

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 27 June 2018  
Judgment handed down on 10 October 2018

**Before**

**THE HONOURABLE MRS JUSTICE SLADE DBE**  
**(SITTING ALONE)**

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THE GOVERNING BODY OF TYWYN PRIMARY SCHOOL

APPELLANT

MR M APLIN

RESPONDENT

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Transcript of Proceedings

JUDGMENT

**APPEAL FROM REGISTRAR'S ORDER**

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## APPEARANCES

For the Appellant

MR CHRISTOPHER HOWELLS  
(of Counsel)  
Instructed by:  
Neath Port Talbot County Borough Council  
Civic Centre Civic Square  
Port Talbot  
Neath Port Talbot  
SA13 1PJ

For the Respondent

MR ANDREW SUGARMAN  
(of Counsel)  
Direct Public Access

## **SUMMARY**

### **PRACTICE AND PROCEDURE - Appearance/response**

In circumstances in which an Appellant is to be understood as consenting to an extension of time for lodging a response to the appeal and the Registrar of the EAT making an Order by consent, the Order is to be construed as granting an extension of time only for the response to the appeal. The extension was rightly held by the Registrar not to apply to a cross-appeal.

The Registrar erred in dismissing a subsequent application for extension of time to lodge a cross-appeal by applying the strict approach to time for appealing to cross-appeals. There are material differences in the **Rules** and **Practice Directions** applicable to appeals and cross-appeals. Whilst they may be juridically comparable they differ in practice. The reactive nature of a cross-appeal explained by Langstaff P in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** UKEAT/0397/14 and policy considerations illustrate why the strict approach to extensions of time for appeals does not apply to cross-appeals. **Slingsby v Griffith Smith Solicitors** UKEAT/0619/07 not followed. **United Arab Emirates v Abdelghafar** [1995] IRLR 243 considered. Decision of Registrar not to extend time for cross-appeal set aside. Using powers under **Employment Tribunals Act 1996** section 35 application for extension of time in which to deliver a cross-appeal made on 19 January 2018 allowed.

**A** THE HONOURABLE MRS JUSTICE SLADE DBE

**B** 1. Mr Aplin, the Respondent to an appeal by his former employers, The Governing Body of Tywyn Primary School (“the school”), appeals from the refusal of Miss Daly, the Registrar of the Employment Appeal Tribunal (“the Registrar”), by Order seal date 15 February 2018 to extend time for service of his cross-appeal.

**C** 2. After a period of acting up in that role, Mr Aplin was appointed Head Teacher at Tywyn Primary School. He was suspended by the school on 1 September 2015 after they were notified that Mr Aplin had consensual sexual intercourse with two 17 year old boys after meeting them through an internet dating website. The website required joining individuals to certify that they are at least 18 years of age. Mr Aplin’s case was that he believed they were. The boys were not pupils of the school. Following disciplinary proceedings taken against him, Mr Aplin resigned on 27 August 2016.

**D** 3. Mr Aplin brought claims of unfair dismissal and sexual orientation discrimination against the school. By a Judgment with Reasons sent to the parties on 28 September 2017, the Employment Tribunal, Employment Judge Beard sitting with members (Mr Charles and Mrs Humphries), held that the claims of unfair dismissal and sexual orientation discrimination were well founded.

**E** 4. By Notice of Appeal of 25 October 2017, the school appealed from the findings of unfair dismissal and sexual orientation discrimination. By a Respondent’s Answer dated 2 January 2018, Mr Aplin resists the appeal and seeks to cross-appeal. By paragraph 4 of the Answer received by the Employment Appeal Tribunal (“EAT”) on 3 January 2018 it is stated:

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**“4. The Respondent cross-appeals from:**

**1. The Tribunal’s decision at §40.6.8 that there were non-discriminatory explanations for the approach of the [sic] Mr Hodges, the LEA officers and the Appellant’s Governors, as described in paragraphs §40.6.5 - §40.6.7.”**

5. By email of 19 February 2018, Mr Aplin appeals the decision of the Registrar of 15 February 2018 to refuse his application of 19 January 2018 to extend time in which to file a cross-appeal. The Registrar held that the time to file a cross-appeal had expired on 21 December 2017.

