[2020 Gib LR 123]

R. (CASSAGLIA) v. EMPLOYMENT TRIBUNAL (GIBRALTAR HEATH AUTHORITY and STAGNETTO (interested parties))

SUPREME COURT (Yeats, J.): April 2nd, 2020

Employment—industrial tribunal—appeals—although court could hear judicial review claim brought by person whose actions Employment Tribunal found to constitute bullying, more appropriate to reconstitute as appeal court under Employment Tribunal (Appeal) Rules 2005 and extend time for pleadings in judicial review claim to form pleadings in appeal

The claimant applied for permission to bring a judicial review claim.

On August 23rd, 2019, the Employment Tribunal found the Gibraltar Health Authority ("GHA") liable for an act of bullying said to have been occasioned by the claimant (the GHA's medical director) against another employee of the GHA. The tribunal found that the claimant had pushed the other employee and then spoken to him in a raised voice using inappropriate language. On September 16th, 2019, the GHA filed a notice of appeal but this was subsequently withdrawn on October 1st, 2019. The GHA informed the other parties that the appeal was to be withdrawn (the fact that the appeal was withdrawn was confirmed on October 9th, 2019).

On November 22nd, 2019, the claimant filed a claim for judicial review seeking a quashing order in respect of the decision of the Employment Tribunal. The claim was brought on three grounds: (a) the Employment Tribunal chairman had erred in holding that the single, isolated incident was sufficiently serious to amount to bullying on the part of the GHA; (b) the Employment Tribunal chairman had erred by failing to engage with the required "multi-factorial assessment" of whether the conduct amounted to bullying attributable to the GHA; and (c) the claimant's interests and reputation had been adversely affected by the tribunal's decision yet he did not receive a fair hearing as he was not a party to the proceedings.

The statutory framework for appeals from the Employment Tribunal was contained in the Employment Act 2015 and the Employment Tribunal (Appeal) Rules 2005. The right to appeal was provided in s.13 of the Act and r.3(1) of the Appeal Rules provided:

> "Any person ('the appellant') wishing to appeal to the court against a decision of the Tribunal shall, within 21 days of the decision, file with the Registrar a notice of appeal in substantially the

form set out in Schedule 1 which shall be signed by or on behalf of the appellant."

The claimant submitted that (a) even though permission to proceed with judicial review would normally be refused if a claimant had failed to exhaust other remedies, the court retained a discretion to allow judicial review to proceed; (b) as he had not been a party to the proceedings before the tribunal he was not "any person" in r.3(1) of the Appeal Rules and he did not have locus to appeal; (c) a statutory right of appeal did not bar access to judicial review if there were special reasons to allow it to proceed; (d) the court's discretion should be exercised in this case so as to allow the judicial review claim to proceed because the claimant had intended to participate in the appeal brought by the GHA but that had since been withdrawn; there were important points of principle and practice regarding the Bullying at Work Act which needed to be resolved; and there were serious and important questions as to whether the claimant received a fair hearing which he should not be prevented from airing on a technicality; (e) in respect of delay, the claimant had relied on the GHA's appeal and it was only when that was discontinued that he had needed to take action; and (f) the court could reconstitute as an appellate court, which would allow the claimant to bring the same matters of law.

The Employment Tribunal submitted that (a) if the claimant were aggrieved by the tribunal's decision he should have brought an appeal against its findings pursuant to the Appeal Rules, which was a suitable alternative remedy, and judicial review was not available; (b) the claimant had not exhausted his appeal remedies and he was not therefore entitled to seek judicial review; (c) if the court did decide to proceed, it should reconstitute itself as an appeal court under the Appeal Rules; and (d) in relation to r.3(1) of the Appeal Rules, the use of the term "any person" was wide enough to include a non-party who was adversely affected by the outcome of the proceedings.

The GHA and the employee who the tribunal found to have been bullied supported the proposition that if the claimant was aggrieved by the tribunal's decision he should have appealed, and that judicial review was not available to him. The GHA submitted that permission to proceed by way of judicial review should also be refused on the grounds of delay.

Held, ruling as follows:

(1) The Appeal Rules allowed any person who was adversely affected by a decision of the Employment Tribunal to appeal to the Supreme Court pursuant to r.3(1). The claimant was a person with a significant interest in the proceedings before the tribunal and in any appeal arising from its decision. Although the GHA was the respondent to the claim, the claim was premised on the acts alleged to have been committed by the claimant. The finding that he had bullied the other employee had the potential to cause him serious reputational damage and to have adverse practical consequences. The claimant had been adversely affected by the tribunal's decision such that he should be able to bring an appeal pursuant to the

Appeal Rules. He had not filed a notice of appeal and had not, therefore, strictly exhausted his remedies prior to filing his claim for judicial review (paras. 19–20).

