Appeal No. UKEAT/0183/16/JOJ
UKEAT/0226/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 22 December 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

OFFICE EQUIPMENT SYSTEMS LTD — APPELLANT

MISS J HUGHES — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KEITH WEBSTER (of Counsel) Instructed by: Wace Morgan Solicitors 21 St Mary's Street Shrewsbury SY1 1ED
For the Respondent	MR PAUL STRELITZ (of Counsel) Instructed by: MSB Solicitors 13th Floor Silkhouse Court Tithebarn Street Liverpool L2 2LZ

SUMMARY

PRACTICE AND PROCEDURE - Appearance/response

PRACTICE AND PROCEDURE - Case management

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*, Schedule 1, Rules 20 and 21 - Employment Tribunal refusing to allow the Respondent's application for an extension of time to lodge its response to the ET claim - whether the ET failed to have regard to a relevant factor - adequacy of reasons*

Subsequent refusal to permit the Respondent to participate at the remedy stage - whether an error of law - adequacy of reasons

The Respondent failed to lodge its response to the Claimant's claims of unfair dismissal, unpaid holiday pay, unpaid wages, sex discrimination and breach of contract in time. It subsequently applied, under Rule 20 **ET Rules 2013**, for an extension of time in which to lodge its response. Its substantive defence to the claims was essentially two-fold: (1) the Claimant was not an employee, she had only ever been a Director of the Respondent; alternatively, (2) if she had been an employee, the Claimant's employment had been terminated by reason of her conduct which was an answer to all her claims.

The ET concluded that the Respondent had been guilty of deliberate and intentional default in failing to lodge its response to the claim in time and its defence lacked merit. Whilst it would suffer greater prejudice than the Claimant if not permitted to lodge its response out of time, that was outweighed by other factors; its application for an extension of time was thus refused.

Subsequently - Judgment having been entered for the Claimant on liability - the Respondent sought to make representations on remedy. A different Employment Judge, having decided the issue of remedy could be determined on the papers, declined the Respondent's request.

The Respondent appealed both decisions.

Held: *Allowing the first appeal but dismissing the second.*

Having taken the view that the merit of the proposed defence was a relevant factor in its determination of the application for an extension of time (applying **Kwik Save Stores Ltd v Swain and Ors** [1997] ICR 49 EAT), the ET had considered the first way in which the Respondent was putting its case (the employment status argument) - finding this had no merit - but had failed to address the second, alternative, case (the repudiatory breach argument). On its face that disclosed an error as the ET had failed to consider a factor that it apparently saw to be relevant to the exercise of its discretion (the merit of the Respondent's case); alternatively, the ET had failed to provide any reasons for rejecting this second aspect of the Respondent's case. Although the appropriate course in these circumstances would have been to apply to the ET for a reconsideration of the decision (on the basis that it had failed to address a relevant point in its Reasons), or to ask the EAT to make a reference under the **Burns/Barke** procedure, the first appeal would be allowed and the matter remitted to the same ET to address the question of the merits of the Respondent's alternative defence and its potential relevance to the determination of its application for an extension of time, such reconsideration to be on the basis of the material already before the ET.

As for the second decision under challenge, this related to an exercise of the ET's broad case management discretion in determining the appropriate way forward in terms of deciding remedy. The Claimant having provided extensive further information, the Employment Judge took the view that remedy could be determined on the papers without need for any hearing. That being so, the possibility of the Respondent's participation (as allowed under Rule 21(3)) did not arise. The Respondent had not raised any questions as to the information provided by the Claimant at any stage such as to suggest that the decision to determine remedy on the papers was other than a permissible exercise of discretion. The ET was not thereby depriving the

Respondent of its right to a fair hearing; rather, the Respondent had failed to lodge a response to the ET claim in time and thus acted in breach of the **Rules** of the ET and thereby failed to avail itself of the right to participate in the proceedings. As for the reasons for declining the Respondent's request to make representations on remedy, the ET was entitled to give reasons proportionate to the decision it was then making. Subject to the point raised by the first appeal, detailed reasons had already been provided as to why the Respondent had not been granted an extension of time to lodge its response; the ET was not obliged to re-visit those reasons at the remedy stage. Otherwise, there was nothing further the ET needed to explain, given its case management decision that the issue of remedy should be determined on the papers.