6. In outline the events leading up to the Order of 15 February 2018 are as follows. By Order of 7 December 2017, HHJ Tucker ordered that the appeal by the school be set down for a Full Hearing. Paragraph 3 of the Order of 7 December 2017 provided:

**“Within 14 days of the seal date of this Order, the Respondent must lodge with the Employment Appeal Tribunal and serve on the Appellant an Answer, and if such Answer include a cross-appeal should forthwith apply to the Employment Appeal Tribunal on paper on notice to the Appellant for directions as to the hearing or disposal of such cross-appeal.”**

7. By email of 13 December 2017 Mr Aplin asked for “*an extension to the time given to prepare documentation for an appeal hearing.*” He asked for an extra two weeks over the Christmas period. The reason for the request was that he had instructed counsel and:

**“Counsel informs me due to the complexity of the case and his ongoing case load up to the 21<sup>st</sup> [December], that devoting the required time is difficult at this stage and I would like to ensure that for natural justice that this time would be afforded.”**

By email later that day the EAT wrote to the school enclosing Mr Aplin’s email applying for an extension of time in which to lodge an Answer to the appeal. The school were asked for their submissions in response including their “*agreement or otherwise*” to the application. The school replied on 14 December 2017:

**“... the Appellant has no objection to the extension of time sought to file an answer to the appeal until 4<sup>th</sup> January.”**

A 8. An Order of 15 December 2017 by the Registrar provided:

“UPON the application of the Respondent by e-mail of the 13<sup>th</sup> day of December 2017 for an extension of time in which to file an Answer to the Notice of Appeal

AND BY CONSENT

IT IS ORDERED that the aforesaid application be granted and that time in which to file an Answer be extended to 4.00pm on the 4<sup>th</sup> day of January 2018.”

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9. An Answer containing a cross-appeal was received by the EAT on 3 January 2018. By letter dated 16 January 2018 Mr Aplin was informed by the EAT that the Registrar directed that the Order of 15 December 2017 was clear that time to file an Answer was extended. However, the Answer contained a cross-appeal and that Mr Aplin would have to make an application to extend time if he wished to pursue it.

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10. By email of 19 January 2018, Mr Aplin applied for an extension of time to present his cross-appeal. He stated that the form of Answer, Form 3, contains a section for a cross-appeal. He had understood that when time was extended to lodge the Answer this included the cross-appeal. He had asked for an extra two weeks to prepare documentation for an appeal hearing. He said there was no prejudice to the school in extending time to cross-appeal whereas he would be prejudiced by being denied the extension. He said that the cross-appeal has real merit.

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11. The school replied on 24 January 2018 to the application for an extension of time to cross-appeal. The submissions were drafted by Mr Howells, counsel who appeared at the hearing of the appeal before me. It was submitted that the distinction between an Answer and a cross-appeal is well defined. Reliance was also placed on the judgment of the EAT in **Slingsby v Griffith Smith Solicitors** [2009] All ER (D) 150 in which it was said to have been confirmed that the strict rules for lodging appeals in time apply also to cross-appeals. Further the **Employment Appeal Tribunal Practice Direction** (“EAT PD”) paragraph 12.2 makes separate reference to

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A the Respondent's Answer and a cross-appeal. It was said that in this case time had been extended  
B by the Order of 15 December 2017 for the lodging of the Answer but not for the cross-appeal.  
C Further, it was said that the application for an extension of time for lodging the cross-appeal  
D should be determined in accordance with the strict rules for appeals set out in **United Arab  
Emirates v Abdelghafar** [1995] IRLR 243 and **Jurkowska v HLMAD Ltd** [2008] IRLR 430.  
E It was said that the explanations offered by Mr Aplin, that he misunderstood the Order extending  
F time, that he was a litigant in person and that he would be prejudiced by being denied an extension  
G of time within which to lodge his cross-appeal, were not good reasons for granting an extension.

12. By Order seal date 15 February 2018, the Registrar refused Mr Aplin's application of 19  
D January 2018 for an extension of time in which to file a cross-appeal.

**The reasons for refusing the application for an extension of time for lodging a cross-appeal**

E 13. The Registrar of the EAT, Miss Daly, referred to the importance of adhering to time limits  
F and that they will be relaxed only in rare and exceptional circumstances. The Registrar referred  
G to paragraph 5.7 of the **EAT PD**. She also relied upon the judgment of the EAT in **Slingsby** in  
H which HHJ Burke QC held that the strict principles which apply to the grant of an extension of  
I time for the institution of an appeal do not apply to the grant of an extension of time for the  
J delivery of a response to an appeal. However, he took a different approach to extensions of time  
K for lodging a cross-appeal saying:

G "31. ... the restriction of time set out in the Practice Direction cannot be taken as an indication  
H that a cross-appeal is to be treated differently from an appeal."