(2) Although judicial review was not normally available to claimants who had not exhausted their available remedies, the court retained a discretion. The court could quite properly exercise its discretion to allow the judicial review to proceed. The claims were not hopeless, frivolous or vexatious. For the purposes of determining whether the judicial review claim was issued promptly, it was reasonable to discount the period up to October 9th, 2019 when all parties had been working on the basis that the GHA was appealing. When looking at promptness, the court could take into account any explanation for the delay that it considered to be reasonable. In the present case, it would have been unnecessary and wrong for the claimant to have issued the judicial review proceedings if a statutory appeal had been lodged against the very same decision. Thereafter, it took approximately six weeks for the claimant's legal team to file their claim, which was not inordinate. The court would not therefore find that permission should be refused on the ground of delay. Any failure to comply with the pre-action protocol for judicial review would not affect the grant or refusal of permission. Breaches of pre-action protocols were relevant principally to questions of costs (para. 23; paras. 31–34).

(3) Although the court could grant permission for the judicial review to proceed, it would be possible and more appropriate for the court to reconstitute as an appellate court to hear an appeal under the Appeal Rules. To proceed by way of appeal, the claimant should have filed a notice of appeal within 21 days of the Employment Tribunal's decision, unless an extension of time were granted by the court. Applications for extensions of time were to be treated as applications for relief from sanctions. Such applications were subject to a three-stage test: first, to identify and assess the seriousness and significance of the failure to comply with the time limit; second, to consider why the default occurred; and third, to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application including the requirement that litigation should be conducted efficiently and at proportionate cost and the interests of justify in the particular case. In the present case, for the purpose of determining whether the failure to comply with r.3(1) was serious or significant, the court would take November 22nd, 2019 (the date on which the judicial review claim was instituted) as the date on which the appeal would be deemed to have been filed. Notice of appeal should have been filed by September 17th, 2019 and there was therefore an assumed delay of 66 days. Such a delay in the context of a 21-day time limit for filing a notice of appeal was serious. It would ordinarily have an impact on the prosecution of the appeal. In considering the circumstances of the case, the court noted that r.4 of the Appeal Rules allowed an appellant a period of 60 days from the filing of the notice of appeal to file a record of appeal. Thereafter, he had a further 10 days within which to

file his memorandum of appeal. Had the claimant chosen to appeal, he would have had a maximum of 91 days to file his grounds. That was similar to the time limit for filing a claim for judicial review. Whilst the procedure was different, the appellant's counsel was not far off the mark when he said that if the appellant had appealed the position would not be very different time-wise. In any event, if the court did not extend time, the matter could continue as a judicial review claim. It would be more appropriate to proceed by way of appeal under the Appeal Rules than by way of judicial review. The legislature had provided a route for an appeal and it should be followed if possible, even if in practice it would make little difference. It would therefore be in the interests of justice to allow such extensions of time pursuant to r.11 as were necessary to deem the pleadings in the judicial review to take the place of the pleadings in the appeal. The court would therefore reconstitute the proceedings into appellate proceedings brought under the Appeal Rules (paras. 34–40; paras. 44–46).

Cases cited:

(1) *Ahsan* v. *Home Secy.*, [2017] EWCA Civ 2009; [2018] HRLR 5; [2018] Imm. A.R. 531, distinguished.

(2) *DLA Piper UK LLP* v. *BDO LLP*, [2013] EWHC 3970 (Admin); [2014] 1 W.L.R. 4425, referred to.

(3) *Denton* v. *T.H. White Ltd.*, [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926; [2015] 1 All E.R. 880; [2014] C.P. Rep. 40; [2014] 4 Costs L.R. 752, applied.

(4) *MA Holdings Ltd.* v. *R.* (*George Wimpey UK Ltd.)*, [2008] EWCA Civ 12; [2008] 1 W.L.R. 1649; [2008] 3 All E.R. 859; [2008] C.P. Rep. 19, considered.

(5) *R.* v. *Osman (Twana Tofiq)*, [2017] EWCA Crim 2178, referred to.

(6) *Sagredos* v. *Cohen*, 2018 Gib LR 293, applied.

(7) *W (A Child) (Care Proceedings: Non Party Appeal)*, *Re*, [2016] EWCA Civ 1140; [2017] 1 W.L.R. 2415; [2017] 1 F.C.R. 349; [2017] 1 FLR 1629, considered.

Legislation construed:

Court of Appeal Rules 2004, r.46(1): The relevant terms of this sub-rule are set out at para. 16.

Employment Act 2015, s.13: The relevant terms of this section are set out at para. 13.

Employment Tribunal (Appeal) Rules 2005, r.3(1): The relevant terms of this sub-rule are set out at para. 14.

r.11(1): The relevant terms of this sub-rule are set out at para. 35.

Employment Tribunal (Constitution Procedure) Rules 2016, rr. 33–34: The relevant terms of these rules are set out at para. 26.