HER HONOUR JUDGE EADY QC

Introduction

1. In this Judgment I refer to the parties as the Claimant and the Respondent, as below. I am today concerned with the Respondent's appeals from two decisions of the Cardiff Employment Tribunal. The first was that of Employment Judge Emery ("the Emery ET"), at a hearing in Wrexham on 12 February 2016, not to allow the Respondent's application for an extension of time to serve its response to the Claimant's ET claim (the reasoned Judgment in that regard being sent to the parties on 10 March 2016). The second was that of Employment Judge Davies, communicated to the parties on 14 April 2016, by which it was stated that the ET would determine remedy without need for a hearing and refusing the Respondent's request to participate in the remedy stage of the proceedings. Liability on the Claimant's claims of unfair dismissal, unpaid holiday pay, unpaid wages, sex discrimination and breach of contract had been upheld by an earlier Judgment, of Employment Judge Cadney, made on 11 March 2016 and sent to the parties on 15 March 2016.

The Relevant Background

2. There is obviously some history to the dispute between the parties, but I start with the pre-claim correspondence between the Claimant's solicitors and Mr Richardson, Company Secretary of the Respondent. In the course of that correspondence, in his letter of 6 July 2015 (variously referred to as 8 July and 9 July), Mr Richardson had referred to the Claimant as having been "deemed to have resigned". By letter of 20 July 2015, those acting for the Claimant stated that they were treating that as a dismissal. Receiving no response to their letter of 20 July, on 1 September 2015 the Claimant's solicitors wrote again to the Respondent, giving notice that the Claimant would be commencing ET proceedings.

3. On 14 September, solicitors acting for the Respondent wrote to the Claimant's representatives, stating they had now obtained instructions and setting out the Respondent's position in respect of the dispute with the Claimant. At the end of that letter it was stated:

> **"Turning briefly to your recent correspondence of 1 September 2015, you state that your client will be commencing Employment Tribunal proceedings and that she has contacted ACAS. Our client has received a letter from ACAS dated 9 September 2015 informing them of an early conciliatory period. We have instructions to approach ACAS with a view to facilitating negotiations between the parties. …"**

4. The Claimant's ET claim was in fact lodged on 3 November 2015. She had notified ACAS under the early conciliation ("EC") provisions on 22 August, and her EC certificate was issued on 6 October. In her ET claim she made the various complaints I have listed above, stating that her employment with the Respondent had ended on 6 July 2015.

5. On 5 November, Notice of that claim, enclosing a copy of the claim itself, was sent to the Respondent. The Notice explained that if the Respondent wished to defend the claim it would need to lodge its response with the ET by 3 December 2015, failing which a Judgment on the claim might be issued and the Respondent only entitled to participate in any hearing to the extent permitted by the Employment Judge hearing the case. The Notice also stated that if a representative was going to act for the Respondent then it should pass the documents to its representative but would itself remain responsible for ensuring that its representative dealt with all matters promptly. On the same day, the ET also sent the parties Notice of a telephone case management Preliminary Hearing listed for 8 January 2016.

6. The Respondent received Notice of the claim on 6 November 2015 but did not submit a response. Accordingly, on 8 December 2015, it was sent Notice that Judgment might now be issued and its participation limited to that permitted by the Employment Judge at any hearing in

A the case. That Notice was received by the Respondent on 11 December 2015. Also on 8 December, the ET wrote to the Claimant asking her to provide further particulars of her claim.

B 7. On 9 December 2015, the Respondent's solicitors wrote to those acting for the Claimant. Although the letter is marked "without prejudice save as to costs", privilege was waived by the parties, and the letter included in the bundle before the Emery ET. In it, those then acting for the Respondent explained as follows:

C

> **"As you will no doubt appreciate, our client was due to file its ET3 on 3 December 2015 but it has not done so. The reason for the ET3 not being filed is that Mr Terry Jackson has been in and out of hospital over the past month or so with a serious lung infection. As a number of your client's allegations centre on Mr Jackson it is clearly imperative for our client to obtain Mr Jackson's comments on the allegations in order to advance its case to the Tribunal.**
>
> **We should inform you that our client has instructed us to put in an application to extend the deadline for filing its response (to which the draft response will be appended as required) citing, amongst other things, Mr Jackson's severe illness as a reason for the delay. We have advised our client that it has good prospects of success on this application given the clear explanation for the delay."**

