did not think it had merit when raised as a point of reconsideration, but it is now raised as a point of appeal before the EAT. But it seems to me that, whatever its merits, this is a point of appeal that could have been raised in relation to the original decision, even had it never contained the error in the judgment that it did, and even if that error had never been corrected. It would still have been open to the claimant to seek to argue on appeal that there was an error in the original decision, because on his case the tribunal failed to dispose of a discrete complaint of direct discrimination along the above lines. The other two matters raised by the proposed grounds of appeal are also matters that could have been

raised in relation to the original decision, even had it not contained the error that was corrected by the judge, and even had that error not in fact been corrected.

67. The fact that the claimant suggests that the certificate of correction ought to have dealt with these three matters, effectively in addition to the matter that it did deal with, does not transform this challenge into a challenge to the certificate of correction. No doubt the claimant would have been content had the judge used the certificate of correction to address these three matters in the way that he considers that the original decision should have addressed them. But none of them would have been suitable for a certificate of correction. They are all points of substance which could have been and it seems to me would have to be raised, if at all, by an appeal, and/or possibly by a reconsideration application, but not by seeking a certificate of correction.

68. However, whilst I agree with Ms Urquhart about all of that, it does not have any bearing on, or resolve by itself, the question of when time runs. In **Aziz-Mir**, the purpose of the appeal was not to challenge the decision to remove the erroneous second case number. In **Kennaugh** the purpose of the appeal was not to challenge the decision in relation to the erroneous section number, and in **Patel**, the purpose of the appeal was not to raise an issue about the erroneous promulgation date. But nevertheless in all of these cases, the issuing of a fresh decision in substitution for the old caused the time for a challenge to be made, to run from a new date, notwithstanding that in all of those cases, it seems to me, the challenges could have been raised by way of appeal in relation to the original decision, had the new decision not been substituted for it.

69. However, the difference in this case is that the certificate of correction did not say that the new decision or a corrected copy of the decision was being issued in substitution for the old decision. In this case the certificate of correction merely referred to the correction that was required, the deletion of paragraph 2 of the judgment to reflect the reasoning in [114]; and it stated

that dates for filing of appeals or reviews were not changed by the certificate of correction or the corrected judgment. It did not refer to a substituted or new judgment or anything of that sort.

70. Similarly, the document that was reissued was amended to describe itself as a "corrected judgment", not a substituted judgment or anything of that sort; and the wording at the end of the reasons preserved the originally given date on which the reasons had been signed by the judge, but added an additional date – corrected judgment dated 11 June 2020 – rather than substituting the new date for the old. This can less clearly be seen in relation to the date of sending in the copy on the EAT's file, because that is a printout, and not the original, which it must be inferred would have had, as often happens, the sending date inserted in manuscript. But the layout makes clear that the date of sending of the corrected judgment is being added and described as such, and is additional to, and distinct from, the preservation of the date of sending of the original decision.

71. Accordingly, unlike **Aziz-Mir, Kennaugh** and **Patel**, this is not a case in which a completely new decision has been issued substituting for, or replacing, the old decision. It is a case where nothing more has happened than a corrected copy being issued pursuant to the certificate of correction. In those circumstances, I agree with the Registrar that the date from which time began to run has not changed and remains the original promulgation date.

72. I turn then to the question of whether time should be extended in this case.

73. It is true, as Mr Urquhart points out, that the certificate of correction stated in terms that the invocation of rule 69 did not lead to any change in the date from which time began to run. I do not think that this can fairly be depicted as an obscure footnote. There is not much text on this entire document. It is well spaced out. It is headed "Important note to parties" in bold and its words as such are unambiguous. Nor do I think that the claimant can rely as such on the fact that the reconsideration decision took no time point, in respect of any assessment of how he conducted

himself regarding the timing of submission of his notice of appeal, since that decision was only to hand some time after both potential deadlines for appealing, on either view of the matter, had passed. Nevertheless, the fact that, when the judge did issue his reconsideration decision, no point is mentioned at all about whether it was or might have been an application made out of time, is worthy of note.