H 14. The Registrar did not accept Mr Aplin's stated misunderstanding that the Order extending  
I time given for lodging the Answer applied to the cross-appeal or that time was needed to "*prepare  
J documentation for an appeal hearing*" were good excuses for delay. Miss Daly noted that at no  
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**A** time before the current application did Mr Aplin ask for an extension of time to lodge a cross-appeal. The school did not object to the application for an extension of time in which to lodge an Answer. The extension of time was granted for the Answer not a cross-appeal.

**B** 15. The Registrar considered that this was not a rare and exceptional case referred to in **Jurkowska** in which the strict laws on time limits could be relaxed. The application was dismissed.

**C**

### **Grounds of Appeal**

**D** 16. Mr Aplin contends that the Registrar erred in deciding that his cross-appeal was lodged out of time. If it was served out of time it is contended that the Registrar erred in holding that time should not be extended for lodging it.

### **The Relevant Rules and Practice Directions**

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#### **Employment Appeal Tribunal Rules 1993 (“EAT Rules”)**

##### Rule 3

“(3) The period within which an appeal to the Appeal Tribunal may be instituted is -

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(a) in the case of an appeal from a judgment of the employment tribunal -

...

(iii) ... 42 days from the date on which the written record of the judgment was sent to the parties.”

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##### Rule 6

“(1) The Registrar shall, as soon as practicable, notify every respondent of the date appointed by the Appeal Tribunal by which any answer under this rule must be delivered.

(2) A respondent who wishes to resist an appeal shall ... within the time appointed under paragraph (1) of this rule, deliver to the Appeal Tribunal an answer in writing in, or substantially in, accordance with Form 3 in the Schedule to these Rules, ...

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(3) A respondent who wishes to cross-appeal may ... do so by including in his answer a statement of the grounds of his cross-appeal, and in that event an appellant who wishes to resist the cross-



**A** appeal shall, within a time to be appointed by the Appeal Tribunal, deliver to the Tribunal a reply in writing setting out the grounds on which he relies.”

Rule 37

**B** “(1) The time prescribed by these Rules or by order of the Appeal Tribunal for doing any act may be extended (whether it has already expired or not) or abridged, and the date appointed for any purpose may be altered, by order of the Tribunal.”

Form 3 - Respondent’s Answer

**C** “4. The respondent cross-appeals from  
*(here give particulars of the decision appealed from)*

5. The respondent’s grounds of appeal are:  
*(here state the grounds of appeal)”*

**D** **Employment Appeal Tribunal Practice Direction 2013 (“EAT PD”)**

“3.1. The Notice of Appeal must be, or be substantially, in accordance with Form 1 ... of the Schedule to the [EAT] Rules. ...

...

**E** 5. Time for Instituting Appeals

...

5.3. If the appeal is against a Judgment [of the Employment Tribunal], the appeal must be instituted within 42 days ... from the date when written reasons for the Judgment were sent to the parties. ...

...

**F** 5.5. An application for an extension of time for appealing cannot be considered until a Notice of Appeal in accordance with para. 3 above has been presented with the EAT.

...

**G** 5.7. In determining whether to extend time for appealing, particular attention will be paid to whether any good excuse for the delay has been shown and to the guidance contained in the decisions of the EAT and the Court of Appeal, as summarised in cases such as *United Arab Emirates v Abdelghafar* [1995] ICR 65, *Aziz v Bethnal Green City Challenge Co Ltd* [2000] IRLR 111 and *Jurkowska v HLMAD Ltd* [2008] ICR 841.

...

**H** 12.2. [Once an appeal has been permitted to go forward to a Full Hearing.] Within 14 days of the seal date of the order (unless otherwise directed), respondents must present to the EAT and serve on the other parties a respondent’s Answer. If it contains a cross-appeal, the cross-appellant must within 14 days of service (unless otherwise directed), pay any fee which is due in respect of the cross-appeal (or apply for remission). ...”