D

8. By letter of 22 December 2015, those acting for the Respondent then wrote to the ET, enclosing an application for an extension of time for lodging its response pursuant to Rule 20 of the **ET Rules 2013**. It enclosed witness statements from Mr Jackson - a salesman employed by the Respondent - and Mr Hall, the solicitor with day-to-day conduct of this matter for the Respondent at that time; it also included a completed form ET3 and draft grounds of response to the Claimant's claim. The ET acknowledged receipt of those documents and sent them on to the Claimant by letter of 4 January 2016, also vacating the hearing listed for 8 January. On 11 January 2016 the ET listed a Preliminary Hearing to determine the Respondent's application. That was the hearing on 12 February 2016 with which the first appeal is concerned.

E

F

G

9. By its draft response to the claim the Respondent contended that the Claimant was not in fact an employee; she had only ever been a Director. In the alternative, it was contended that

H

A the Claimant had been dismissed by letter of 7 July 2015 (in fact, that must be 6 July), after she had not attended for work from September 2014 onwards. The Claimant's dismissal, it was contended, was thus by reason of her conduct and was neither unfair nor in breach of contract, nor because of her sex, and that also provided an answer to her other claims. The application for an extension of time in which to enter a response explained how it would be necessary to obtain instructions from Mr Jackson, who had been seriously ill between 6 November and 7 December 2015 and only able to contact the Respondent's solicitors on 9 December and to give proper instructions on 21 December.

The Emery ET Decision

10. Thus it was that this matter came before Employment Judge Emery on 12 February 2016. Having regard to the explanation provided by the Respondent, the documents on which it relied and, more generally, to the correspondence between the parties, the ET concluded that:

> **"35. … the chronology showed that solicitors were instructed early on in the process, prior to issue of the claim, and the parties engaged in open and without prejudice correspondence. The letter of 14 September states clearly that instructions were being obtained from Messrs Jones and Richardson, the Director and Company Secretary, at a time when Mr Jackson was at work. The open correspondence shows that the respondent was capable of giving instructions prior to issue of proceedings, and did do so. The claim was of no surprise, it was discussed with solicitors when it arrived, but no holding defence and/or Rule 20 application was made. I did not accept that Mr Jackson's ill-health was sufficient reason not to make a Rule 20 Application on or before 3 December 2015; Mr Jackson's detailed instructions were not needed to make an application, and no evidence was adduced, despite Mr Richardson's attendance at tribunal, as to why, apart from Mr Jackson's ill-health, such an application was not made. I concluded on the evidence in front of me that there was a deliberate and intentional decision by the respondent not to comply with this deadline, the reason being that the claim was an issue for Mr Jackson to address.**
>
> **36. On 9 December the respondent states [sic] it will make a rule 20 application, but failed to do so for a further 13 days, notwithstanding that Mr Jackson was able to discuss the case with solicitors. I did not accept that Mr Jackson's workload was a genuine reason for this delay. He was clearly capable of discussing the case with solicitors; he was capable of giving instructions and clearly did so, as the 9 December letter states that the respondent has "*instructed*" solicitors to make the application. I did not accept that it was pressure of work which caused further delay, and I concluded that the respondent simply decided that this time-limit was not a priority for it."**

11. Noting that the merits of the potential defence could be relevant to the grant of an extension of time - "*if the defence has some merit, justice will often favour the granting of the extension of time*" (paragraph 37) - the Employment Judge further observed as follows:

> **"40. The nub of the respondent's defence as argued in this hearing is that the claimant was not an employee and in fact had never attended work. But, as shown by the correspondence set out in paragraph 9 above, the respondent's position shifted over time. In June and July 2015 the correspondence states that she had not attended work since September 2014, and she is "deemed to have resigned". Other documents accept the claimant received salary, it was paid under PAYE.**
>
> **41. … I accepted the claimant's position that if the respondent had believed the claimant had done no work for it and had not been an employee this issue would have been raised in correspondence prior to Mr Jackson's sick leave in November 2015.**
>
> **…**
>
> **43. I concluded on the basis of the documents in front of me that there was no real merit in the respondent's defence as raised and argued at this hearing as its defence was contradicted by its documents. All the documents suggested that the claimant had attended work until September 2014, was paid through PAYE, and the respondent's defence on this point was contrary to the evidence."**