Supreme Court Rules 2000, r.32:

"Where an appeal is from a tribunal or person and there is no respondent or the respondent does not appear and is not represented, the tribunal or person, as the case may be, shall be entitled to appear and be heard on the appeal."

Civil Procedure Rules (S.I. 1998/3132), r.52.1(3)(d): The relevant terms of this provision are set out at para. 16.

r.54.5(1): The relevant terms of this provision are set out at para. 25.

R. Pennington-Benton and *D. Martinez* for the claimant;
Sir P. Caruana, *KCMG*, *Q.C.* and *C. Allan* for the respondent;
N. Cruz and *C. Wright* for the first interested party;
C. Salter for the second interested party.

1 **YEATS, J.:** On November 22nd, 2019, Dr. Daniel Cassaglia filed a claim for judicial review seeking a quashing order in respect of a decision of the Employment Tribunal ("the tribunal"). The tribunal had, by a judgment of its Chairman, Joseph Nuñez, dated August 23rd, 2019, found the Gibraltar Health Authority ("the GHA") liable for an act of bullying said to have been occasioned by Dr. Cassaglia against Lawrence Stagnetto. Both are employees of the GHA.

2 The claim came before me for a permission hearing on February 18th, 2020 at which the following preliminary procedural points were raised. These affect whether the claim is to proceed and, if it does, in what form:

(i) First, and fundamentally, the tribunal says that if Dr. Cassaglia was aggrieved by the tribunal's decision he should have brought an appeal against its findings pursuant to the provisions of the Employment Tribunal (Appeal) Rules 2005 ("the Appeal Rules"). That judicial review is not therefore available to Dr. Cassaglia as there is a suitable alternative remedy that he could have availed himself of. The GHA and Mr. Stagnetto support this position. In addition, the GHA say that I should refuse permission on the grounds of delay.

(ii) Secondly, I should determine whether the court should reconstitute into an appellate court pursuant to the Appeal Rules. To do so, I would have to extend time for the bringing of an appeal, as notice should have been filed within 21 days of the tribunal's decision. This is objected to by the GHA and by Mr. Stagnetto.

3 It is important to note at the outset that Dr. Cassaglia continues to deny that he bullied Mr. Stagnetto. However, he accepts that, in these proceedings, he is unable to challenge the factual findings made by the tribunal. Whether the matter progresses as a claim for judicial review or as an appeal, he is restricted to raising matters of law. It is nevertheless

necessary that I set out some factual background so that the legal issues can be seen in context.

4 On December 19th, 2017, Mr. Stagnetto filed a claim with the tribunal under the Employment (Bullying at Work) Act 2014 ("the Bullying at Work Act") complaining that on September 20th, 2017, Dr. Cassaglia had pushed him with both hands; sworn at him; shouted at him; and accused him of interfering with an investigation by blocking a request for information. Mr. Stagnetto's case was that this had left him distressed and alarmed. At the time, Dr. Cassaglia was the GHA's medical director and therefore one of the more senior managers in the organization. Before the tribunal, the GHA, as respondent to the claim, took what was described by the Chairman as a "neutral stance." It nonetheless submitted that a single one-off incident could not constitute bullying under the Bullying at Work Act. Further, it was said that if a single act could constitute bullying then the evidence was such that it could not be proved by Mr. Stagnetto and that, in any event, if Dr. Cassaglia's evidence was believed, then there was no conduct which could amount to bullying. The GHA did concede that an argument had taken place at the Pathology Department between both men. (The GHA also made other admissions regarding its duties under the Bullying at Work Act and about its bullying policies and procedures which I need not detail at this stage.)

5 Dr. Cassaglia's evidence was that he did not push or swear at Mr. Stagnetto. He however accepted that he may have raised his voice. He had been upset by what he perceived to be an obstructive attitude by certain members of the Pathology Department in an investigation he was carrying out and had confronted Mr. Stagnetto. Following the incident, Dr. Cassaglia accused members of staff in the department of ganging up against him to concoct the allegations. There had been long-standing issues between both sides and, according to Dr. Cassaglia, they wanted to frustrate him from exercising his authority as medical director over them.

6 In the event, the tribunal found that Dr. Cassaglia had pushed Mr. Stagnetto with both hands so as to manoeuvre him into a private office and had then spoken to him in "a raised and raising voice" using inappropriate language. The Chairman ruled that this single incident was sufficiently serious to constitute bullying under the Bullying at Work Act. At a remedies hearing which took place in December 2019, the GHA was ordered to pay Mr. Stagnetto the sum of £7,000 in damages.

7 I should also add for the sake of completeness that there was a second bullying claim made by another GHA employee, Audrey Smith, against Dr. Cassaglia arising out of the same incident, but that was dismissed by the tribunal.

8 The judicial review is brought by Dr. Cassaglia on three separate grounds. The first is that:

> "The Chairman erred in holding that the single, isolated, and premeditated act of pushing, together with ancillary outbursts, was 'sufficiently serious' to amount to bullying on the part of the employer."