**A**     Ground 1

17.     The principal submission made by Mr Sugarman, counsel for Mr Aplin, was that by EAT Rule 6(2) resistance to an appeal is made by delivery to the EAT of a specified document titled “Respondent’s Answer” (the Answer). The mode of cross-appealing is provided in paragraphs 4 and 5 of the Answer. It was submitted that the time given for lodging the document, the Respondent’s Answer, applied to all it contains including a cross-appeal. There is no such provision in the **EAT Rules** for lodging a separate document to initiate a cross-appeal. Accordingly, the Order of the Registrar of 15 December 2017 by which time in which to file an Answer was extended to 4.00pm on 4 January 2018 applied to the entire document including the sections in which a cross-appeal could be made.

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18.     Mr Sugarman submitted that the **EAT PD** which provides that a Respondent who wishes to cross-appeal but has failed to deliver an Answer may be barred from taking part in the appeal indicates that the means of cross-appealing is to serve an Answer. If an extension of time is granted for delivering an Answer the extension applies to the document and everything it contains.

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19.     Mr Sugarman submitted that the judgment of the EAT in Slingsby was concerned with a different issue from that raised by ground 1 of this appeal. It was not concerned with whether an Answer should be treated as one document so that an extension of time applied to all within it. The issue was whether an extension of time should have been granted at all. It was submitted by Mr Sugarman that the conclusions of the EAT that discretion whether to extend time for lodging an Answer could and, in that case, should be subject to different considerations for the response to the appeal and to the cross-appeal are not relevant to the issue in ground 1 of this appeal: the construction of the Order of 15 December 2017.

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**A** 20. Mr Sugarman relied upon the general terms of the request made by the Claimant on 13 December 2017 for an extension of time within which to file an Answer to the cross-appeal to contend that they applied to considering whether to cross-appeal as well as to resisting the appeal.

**B** According to the Order of 15 December “*that the aforesaid application be granted and that time in which to file an Answer be extended to 4.00pm on the 4<sup>th</sup> day of January 2018*” be construed as applying to the entire document including the possibility of a cross-appeal.

**C** 21. Mr Howells, counsel for the school, submitted that on its proper construction the Order of 15 December 2017 extending time for service of the Answer to 4 January 2018 applied only to resisting the appeal. Counsel accepted that the Answer is a single document but submitted that

**D** it contains two distinct parts. One is a reply to an appeal. The other is a cross-appeal if a Respondent wishes to do so.

**E** 22. Mr Howells relied on the judgment in Slingsby in which the EAT proceeded on the basis that the two parts of the Answer document are juridically different. The first part, the response to the appeal, is a reactive process. The cross-appeal focuses on those parts of the Judgment which the Respondent wishes to challenge. Granting an extension of time for responding to an

**F** appeal is not to be taken as also granting time to cross-appeal. Mr Howells relied upon the judgment of the EAT in Slingsby to point out that a Respondent has 42 days from receipt of the Judgment to consider whether there are points in it which he wishes to challenge.

**G** 23. In further support of his contention that the two elements of the Answer form should be treated differently including for the purpose of deciding whether to extend time for the service of the document, counsel referred to the **EAT PD**. PD 11.14 provides that the sift procedure applies to cross-appeals as it does to appeals. Further, PD 12.2 makes separate reference to the

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A “Respondent’s Answer” and “a cross-appeal”. When the fees regime was in place, a fee had to be paid for a cross-appeal.

B 24. Mr Howells pointed out that the application made by the Claimant on 13 December 2017 for an extension of time in which to lodge an Answer did not state that he intended to cross-appeal. It was not known whether he wanted to do so. Mr Howells submitted that a party applying for an extension should make it clear which part of the Answer form requires an extension of time. There may be different reasons for asking for an extension of time to respond to an appeal from those relevant to such an application in respect of a cross-appeal.

D *Discussion and Conclusion*

E 25. It is somewhat curious that whereas EAT Rule 6(2) provides that a Respondent who wishes to resist an appeal shall deliver an Answer in writing in, or substantially in, accordance with Form 3, Rule 6(3) provides that a Respondent who wishes to cross-appeal may, not shall, do so by including this in his Answer. No form or time provision is made in the **Rules** for lodging a cross-appeal independently of the Answer. In practice that may never occur however the existence of this possibility supports the contention that the application for an extension of time of a response to an appeal and a cross-appeal can be treated differently albeit that they are both contained in the same document, the Answer.