12. Finally, the Employment Judge turned to the question of prejudice. Accepting that the prejudice to the Respondent was greater than that which might be suffered by the Claimant in terms of added delay, the Employment Judge concluded that discretion should not be exercised to allow the application under Rule 20, explaining:

> **"47. … having balanced the factors set out in *Kwik Save* [*Stores Ltd v Swain and Ors* [1997] ICR 49 EAT] … [I] concluded that the respondent's deliberate and intentional default was a significant factor, as was the lack of merit to the defence, that these outweighed the obvious prejudice to the respondent in not being able to defend the claim. …"**

The ET Remedy Hearing Decision

13. The Respondent's application for an extension of time to enter its response having thus been rejected, by a Judgment made on 11 March 2016 (sent out on 15 March), Employment Judge Cadney upheld the Claimant's claim, limited to the question on liability, directing that the matter would now proceed to the remedy stage.

14. It appears that this matter was then case managed by Employment Judge Davies, who, by letter of 18 March 2016, asked for further information to be provided by the Claimant so the ET might be able to determine whether or not a remedy hearing was required. On 31 March 2016, those acting for the Respondent wrote to the ET, stating that it intended to appeal the Emery ET Decision but further asking as follows:

> **"If despite this appeal the Tribunal still considers it appropriate to issue a judgment on remedy without the need for the hearing, the Respondent would like the Employment Judge to exercise his/her discretion to allow the Respondent to fully take part in the consideration of remedy and to take part in any hearing on remedy."**

15. Also, on 1 April 2016, the Claimant's solicitors wrote to the ET, enclosing an updated schedule of loss and two witness statements, together with exhibits.

16. By email of 14 April 2016 the ET wrote to the parties in the following terms:

> **"An Employment Judge has considered the information received from the Claimant and it appears there is sufficient material upon which to make a determination on remedy without the need for a hearing. The Respondent's request to participate at remedy stage is declined. The matter will be considered on paper and judgment issued in due course."**

17. In response, the Respondent emailed the ET on 18 April, asking if it might at least make written representations, but it then received a response from Employment Judge Beard, to whom the file had apparently then been passed, who replied as follows:

> **"EJ Davies declined the Respondent's request to participate at the remedy stage. That is a decision on an interlocutory matter, by an Employment Judge. Given the decision in *SERCO v Wells* UKEAT/0330/15 such a decision can only be revisited in specific circumstances, none of which appear to apply here. In those circumstances, there is no jurisdiction to alter the decision that the Respondent should not be permitted to participate."**

18. On 20 April 2016, Employment Judge Beard then sat alone and made preliminary findings on remedy, which were sent out to the Claimant and copied to those acting for the Respondent in draft form under cover of a letter of 27 April 2016.

A **The Relevant Rules and Legal Principles**

19. By Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules") Rule 20(1) provides as follows:

> **"20.** ***Applications for extension of time for presenting response***
>
> **(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation as to why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application."**

B

C

20. Then, by Rule 21 it is provided:

> **"21.** ***Effect of non-presentation or rejection of response, or case not contested***
>
> **(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.**
>
> **(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.**
>
> **(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge."**

D

E

21. The President of Employment Tribunals for England and Wales has issued guidance as to the approach that Tribunals should adopt under Rule 21, in particular as follows:

F

> **"Action by the Employment Judge:**
>
> **1. The Employment Judge will review all the material that is then available. This will normally consist of the claim form and any response form that has been validly submitted and any other supplementary documents.**
>
> **2. They will consider whether the matter requires more information. If so, they will cause a letter to be written to the party/ies specifying the further information that is required.**
>
> **3. If no such information is required, or once such information has been received then the Employment Judge will consider whether it is appropriate to:-**
>
> > **a. issue a Judgment in full for all claims and remedy; or**
> >
> > **b. issue a Judgment in full for all liability issues and hold a hearing for remedy or request further details of remedy matters; or**
> >
> > **c. issue a Judgment in part for one or more of the items claimed, together with any remedy issues arising; or**

G

H

d. issue a Judgment in part for one or more of the items claimed but not remedy issues and hold a hearing for remedy or request further details of remedy matters; or

e. consider any of the combinations of Judgment for liability matters or remedy matters which they consider appropriate on the facts available to them at the time of consideration; and

f. arrange for a hearing to be held for any part of the claim that has not had a judgment issued or for any remedy matters remaining outstanding as a result of such judgment having been issued and make appropriate case management orders.