Dr. Cassaglia accepts that a single act could, in certain extreme circumstances, amount to bullying. However, his case is that on the facts as found by the tribunal, it was not open to it to make a determination that this constituted bullying under the Bullying at Work Act.

9 The second ground is that:

> "The Chairman erred in law by failing to engage with the required multi-factorial assessment of whether the conduct amounted to bullying attributable to the employer—as opposed to a one-off, unauthorised act which reasonably and fairly cannot amount to institutional bullying within the meaning of the [Bullying at Work] Act."

Here, Dr. Cassaglia will seek to argue that, as a matter of law, the tribunal needed to consider whether the acts complained of could reasonably be attributed to the employer. That the tribunal should do so by considering all the circumstances including "the degree of control, direction and influence" the employer could exercise over the relevant conduct.

10 The third ground is that:

> "The claimant's interests and reputation have been adversely affected by the tribunal's decision, yet he did not receive a fair hearing."

Dr. Cassaglia was not a party to the proceedings before the tribunal but will say that he is a person affected by the outcome. There have been practical and reputational effects in the finding that he bullied Mr. Stagnetto. As such, he says that his rights to a fair hearing were engaged but were not sufficiently protected by the tribunal. He complains, amongst other things, of the following: that he was not made aware of the bullying claim until very late in the day; that the timing of the tribunal hearing did not enable him to clear his name in the parallel disciplinary proceedings instituted by the GHA; that he was not made a party to the tribunal proceedings or advised that he could be represented at the hearing; and that he was not present or told to be present at the hearing whilst witnesses were giving their evidence.

11 Sir Peter Caruana, Q.C., who appeared on behalf of the tribunal, submitted that Dr. Cassaglia had not exhausted his appeal remedies and he was not therefore entitled to seek judicial review of the tribunal's decision. Sir Peter made it plain that in making this submission it was not the tribunal's intention to prevent an aggrieved person from challenging its decision and therefore suggested that the court could reconstitute as an

appellate court. The practical distinction for the tribunal between the two routes is that the tribunal would play no part in the appeal whereas it is the named defendant in the judicial review. (In an appeal, the tribunal would only be entitled to be heard if there were no respondent or no respondent appearing—see r.32 of the Supreme Court Rules 2000.)

12 It is undoubtedly the law that permission to proceed with a judicial review will normally be refused if a claimant has failed to exhaust other possible remedies. No party sought to argue otherwise. Rowan Pennington-Benton, who appeared for Dr. Cassaglia, did, however, submit that the court nevertheless retains a discretion to allow it to proceed.

13 The starting point is to determine whether an alternative remedy does indeed exist. The statutory framework for appeals from the tribunal to this court is contained in the Employment Act and in the Appeal Rules. The right to appeal is provided for in s.13 of the Employment Act 2015. This states:

> "An appeal lies to the Supreme Court on any question of law arising from any decision of, or arising in any proceedings before, the Employment Tribunal."

14 The Appeal Rules then set out the procedure which is to be followed. Rule 3(1) deals with instituting the appeal. It provides as follows:

> "Any person ('the appellant') wishing to appeal to the court against a decision of the Tribunal shall, within 21 days of the decision, file with the Registrar a notice of appeal in substantially the form set out in Schedule 1 which shall be signed by or on behalf of the appellant."

15 In his written submissions, Mr. Pennington-Benton doubted whether the term "any person" used in r.3(1) could include Dr. Cassaglia when he was not a party to the proceedings before the tribunal. (In his statement of facts and grounds for judicial review, Dr. Cassaglia actually asserts that, as a non-party, he does not have locus to appeal.) At the hearing, whilst maintaining that the provision was confusing and unclear, I understood him to accept that any person with sufficient interest could indeed appeal.

16 Sir Peter likened r.3(1) and the use of the term "any person" to the provisions governing appeals from this court to the Court of Appeal. In r.48(1) of the Court of Appeal Rules 2004, notice of appeal can be filed by "any person desiring to appeal to the court in any civil cause or matter . . ." He further referred the court to Civil Procedure Rules, r.52 (which rule applies to appeals to the Court of Appeal by virtue of r.6 of the Court of Appeal Rules). At r.52.1(3)(d) of the CPR, the term "appellant" is defined as being: "a person who brings or seeks to bring an appeal." In the commentary to the rule found at para. 52.1.3 of the *White Book*, it is said that: "This definition is wide enough to embrace a person who is not a party to the proceedings below, but who is adversely affected by the

outcome." The commentary then refers to two authorities: *MA Holdings Ltd.* v. *R. (George Wimpey UK Ltd.)* (4) and *Re W (A Child) (Care Proceedings: Non Party Appeal)* (7).