G 26. The difference in treatment of the two elements in an Answer in an application for extension of time for service of that document is illustrated by the judgment of the EAT in Slingsby. Whilst the approach of the EAT to the exercise of discretion to extend time for a cross-appeal was questioned by Langstaff P in an appeal against the Registrar’s Order in Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14 and by the Claimant in

**A** this appeal, the possibility of applying different considerations to whether an extension of time for lodging the Answer in respect of the two different elements of that document has not.

**B** 27. The Answer in Form 3 may contain two elements. A response to an appeal and a cross-  
**C** appeal. If no other Order is made, EAT PD 12.2 provides that within 14 days of the seal date of  
**D** the Order that an appeal proceed to a Full Hearing the Respondent's Answer must be presented  
**E** to the EAT and served on the parties. An Order for a different time for service is a judicial act  
**F** exercising a discretion whether to do so. There may be different reasons for seeking an extension  
**G** of time in which to lodge resistance to an appeal or for raising a cross-appeal. Although both are  
**H** in the same document, the Answer, different considerations may be relevant to the exercise of  
discretion whether to extend time in respect of each. The issue under ground 1 of this appeal is  
whether the Order of 15 December 2017 extended to both elements of the Answer or just to the  
response to the appeal.

**E** 28. If there is doubt as to the meaning of an Order extending time for delivering an Answer,  
in my judgment it is permissible and in the case under appeal necessary to take into account the  
context in which it was made.

**F** 29. Ground 1 concerns the proper interpretation of the Order of 15 December 2017. The  
Order was made granting the application by the Claimant in his email of 13 December 2017 for  
an extension of time in which to file an Answer to the Notice of Appeal. The Claimant did not  
ask for time to consider whether to bring a cross-appeal. His request for "*an extension to the time  
given to prepare documentation for an appeal hearing*" could apply to either resisting an appeal  
or to a cross-appeal or to both. The Respondents were asked for any submissions to include  
agreement or otherwise to the application. At the time of the application the school could not

**A** and Mr Aplin may not have known whether he would lodge a cross-appeal. The only requirement was to lodge an Answer to the appeal if it was to be resisted. In my judgment the school's agreement to the extension of time "*to file an Answer to the appeal*" is to be construed as just that: agreement to an extension of time to lodge an Answer to the appeal. The agreement did not extend to agreement to an extension of time to cross-appeal.

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**C** 30. It is significant that the Order of the Registrar granting an extension of time in which to file an Answer did not contain any Reasons. It is recorded that it was made by consent. In my judgment the terms of the application and the consent extend only to the Answer to the appeal. Nothing more had been clearly requested or agreed to.

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**E** 31. By her Order and Reasons of 15 February 2018 the Registrar did not err in holding that the cross-appeal sent to the EAT on 2 January 2018 was 13 days out of time. On a proper construction of the Order of 15 December 2017, time was not extended for delivery of the cross-appeal.

**F** 32. Ground 1 does not succeed.

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**Ground 2**

*Submissions of the Parties*

33. Mr Sugarman contended that if, as I have decided, the Order of 15 December 2017 did not include an extension of time for delivering Mr Aplin's cross-appeal, the Registrar erred in holding that the strict approach to the lodging of a Notice of Appeal as explained in **Abdelghafar** applied to extension of time to lodge a cross-appeal.

A 34. Counsel submitted that the approach of HHJ Burke QC in Slingsby of applying the strict approach to applications for extensions of time for appeals should not be applied to cross-appeals. It was said that the EAT failed to recognise two different approaches to the exercise of discretion to two parts of one document, the Answer.

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C 35. Mr Sugarman pointed out that the **EAT PD** refers to Abdelghafar and subsequent cases only in paragraph 5.7 which deals with the time for instituting appeals not cross-appeals. It was submitted that the judgment of HHJ Burke QC should not be followed when in paragraph 30 of Slingsby he held that as the juridical nature of a cross-appeal to the EAT is the same as that of an appeal, the same approach to an extension of time should be applied. Whilst HHJ Burke QC D recognised that the **EAT PD** provides normally for only 14 days to deliver a cross-appeal, he took into account that a Respondent to an appeal will have had a much longer time to consider the Judgment of the Employment Tribunal. Mr Sugarman submitted that this approach is not to be followed as a Respondent may only consider cross-appealing if the other party appeals.