4. If such a hearing is to be held then the Respondent will be entitled to receive notice

a. of any hearings and decisions but entitlement to participate in the hearing will be limited as provided by Rule 21(3); and

b. the hearing that will be held ordinarily will be a hearing as provided for under Rule 57.

5. If a judgment is issued it will be copied to all parties as soon as possible thereafter and notice sent of any hearing if an Employment Judge has considered it appropriate for such a hearing to take place.

6. Judgment will be issued as provided for under paragraph 3 above where an Employment Judge is satisfied that they have sufficient information properly so do to. For example, an Employment Judge will examine whether the claim is clearly stated and whether there are any matters which might affect whether the Tribunal has jurisdiction to hear the claim. The Employment Judge will consider all detail contained in the written matters before them; consider any obligation or burden on either of the parties in relation to proving such matters; the calculations that have been provided (if any) by the claimant; any case management orders that have previously been made; and any response. If the Employment Judge has any reasonable doubt as to the whole or any part of such matters contained in the claim then the claim will be listed for hearing. The provisions of Rules 57-59 will apply.

7. Any party who wish to ask for reconsideration of such a decision must make such application in accordance with the provision of Rules 70-72.

8. Any party who considers lodging an appeal against such a judgment must comply with the Rules of the Employment Appeal Tribunal."

22. It was common ground before the ET that the principles to be applied when considering an application for an extension of time for presenting a response are those set out by Mummery J (as he then was) in **Kwik Save**. Those principles require that all relevant documents and other factual material must be put before the ET to explain both the non-compliance and the basis upon which it is sought to defend the case on its merits, and an Employment Judge, exercising their discretion, must take account of all relevant factors, including the explanation, or lack of explanation, for the delay, the merits of the defence and must reach a conclusion that is objectively justified on the grounds of reason and justice, taking into account the possible prejudice to each party. Specifically, Mummery J provided the following guidance:

"*The discretionary factors*

The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default. In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.

In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. The process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice. An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer if the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour in granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgment that often renders the exercise of a discretion more difficult than the process of finding facts in dispute and applying to them a rule of law not tempered by discretion.

It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham MR in *Costellow v Somerset County Council* [1993] 1 WLR 256, 263:

> **"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate."**

Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a notice of appearance, the industrial tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. This does not mean that a party has *a right* to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case."

23. Before me, for the Claimant it has been urged that following the stricter approach to breach of Court rules and directions now taken in the Civil Courts (see, for example, **Mitchell v News Group Newspapers Ltd** [2013] EWCA Civ 1537) it would be legitimate for the ET and the EAT to determine an application for an extension of time solely on the basis of the Respondent's default. Allowing that the **Civil Procedure Rules** do not directly apply in ET proceedings, there is certainly authority for stating that ETs are entitled to take a stricter line than previously (see **Harris v Academies Enterprise Trust and Ors** [2015] ICR 617 EAT per

A Langstaff J, in particular at paragraphs 39 and 40; and, in relation to Tribunals more generally, see **BPP Holdings v Commissioners for Her Majesty's Revenue & Customs** [2016] EWCA Civ 121, per Ryder LJ (Senior President of Tribunals), in particular at paragraphs 37 and 38).

B

24. Where a Respondent seeks to appeal to the EAT in respect of an extension of time, paragraph 19 of the **EAT Practice Direction 2013** applies. The Notice of Appeal must then include particulars showing that there is a good excuse for the Respondent's failure to present its response and that there is a reasonably arguable defence to the claim. In order to satisfy the EAT on these matters, the Respondent needs to lodge, together with the Notice of Appeal, a witness statement explaining in detail the circumstances of the failure, the reason for it and the facts and matters relied on for contesting the claim on the merits. There is also to be exhibited to the witness statement all relevant documents and a completed draft response.