17 The first of the cases concerned a landowner who wished to appeal a planning decision. At first instance the court quashed a local plan adopted by the council. The council then decided not to appeal. The landowner was a person affected by the decision but had not been a party to the original proceedings. The Court of Appeal granted the landowner permission to appeal. Dyson, L.J. said ([2008] EWCA Civ 12, at paras. 9 and 19):

> "9. It would be surprising if the effect of the CPR were that a person affected by a decision could not in any circumstances seek permission to appeal unless he was a party to the proceedings below. Such a rule could work a real injustice, particularly in a case where a person who was not a party to the proceedings at first instance, but who has a real interest in their outcome, wishes to appeal, the losing party does not wish to appeal and an appeal would have real prospects of success."

> "19. In my view, therefore, giving the language its plain and ordinary interpretation, paragraph [52.1(3)(d)] . . . does not require an appellant to have been a party to the proceedings in the court below."

18 The second case involved an application for permission to appeal by a social worker and a police officer who had been heavily criticized in care proceedings. The Court of Appeal affirmed the interpretation given to the term "appellant" in the *Wimpey* case.

19 I consider that Sir Peter's submissions on behalf of the tribunal are correct. The Appeal Rules allow any person who is adversely affected by a decision of the tribunal to appeal to this court pursuant to r.3(1).

20 Charles Salter, who appeared for Mr. Stagnetto, submitted that Dr. Cassaglia does not strictly have an interest in the outcome of the tribunal's proceedings. He has no interest in what damages Mr. Stagnetto may be awarded or in construing the Bullying at Work Act. Those proceedings are between Mr. Stagnetto and the GHA. They are not about the person carrying out the bullying but about how the employer has dealt with the events. Dr. Cassaglia's interests are limited to defending himself from the tribunal's findings. If he does have a grievance against his employer then that is a matter for a different forum. Whilst Mr. Salter is not wrong, in my judgment, Dr. Cassaglia is nonetheless a person with significant interest in the proceedings before the tribunal and in any appeal arising from its decision. Although the GHA were the respondents to the claim, the claim was premised on the acts said to have been occasioned by Dr. Cassaglia. He was found to have bullied Mr. Stagnetto. This is a finding which has

the potential to cause him serious reputational damage and to have adverse practical consequences. It is unarguable to suggest otherwise. There has been a referral to the General Medical Council, although any disciplinary hearing which may follow has been placed on hold pending the outcome of this case. Dr. Cassaglia is a person who has been adversely affected by the tribunal's decision such that he should be able to bring an appeal pursuant to the Appeal Rules. He did not file a notice of appeal and has not therefore, strictly, exhausted his remedies prior to filing his claim for judicial review.

21 Mr. Pennington-Benton submitted that a statutory right of appeal does not bar access to judicial review if there are special reasons to allow it to proceed. He referred the court to *Ahsan* v. *Home Secy.* (1). There, the Court of Appeal was considering whether to allow applications for judicial review by appellants who wished to challenge the decision of the Secretary of State refusing them leave to remain in the United Kingdom. The appellants were in fact entitled to an alternative remedy which was an "out of country" appeal—a process which allowed them to appeal but only after they had left the country. The Court of Appeal gave the appellants permission to proceed with their claims for judicial review because it considered that the "out of country" appeal was not an adequate remedy in their cases. I agree with Sir Peter that this is not a particularly helpful example because the court determined that the alternative remedy was not a suitable one whereas in our case there is no question as to the suitability of proceeding by way of appeal. Nevertheless, it is correct to say that the court does retain a discretion.

22 In the present case, Mr. Pennington-Benton submits that the court should exercise its discretion to allow the judicial review to proceed. He highlighted that Dr. Cassaglia had intended to participate in the appeal brought by the GHA but that was withdrawn; that there are important points of principle and practice regarding the Bullying at Work Act which need to be resolved; and that there are serious and important questions as to whether Dr. Cassaglia received a fair hearing which he should not be prevented from airing "on a technicality." The tribunal's presence can be dispensed with if need be and that would deal with Sir Peter's concern.

23 I have already stated that it is the law that judicial review is not *normally* available to claimants who have not exhausted their available remedies. But, whilst this was not raised by the parties at the permission hearing, it is curious to look at the reasons for the rationale. The learned authors of *De Smith's Judicial Review*, 8th ed., at para. 16–017 (2019) suggest that there are four. They say:

> "There are various reasons why legislation may create an avenue of redress into which the Administrative Court may seek to divert challenges, including: a desire to make access to justice available

> more locally (although this is less powerful since regionalisation of the Administrative Court); a wish to prevent the Administrative Court becoming overburdened with cases; the fact that a tribunal or other specialist body may have more expertise in the subject of the claim than the Administrative Court; and that substitutes for judicial review may be provided at lesser cost."

Clearly, none of the first three reasons are relevant to this particular case. Both the appeal and the judicial review would proceed in the exact same court. As to the fourth, the cost, I am not certain that there would be any meaningful difference between the two. Taking this into account together with Mr. Pennington-Benton's submissions, it seems to me that I could quite properly exercise my discretion to allow the judicial review to proceed.