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F 36. The judgment of Langstaff P in Weerasinghe was relied upon to demonstrate the difference in nature between an appeal and a cross-appeal. When examining the policy underpinning cross-appeals in the EAT, Langstaff P in paragraph 19 held:

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“19. ... It is familiar that many parties, though not fully content with a decision of a Tribunal, are prepared to accept it at least as it stands. If such a party discovers that the other party, also dissatisfied, intends to seek to change that order in their favour, then it is not difficult to see that the response is to seek itself to mount an appeal. One appeal therefore becomes responsive to another. If the other appeal were not brought, neither would be within time. ...”

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Mr Sugarman pointed out that a Respondent need not consider cross-appealing unless and until the other party lodged an appeal. Counsel submitted that the approach of HHJ Burke QC to say a cross-Appellant should be treated as having had substantially more than 14 days in which to consider and formulate a cross-appeal did not recognise the usual approach of Respondents. The

**A** conclusion that a Respondent should be held to the strict approach on extensions of time which is applied to Appellants should not be followed. The analysis of the nature of a cross-appeal adopted by Langstaff P in Weerasinghe was to be preferred. Counsel submitted that Slingsby should not be followed on this issue.

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37. Mr Sugarman submitted that if the general rather than the strict approach to the exercise of discretion had been adopted to the decision on extension of time for a cross-appeal, even if it were to be considered separately from the response to the appeal, the same extension would and should have been granted.

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38. Mr Sugarman submitted that the decision reached by the Registrar to refuse Mr Aplin’s application of 19 January 2018 to extend time for his cross-appeal was wrong in applying the strict approach to time limits for appeals. In his application of 19 January 2018 Mr Aplin pointed out that his original application for an extension of time applied to all that would or could be included in the Answer. Further it was submitted by him that the EAT’s Order of 15 December 2017 said that “*the application be granted*”. The application and Order extended time for delivery of the Answer. Mr Sugarman submitted that the Order of 15 December 2017 did not make clear that the extension of time to 4 January 2018 did not apply to the entirety of the Answer. At the lowest it was not clear that it did not apply to the inclusion of a cross-appeal.

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39. In the alternative Mr Sugarman submitted that even if the Registrar had not erred by applying the strict approach to time limits for appeals to the application to extend time for the cross-appeal, she erred in not considering this to be a rare and exceptional case. Applying Abdelghafar and Jurkowska an extension of time should be granted in a rare and exceptional case. The Order of 15 December 2017 understandably led the Claimant to believe that the



**A** extension granted applied to the entirety of the Answer which included the possibility of a cross-appeal.

**B** 40. Mr Sugarman asked for the EAT to substitute a decision that time for delivering the cross-appeal be extended to 4 January 2018. Accordingly, the cross-appeal delivered on 3 January would have been made in time.

**C** 41. Mr Howells contended that the Registrar did not err in applying the strict approach to extension of time for appeals to cross-appeals. Such applications were to be refused except in rare and exceptional cases. This was not one.

**D** 42. Counsel for the school submitted that the approach of HHJ Burke QC in **Slingsby** to the exercise of discretion to extend time for cross-appeals was right and should be followed. Mr Howells adopted the reasons given in **Slingsby** for treating applications for an extension of time to cross-appeal differently from those to a reply to an appeal. He submitted, as observed in **Slingsby**, that a Respondent has 42 days as well as the 14 days allowed in the **EAT PD** to consider whether to challenge any adverse finding in the decision of the ET. Accordingly a strict approach was rightly adopted by the Registrar to the application for an extension of time to cross-appeal. Mr Howells did not accept that **Weerasinghe** contradicted the approach adopted by the EAT in **Slingsby** to applications for an extension of time for cross-appeals.

**G** 43. Mr Howells submitted that a party applying for an extension of time should make it clear which part of the form requires an extension. Different reasons may apply to the request for an extension for a response to an appeal and to a cross-appeal. In this case Mr Aplin made no

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**A** reference in his original application for an extension of time to deliver an Answer to an extension of time to consider a cross-appeal. The consent to the extension was given on that basis.

**B** 44. Mr Howells submitted that, in any event, Mr Aplin had not advanced circumstances which  
**C** merited the exercise of a discretion to extend time for a cross-appeal. Whether the strict approach  
or the general approach to the exercise of discretion were adopted, the reasons advanced by Mr  
Aplin in his application of 19 January 2018 would not support the exercise of discretion to grant  
**D** an extension of time to cross-appeal. A misunderstanding of the Order of 15 December 2017 is  
not a good excuse for failing to lodge the cross-appeal in time. This is equivalent to  
misunderstanding the Rules of the EAT which do not constitute a good excuse for missing  
deadlines. Nor was the difficulty in obtaining legal advice stated in the original application and  
incorporated in the application of 19 January 2018 an exceptional circumstance or good excuse  
for not lodging the cross-appeal in time. Many litigants in the EAT do not have legal advice.