C

D

The Grounds of Appeal

E

25. By its first appeal against the Emery ET Judgment the Respondent advances two grounds: (1) that the ET failed to consider the merits of the Respondent's alternative defence as it was required to do by the guidance provided in **Kwik Save** and thereby committed an error of law; or, alternatively, (2) by failing to address the alternative defence in its Reasons the ET failed to provide adequate explanation in accordance with the requirements of the **ET Rules**. By its second appeal the Respondent's challenge is put as follows: (1) that it was denied a fair trial by not being able to participate in the determination of remedy in this case (either the ET erred in refusing the Respondent's request to participate, or, more generally, in determining remedy without setting the matter down for a hearing); and (2) the ET again failed to provide adequate reasons for its decision.

F

G

H

Submissions

The Respondent's Case

26. On behalf of the Respondent, Mr Webster accepts that those previously acting for the Respondent had, as the Emery ET found, sufficient instructions to lodge an application for an extension of time and a holding response within the relevant time period, but he contends that it would be wrong to visit the sins of the solicitors on the Respondent itself (albeit accepting that before the ET the Respondent was not suggesting that there was any difference between its position and that of its solicitors). He also contended that the ET was wrong to conclude that there had not been pressure of work contributing to the delay; given that Mr Jackson had been off sick for November, inevitably there was additional pressure when he returned.

27. As for the question of merit, employment status was a complex, nuanced matter, and the ET's determination of this question without proper assessment of the evidence was inappropriate. More particularly, the ET had failed to address the Respondent's alternative defence, and it could not be said that the strength or weakness of that alternative defence was so obvious that the ET could be assumed to have formed the view it had no merit. Whilst allowing it might be said that the appropriate course would have been to use the **Burns v Royal Mail Group plc** [2004] ICR 1103 EAT / **Barke v SEETEC Business Technology Centre Ltd** [2005] EWCA Civ 578 procedure - given this was an omission of reasons point - there was no rule that an Appellant had to do so (although indicated to be the appropriate route by HHJ Serota QC in **Wolfe v North Middlesex University Hospital NHS Trust** UKEAT/0065/14).

28. Turning to the second appeal, pursuant to Rule 21(3) of the **ET Rules**, the decision whether the Respondent could participate at the remedy stage should have been made by the Employment Judge with responsibility for the relevant hearing. That would have been

Employment Judge Beard, who determined remedy, not Employment Judge Davies. Moreover, the amount at issue at the remedy stage was significant. The Claimant was claiming close to £70,000. The issues were complex, as evidenced by the fact the ET had had to ask the Claimant for more information. The Respondent had a right to a fair hearing and should not be locked out from contesting financial claims made against it without good reason. Moreover, the ET was required to provide adequate reasons for its decision (see **Meek v City of Birmingham District Council** [1987] IRLR 250 CA). Employment Judge Davies's decision did not do so.

The Claimant's Case

29. The Claimant first submitted that it was permissible for the EAT to itself take a view as to whether the Respondent's deliberate and intentional default - as the ET had found - was sufficient to mean no extension of time should be granted; that must follow from the stricter regime now applicable in the Civil Courts (see **Mitchell** and **Harris** above) and also from the requirements of paragraph 19 of the **EAT Practice Direction**. Even if the principles laid down by Mummery J in **Kwik Save** were those that should be applied, then the first factor - consideration as to why the Respondent had not complied with time limits where intentional default was framed as the most serious - could still be determinative. In the present case, the Respondent did not and could not challenge the findings of the Emery ET adverse to it in terms of the factual conclusions and critical comments as to why the time limits were not complied with. Moreover, as the Emery ET had recognised, Rule 20 of the **ET Rules** did not require the submission of a draft of the response if the application for an extension of time was made before the expiration of the time limit. The ET had found as a fact that the Respondent was aware of the Claimant's claim from 7 November and its solicitors had found out about the ET claim at or around the same time; there was no need for Mr Jackson's instructions or even for a holding defence: a mere application on or before 3 December 2015 would have been sufficient.

30. On prejudice (the second factor identified in **Kwik Save**), whilst the ET found this weighed more heavily for the Respondent, it was also true that the prejudice identified would be the same for any Respondent, that of being unable to participate in the proceedings.