24 In any event, Mr. Pennington-Benton submitted that the court could easily reconstitute as an appellate court and that would allow him to bring the same matters of law. The pleadings in the judicial review would be taken as the pleadings in the appeal and the matter could proceed to a hearing. He referred me to two authorities, *R.* v. *Osman (Twana Tofiq)* (5) and *DLA Piper UK LLP* v. *BDO LLP* (2), where appeals were reconstituted into a judicial review. Although these cases involved a reconstitution into an administrative court and not the reverse, it was submitted that reconstitution was possible if it was appropriate for the court to deal with a case justly.

25 Nicholas Cruz, who appeared for the GHA, also raised the question of delay. He submitted that there has been inordinate delay on the part of Dr. Cassaglia in bringing his claim. A judicial review claim must: "be filed—(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose" (CPR 54.5(1)). There are in fact two parts to the GHA's submissions. The first is that as concerns ground 3 of the intended judicial review, this was not brought within the three-month time limit and is therefore out of time. As to grounds 1 and 2, although they were brought on the last day of the three-month time limit, they were not brought promptly.

26 As has been explained, the third ground concerns a complaint by Dr. Cassaglia that he did not participate at the tribunal hearing to an extent which afforded him a fair trial. He also complains that he did not get sufficient notice of the hearing and that the timing of the proceedings before the tribunal meant that he was unable to clear his name in the disciplinary proceedings commenced by the GHA against him. Mr. Cruz submitted that there was no question that, at the latest, by January 10th, 2019 Dr. Cassaglia knew about the tribunal hearing that was to take place and that therefore time should start to run from that date. (The GHA's case is that he was in fact informed earlier.) I pause here to explain that the

GHA will in any event say that Dr. Cassaglia's complaint regarding participation at the hearing is unfounded because he could have applied to join the proceedings as a party but he did not. This submission is based on rr. 33 and 34 of the Employment Tribunal (Constitution Procedure) Rules 2016 which provide as follows:

> "33. The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings and may remove any party.
>
> **Other persons.**
>
> 34. The Tribunal may permit any person to participate in proceedings, on such terms as may be specified, in respect of any matter in which that person has a legitimate interest."

It is said for the GHA that these provisions could have enabled Dr. Cassaglia to apply to be added as a party. He did not do so which means that he should not now be able to take the point. I observe that on the face of it these provisions do appear to allow any party with a sufficient interest to participate and that therefore an application could have been made by Dr. Cassaglia. However, this point was not fully argued at the permission hearing. Furthermore, there is more to ground 3 than just the question of participation at the hearing. In any event, Mr. Cruz did confirm that the GHA's objection to permission being granted centred on the question of delay alone.

27 The delay point on ground 3 is simply that time started to run from January 10th, 2019 when Dr. Cassaglia was advised that the hearing was to take place. Any judicial review of these complaints should have been brought at that time. The option to complain has therefore now passed and even though the court retains a discretion to extend any time limit, there is no good reason to do so in this case. It seems to me that I can deal with this submission in short order. The complaints relate to a trial process. The trial came to an end when the judgment of the Chairman was handed down. That is the operative date for any issues arising from the process, including those matters complained of in ground 3 of the judicial review. Indeed, para. 4.1 of Practice Direction 54A of the CPR provides as follows:

> "Where the claim is for a quashing order in respect of a judgment, order or conviction, the date when the grounds to make the claim first arose, for the purposes of rule 54.5(1)(b), is the date of that judgment, order or conviction."

The claim is for a quashing order. The date of the judgment must be the date from which time starts to run in respect of any complaint being relied on for the purposes of the relief sought.

28 More generally, the GHA say that judicial review claims should be brought promptly. That the court may refuse permission even when a claim is instituted within the three-month time limit but was not made promptly. Again, this is undoubtedly the law and the only interpretation that can be given to CPR 54.5(1).

29 Dr. Cassaglia's case is that he asked the GHA to appeal the tribunal's decision, which initially it agreed to do. Indeed, the GHA filed a notice of appeal within the prescribed period. However, the GHA subsequently advised him that they were withdrawing the appeal. At that stage he decided to proceed by seeking judicial review of the tribunal's decision and counsel was instructed to settle the pleadings. The claim was filed on the last day of the three-month time limit. A short chronology of the relevant dates is as follows:

August 23rd, 2019	Date of the tribunal's written judgment (provided to Dr. Cassaglia on August 27th, 2019).
September 16th, 2019	The GHA file their notice of appeal.
October 1st, 2019	Messrs. Isolas, acting for the GHA, advise Messrs. Hassans that they have been instructed to withdraw the appeal.
October 4th, 2019	Messrs. Hassans ask that the GHA reconsider its decision.
October 9th, 2019	Messrs. Isolas inform Messrs. Hassans that they advised the other parties on October 4th, 2019 that the notice of withdrawal of the appeal was to be filed on October 7th, 2019. (They do not actually confirm when it was filed.)
November 22nd, 2019	The judicial review claim form is filed.