74. However, where I do agree with the claimant and with Mr Diamond is that in this case the waters were muddied, and confusion was sown, by the employment tribunal issuing the letter of 11 June 2020 which, on its face, coming out together with the reissued tribunal decision on the same date, and bearing the same date, naturally read as referring to that decision and conveying to the reader that there was 42 days from then to appeal from that decision. The judgment booklet would not have taken matters any further. It would simply have confirmed the general principle that 42 days runs from the date of sending of the decision in question; and the 11 June letter conveyed that the decision in question to which it was referring was the decision that came out at the same time.

75. This was, in my view, a contradictory message to the message conveyed by the warning on the certificate of correction itself. As I have said, I do not think it was either necessary or in fact appropriate for that letter to have been issued again in that way. Any accompanying letter referring to the possibility of appealing or seeking a reconsideration should have made clear that time still ran from the original date of sending of the decision.

76. I do not think that either **Carroll** or **Green v Mears** is precisely in point in this particular factual context. **Green v Mears** was a case in which the claimant was relying on what he said was his understanding that time ran from the date of the issue of a reconsideration decision. In that case there was nothing at all issued by the employment tribunal that could have given him that

impression; and the only materials that were issued or to which he was referred, stated in terms that this was not the position and that the making of an application for reconsideration does not lead to any extension of time or alteration in the time for appealing. That is not, therefore, comparable with what happened in this case, in which conflicting or contradictory documents were issued by the employment tribunal.

77. The situation in **Carroll** is perhaps a little closer to the present situation insofar as the tribunal had sent out its decision, but to the wrong address, and at a certain point the claimant became aware that a decision had been issued. But it was only when the claimant did become aware that a decision had in fact been issued (although it had never been received because it was not sent to the right address) that it was said at [34] in **Carroll**, citing there in fact a phrase used in the earlier decision in **Sian v Abbey National Plc** [2004] ICR 55, that he should then have acted with extreme diligence to present his appeal once he was on notice that a decision had in fact been issued and time was against him, or at least might be. Up until that point, however, he was given by the EAT the benefit of the doubt. That is a little closer to the facts of this case, but not so close as to be on all fours, given that in this case the tribunal has issued two documents that conflicted on the same day.

78. It is in those circumstances that I do not think it can be fairly said against the claimant that he had a proactive duty to raise the point with extreme diligence. The situation was not of his making. It would no doubt have been sensible for him to make enquiries, but I see force in Mr Diamond's submission that, even if he had, he probably would not have got a clear answer or one on which he could safely rely. Insofar as this raises an issue of law, neither the EAT staff nor the employment tribunal staff for that matter would be in a position to give him a definitive answer or determination. As we have seen from the territory that I have had to traverse in order to reach my decision, the answer is not entirely straightforward and requires some careful analysis of the

prior authorities in order to reach it; nor can the answer readily be obtained merely by reading the rules because they are as such silent on the question of the effect on the time point of the invocation of the rule 67 power. It is in this context that I have some sympathy with the observation that it is noteworthy that the judge did not pick up on the point in his reconsideration decision. As I have said, that is just an observation, however. It is not a material point in my decision on this appeal.

79. In those circumstances, I do not think that the argument depends on the Article 6 authorities on which Mr Diamond relies. What I have to consider is whether the particular circumstances of this case amount to exceptional circumstances applying the well-known guidance in **Abdelghafar** [1995] ICR 65, or alternatively a reasonable excuse for the claim not having been presented in time.

80. I do consider that, if not a reasonable excuse, these circumstances do amount to unusual and exceptional circumstances given, I repeat, that the problem originated with an error on the part of the tribunal. I have therefore decided that time should be extended and I agree with the Registrar's decision on that point as well.

81. For all of these reasons, this appeal is dismissed. Whilst the underlying substantive appeal against the employment tribunal's decision has been presented out of time, time is extended and so it will proceed to the next stage of consideration by the EAT.

82. I have not thought it necessary when reaching this decision to say anything more about the merits of the underlying substantive grounds of appeal, save to say that I do not consider that it is so plain and obvious that all three of them are completely hopeless that that would have been reason not exceptionally to extend time in the unusual circumstances of this case. I am not, however, expressing any view about the merits beyond that. I am not saying that it would either be right or wrong for a judge at the Rule 3(7) stage to come to the view that the grounds, or any of them, either do or do not disclose reasonable grounds for appeal. I leave that matter entirely open to the judge

considering them at the Rule 3(7) stage, which is the next stage for this appeal.