31. As for merits, the Claimant observes that the ET would have been entitled to refuse the Respondent's application simply on the basis of the failure to comply with the Rule and the finding of lack of explanation (see **Mitchell** and **Harris** again). In any event, all that was required was that some consideration was given to this factor, which - given that the ET had specifically referred to the Respondent's submission on the alternative defence at paragraph 22 of its Reasons - was sufficient: although the ET failed to expressly refer to consideration of the alternative defence in the Reasons, it was apparent it had referred to (and in all likelihood considered) the merits of that alternative before reaching its conclusions. The Respondent had not chosen to seek a reconsideration of the ET's decision but was seeking to capitalise upon the absence of any express reference so as to elevate this into a ground of appeal. A failure to make reference to this specific matter should not be taken to be an error of law; care should be taken to not infer that an experienced ET had overlooked a point simply because it did not expressly mention it (**Retarded Children's Aid Society Ltd v Day** [1978] IRLR 128 CA). Yet, further, even if the ET had allowed that merit was a relevant factor but had wrongly failed to address the alternative case on the Respondent's response, the EAT was not bound to take the same approach. It could itself conclude that the Respondent's default outweighed any issue of merit in any event (see above). Alternatively, it could take the view that it had all the relevant material to itself conclude that the alternative defence simply had no merit.

32. As for the second appeal, Employment Judge Davies had been reaching a case management decision under Rule 21(2) and had been entitled to take the view that the issue of

remedy could be determined without a hearing. As there was no hearing, the potential exercise of discretion under Rule 21(3) did not arise. No substantive points could be made (still less had been made) against Employment Judge Beard's subsequent draft decision on remedy: the pecuniary losses had been calculated on the basis of the salary paid to the Claimant by the Respondent during her employment and could not be challenged, and the sums in issue in the sex discrimination case were also based on the Claimant's witness statement and were properly a matter for assessment by the ET; there was nothing further that was needed. As for adequacy of reasons, Employment Judge Davies had provided sufficient explanation.

Discussion and Conclusions

33. It is important to be clear as to what is in issue before me on these appeals, not least as that has not always been apparent from the parties' oral submissions before me. The first appeal is solely concerned with what is said to be the failure by the Emery ET to address the Respondent's alternative defence: that is, the Claimant's conduct or repudiatory breach point. That was referenced in the draft grounds of resistance and then again at paragraph 22 of the ET's reasoning, where it summarises the Respondent's counsel's submissions before it. It is, however, not mentioned in the ET's conclusions section. This is put either as a substantive failure to consider fully that which the ET had allowed was a relevant factor - that is, the Respondent's proposed defence to the claims - or as a failure to provide adequate reasons. There was no appeal against the ET's other findings, for example as to the issue of deliberate and intentional default or as to the lack of merit of the Respondent's contention as to the Claimant's employment status point.

34. To the extent that Mr Webster sought to address these as matters to be determined at this hearing, he was wrong to do so. They are not matters raised by the appeal. Similarly, however,

it is apparent that the Emery ET - in its exercise of its broad judicial discretion - did consider the merit of the Respondent's proposed defence to be a relevant factor. I can see that it might have been arguable that it did not need to do so; perhaps its findings on deliberate and intentional default might have been sufficient for some Tribunals to consider that was enough. This ET, however, did not take that view; it considered all three factors identified in **Kwik Save** to be relevant, albeit that it considered the Respondent's deliberate and intentional default and the lack of merit of its defence outweighed the issue of prejudice. The Claimant has suggested that I can take my own view as to whether that is appropriate or as to whether the Respondent's application could simply have been dismissed, given the ET's findings on its default. There is, however, no cross-appeal before me, nor has the Claimant in her Respondent's Answer relied on alternative grounds on which the EAT might uphold the ET's conclusion.

35. Given where I am thus placed by the grounds of appeal and the Claimant's simple reliance on the Emery ET's reasoning, I do not consider it is open to me to start again. I need to consider the decision on its own terms and ask whether the Respondent's specific point of challenge is made good. Doing so, I am satisfied that it is. The ET considered the question of the merit of the proposed defence to be a relevant factor and was plainly aware that the Respondent was putting its case on two alternative bases. It considered the first and found it had no merit. That reasoning, however, does not enable me to read across and conclude that it also so found on the second. Equally, I do not consider that I can determine the point myself: that is not a course that the Respondent agrees, and I can see that it is possible that the ET might find merit in the alternative case that it did not find on the employment status question. That being so, I am bound to remit the point.