30 Mr. Pennington-Benton submitted that Dr. Cassaglia was relying on the GHA's appeal and did not therefore need to take any steps whilst the appeal was afoot. It is only when the appeal was discontinued that he needed to take action. He submitted that the delay from October 9th, 2019 (when the fact that the GHA's appeal was withdrawn was confirmed) to November 22nd, 2019 is not unreasonable in light of the preparatory work which needed to be undertaken.

31 For the purposes of determining whether or not the judicial review claim was issued promptly, I agree with Mr. Pennington-Benton that it is reasonable to discount the period up to October 9th where all parties were working on the basis that the GHA was appealing. When looking at promptness, the court can take into account any explanation for the delay that it considers to be reasonable. It would have been unnecessary and indeed wrong for Dr. Cassaglia to have issued the judicial review proceedings if a statutory appeal had been lodged against the very same decision. Thereafter it took Dr. Cassaglia's legal team a period of approximately six weeks to file their claim. In my judgment, leaving to one side the fact that I have determined that Dr. Cassaglia could have appealed himself under the Appeal Rules, the time lapse of six weeks for the filing of a judicial review claim form and associated pleadings in the circumstances of this case is not inordinate. I would not therefore find that permission should be refused on the grounds of delay.

32 In its acknowledgment of service, the GHA also complained that Dr. Cassaglia had not complied with the pre-action protocol for judicial review. In particular, that there had been no engagement with the tribunal and/or Mr. Stagnetto. Perhaps unsurprisingly, this was not an argument that was developed by Mr. Cruz at the hearing. The aims of the protocol are set out in para. 3. A principal aim is to "try to settle the dispute without proceedings or reduce the issues in dispute." I certainly see little point in Dr. Cassaglia attempting to engage with the tribunal and/or the other parties to this action to try and settle in what is in effect an appeal situation. It is, however, right to say that the other parties should have been advised that the claim was to be filed and the basis for it. It may have assisted them, for example, in preparing their own submissions and/or in narrowing down issues. Nevertheless, I do not consider this to be a matter which affects the grant or refusal of permission. Breaches of pre-action protocols are relevant principally to questions of costs.

33 The court's permission is required for a judicial review claim to proceed—CPR 54.4. At para. 54.4.2 of the *White Book* it is said that permission will be granted if:

> ". . . the court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and all the relevant evidence . . . The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious . . ."

None of the parties sought to argue against the merits of the case (other than for the GHA which, to a limited degree, objected to ground 3 as I have set out in para. 26 above. The GHA also made it clear that they consider grounds 1 and 2 to be without merit but they chose not to

articulate their reasons for this). I do not consider Dr. Cassaglia's claims to be hopeless, frivolous or vexatious.

34 It therefore seems to me that I could exercise my discretion and grant permission for the judicial review to proceed. However, would it be possible and more appropriate for this court to simply reconstitute as an appellate court to hear an appeal under the Appeal Rules? (As I stated in my short introduction above, reconstitution into an appellate court was objected to by the GHA and by Mr. Stagnetto. Of course, the objection to reconstitution by the GHA and Mr. Stagnetto becomes less relevant in light of my determination that I could allow the judicial review to proceed. The motivation behind the objection was to prevent the matter from going ahead not to choose one process over another.)

35 To proceed by way of appeal Dr. Cassaglia ought to have filed his notice of appeal within 21 days. He did not do so. Rule 11(1) of the Appeal Rules allows for extensions of time to be granted by the court. The rule provides as follows:

> "A judge may by order extend or abridge the time limited by these rules for doing any act whether before or after the expiration of such time limit and whether before or after the doing of the act."

36 So how is this discretion to be exercised? In *Sagredos* v. *Cohen* (6), the Court of Appeal held that in appeals to that court, extensions of time are to be treated as applications for relief from sanctions and consequently are subject to the three-stage test in *Denton* v. *T.H. White Ltd.* (3). Rimer, J.A. explained that the Court of Appeal Rules 2004 are silent as to what criteria to apply in extension applications and therefore the court has to look at the practice of the English Court of Appeal. Sir Colin stated (2018 Gib LR 293, at para. 19):

> "The practice [in England] is for an application for an extension of time for appealing to be treated as an application for relief from the implied sanction that, if the notice of appeal is late, the appeal cannot be pursued. That makes good sense because, failing any extension of time, the appellant will indeed suffer the very real sanction of being unable to pursue his appeal."

37 It seems to me that I must follow the same approach. Rule 3(1) of the Appeal Rules provides for a 21-day time limit within which to file a notice of appeal. If he does not do so, and there is no extension pursuant to r.11, the intended appellant will be sanctioned in that he will be unable to pursue an appeal. Like with the relevant rule in the Court of Appeal Rules, an application for an extension of time for filing a notice of appeal under the Appeal Rules is an application for relief from an implied sanction.