A

36. Given that I am remitting a point of absence of reasoning to the ET, I did question whether the appropriate course might not simply be to adjourn this hearing to enable the ET to provide the omitted reasoning under the **Burns/Barke** procedure; certainly, I can see a strong argument for saying this is the course that should have been followed earlier. In such circumstances, the guidance from existing case-law makes clear that the appropriate course for a party is to apply in the first instance to the ET for reconsideration to make good that which it has omitted to address. That avoids the additional costs and delay that will otherwise occur if the issue is raised only on appeal. Even if a reconsideration has not been sought, then the party raising the point should ask the EAT for a direction under **Burns/Barke**. It is hard to see how allowing the point to be pursued to a Full Hearing (when success for the Appellant will only mean remission back to the ET to make good a defect in the Reasons) is in accordance with the overriding objective. All that said, given that this matter had reached the stage of a Full Hearing, there was little to be gained by simply adjourning the matter for questions to be raised with the ET, and there was a risk of injustice being created if that course was adopted at this late stage. I have, therefore, proceeded to determine the question raised by the first appeal, and duly allow it, although I am unable to see that any course is appropriate other than to remit the matter to the same Employment Judge, to the extent that is still practicable, to address the question of the merit of the Respondent's alternative proposed defence and whether that is seen as impacting upon the ET's conclusion in any way.

B

C

D

E

F

G

37. I turn then to the second appeal. Although I have allowed the first appeal, given the limitations on the scope of that appeal it seems sensible that I should proceed to consider the issues raised by the second in any event (albeit if the Emery ET reaches a different conclusion, having addressed the alternative defence point, then the subsequent decisions relevant to remedy are likely to fall away). In addressing the second appeal, I bear in mind that although

H

A the Respondent has said that the matters raised at the remedy stage were so complex that it was effectively perverse not to set the matter down for a hearing, no points have been raised before me as to the draft findings made by Employment Judge Beard; it has not been suggested that the calculations are wrong, that the ET proceeded on the basis of inaccurate information or that it proposed an injury to feelings award that was excessive or disproportionate.

38. Rather than taking any issue with the draft findings on remedy, the Respondent objects to the fact that it was not heard. That, however, was not because the ET denied it a fair hearing: if the Emery ET reached a permissible conclusion - which it did, subject to the one point raised on the first appeal (see above) - then it is not the ET that has denied the Respondent a fair hearing; the Respondent has itself failed to comply with the **Rules** of the ET such as to avail itself of that right.

39. What then follows in terms of the decisions made by Employment Judge Davies are case management decisions that the ET was required to make on the basis that the Respondent had lodged no response. Employment Judge Davies considered it was possible that the question of remedy might be resolved on the papers if further information was provided by the Claimant; can I say that was an impermissible exercise of the ET's case management discretion? I cannot see that I can. Relevant factors were taken into account; regard was not had to the irrelevant; the ET was entitled to exercise its case management discretion in accordance with the overriding objective, and, in so doing, it reached a permissible conclusion.

40. As for denying the Respondent the opportunity to make representations on remedy, given that the ET determined (on the basis of the information then provided by the Claimant) that a hearing was not required, there was no need for a separate determination to be made

under Rule 21(3); that question simply did not arise. I can, further, see no basis for considering that Employment Judge Davies erred in taking the view that the Respondent was not to be permitted the opportunity to put in representations otherwise.

41. I further considered whether it might be said that Employment Judge Davies needed to give more reasons for the decision reached. I cannot see that it can. An ET is entitled to give reasons proportionate to the particular decision it is communicating. Here, a detailed Judgment and Reasons had been provided on the crucial question of whether the Respondent should be permitted to lodge a response out of time, with all that that would imply. Subject to the point raised by the first appeal, the ET had fully addressed the Respondent's arguments in that regard. Employment Judge Davies was not obliged to revisit those points. As for the specific issues raised at the remedy stage, very full particulars and evidence had been provided by the Claimant in response to the ET's request, and the Respondent had not raised any substantive queries that Employment Judge Davies could have addressed at that stage. Having taken the view that the information provided enabled the ET to determine remedy without a hearing, I cannot see that Employment Judge Davies was required to do more. The reason why the Respondent was not permitted to make representations was obvious: it had not entered a response to the claim in time and had been refused an extension of time. It had no right to make representations in the proceedings thereafter save to apply to an Employment Judge at any hearing to be heard. For those reasons, I therefore dismiss the second appeal.