38 The three-stage test in *Denton* was set out in the judgment ([2014] 1 W.L.R. 3926, at para. 24):

> ". . . A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]'."

Factors (a) and (b) are (at para. 33):

> "(a) the requirements that litigation should be conducted efficiently and at proportionate cost; and (b) the interests of justice in the particular case."

39 For the purposes of determining whether the "failure" to comply with r.3(1) is serious or significant, it must be right that I take November 22nd, 2019 (the date on which the judicial review claim was instituted) as the date on which the appeal would be deemed to have been filed. As notice of appeal should have been filed by September 17th, 2019, there is therefore an assumed delay of 66 days. There is no yardstick with which to measure seriousness of delay when failing to meet a time limit. Assessment must include having regard to the timeframe afforded to comply with a rule, the nature of the act which is to be undertaken and the effect of the delay. In my judgment, a delay of 64 days in the context of a 21-day time limit for filing a notice of appeal is serious. Such a delay would ordinarily have an impact on the prosecution of the appeal.

40 Why did the delay occur? As noted above, Dr. Cassaglia's position is that the delay came about because he was relying on the appeal brought by the GHA and did not take any steps himself. Thereafter, there was preparatory work which required to be undertaken before proceedings were issued. This of course ignores that Dr. Cassaglia could also have appealed himself. Indeed, had he filed a notice of appeal within a few days of the GHA discontinuing its appeal then there may well have been no real argument on delay even if technically he was out of time at that point. It is the decision to proceed by way of judicial review that caused the extensive delay. (As noted above, in Dr. Cassaglia's statement of facts and summary of grounds he asserts that he had no locus to appeal pursuant to the Appeal Rules. I have determined that this was wrong.)

41 The third stage of *Denton* (3) requires consideration of all the circumstances of the case giving particular weight to factors (a) and (b). In *Denton*, the court described factors (a) and (b) in the following way ([2014] 1 W.L.R. 3926, at para. 34):

> "Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated."

42 Mr. Salter highlighted that the proceedings before the tribunal continued to a remedies hearing in December 2019. That whilst Mr. Stagnetto was funded by his trade union, that hearing took place at significant cost on reliance that there was no appeal. I do not, however, consider that Mr. Stagnetto has suffered any prejudice over and above what he would have suffered had the appeal been filed on time. The likelihood is that the remedies hearing would have proceeded as planned in any event.

43 Mr. Cruz submitted that the GHA's duty is to safeguard the interests of all its employees and that therefore includes Mr. Stagnetto. It is unfair on him to prolong matters further. The GHA had put Dr. Cassaglia's case forward before the tribunal. Thorough examination of the process and the testing of evidence to maintain fairness was undertaken. As far as the GHA is concerned, the relevant matters were determined by the tribunal. They have now received advice from counsel that an appeal has no prospects of success—although as I have already pointed out other than briefly with regards to ground 3, they have not set out why they say this is so. In reply, Mr. Pennington-Benton expressed surprise as to the robust nature of the GHA's objection to the judicial review and/or appeal against the tribunal's findings bearing in mind both the more neutral position it took at first instance and the fact that they have been found liable under the Bullying at Work Act. I will simply observe that the GHA could stand back if it does not wish to challenge the tribunal's conclusion. Mr. Stagnetto has his own representation.

44 In considering the circumstances of the case, I note that r.4 of the Appeal Rules allows an appellant a period of 60 days from the filing of the notice of appeal to file a record of appeal. Thereafter, he has a further 10 days within which to file his memorandum of appeal. These are not short timeframes. Had Dr. Cassaglia chosen to appeal, he would have had a maximum period of 91 days to file his grounds. This is a period similar to the time limit for filing a claim for judicial review. Whilst of course the procedure is different, Mr. Pennington-Benton was not far off the mark when he said that had Dr. Cassaglia appealed we would not be in a very different position time-wise and that the only complaint that Mr. Stagnetto can really have is that the decision of the tribunal is being challenged. Leaving to one side the fact that Mr. Stagnetto did not receive notice that a

challenge to the tribunal's findings was being maintained after the GHA withdrew its own appeal, he is suffering no other prejudice.

45 More fundamentally, if I do not extend time the matter could in any event continue as a judicial review claim. In my judgment, it would be more appropriate to proceed by way of appeal under the Appeal Rules than by way of judicial review. The legislature has provided a route for an appeal and it should be followed if possible—even if in practice it will make little difference. It is therefore in the interests of justice that I allow such extensions of time pursuant to r.11 as are necessary to deem the pleadings in the judicial review claim to take the place of the pleadings in the appeal.

46 I will therefore reconstitute these proceedings into appellate proceedings brought pursuant to the Appeal Rules. I will hear the parties as to what directions should follow to allow the appeal to proceed to a final hearing.

Ruling accordingly.