**E** 45. Mr Howells submitted that if the Registrar erred in applying to the cross-appeal the strict  
approach applicable to appeals and her decision were to be set aside, the decision whether to  
extend time for the cross-appeal should be remitted to her.

**F**

*Discussion and Conclusion*

**G** 46. EAT Rule 3(2)(ii) specifies a time within which an appeal from the Judgment of an  
Employment Tribunal must be served: 42 days from the date on which the document is sent to  
the parties. Rule 6(1) provides that the Registrar shall notify every Respondent of the date  
appointed by the Appeal Tribunal by which any Answer must be delivered. The Rules do not  
**H** specify a particular number of days within which a Respondent's Answer must be served. Such  
a time is given in EAT PD 12.2. However unlike service of the Notice of Appeal, the time

**A** provided in the **PD** may be set, usually by the Registrar, for a different interval than the 14 days referred to in the **PD**.

**B** 47. EAT PD 5 contains detailed provisions for the extension of time to appeal. The application cannot be considered until a Notice of Appeal in accordance with paragraph 3 has been presented to the EAT. PD 5.7 provides that in determining whether to extend time for appealing, particular attention will be paid to whether any good excuse for the delay has been shown and to the guidance contained in specified authorities including **Abdelghafar** and **Jurkowska**. No provision in the **PD** states that these principles should be applied to service of an Answer. All applications for extensions of time are the subject of PD 14.5, but the only provision in the **EAT PD** relating to how the discretion under that provision should be exercised is that in PD 5.7 which applies to appeals.

**E** 48. The basis for the decision of the EAT in **Slingsby** that the strict principles which apply to a time for presentation of appeals also apply to cross-appeals was that the policy reasons referred to by Mummery P (as he then was) in **Abdelghafar** apply equally to the case of a cross-appeal.

**F** 49. After referring to procedural defaults in interlocutory steps in respect of which Mummery P observed “*the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time*”, the passage from **Abdelghafar** relied upon by HHJ Burke QC included the following:

“... The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. ...”

**H** Mummery P continued:

“... The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. ... The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on

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appeals. An extension may be refused, even though the default in observing the time limit has not caused any prejudice to the party successful in the original proceedings.”

50. HHJ Burke QC observed at paragraph 30 that:

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“... The juridical nature of a cross-appeal to the EAT is, as I see it, the same as that of an appeal. ...”

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I agree that a party who cross-appeals to the EAT challenges a Judgment of an ET as does an Appellant. However, with respect to the very experienced Judge, such a similarity does not lend support to an assumption that a Respondent will have considered whether to cross-appeal for the period from the promulgation of the ET Decision to the expiry of 14 days from the Order for service of a Respondent’s Answer. At paragraph 31 HHJ Burke QC adverted to 14 days to consider a cross-appeal “*in the event of an appeal by the other side*”. However, this difference in timing for considering whether to challenge the Decision of the ET or that a cross-appeal is reactive and may only be made in the event that an appeal is lodged, appears not to have been taken into account in holding that the strict principles applicable to an extension of time for institution of an appeal apply equally to the case of a cross-appeal.

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51. The EAT in Weerasinghe was not directly concerned with the question of whether the courts should adopt the same approach to time for cross-appeals in the EAT as to appeals. However, Langstaff P made observations on the nature of a cross-appeal and policy considerations recognising that a party may not wish to challenge an adverse decision unless the other party does so. These are relevant to and take a different approach from that adopted in Slingsby. Langstaff P held at paragraph 19:

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“19. I approach the question of policy in this way. The system of appeal in this Tribunal is part of a system of justice which ought, so far as it can do, not only to permit people to litigate their disputes but should seek, where it can, to reconcile them to their differences rather than to exacerbate them. It is familiar that many parties, though not fully content with a decision of a Tribunal, are prepared to accept it at least as it stands. If such a party discovers that the other party, also dissatisfied, intends to seek to change that order in their favour, then it is not difficult to see that the response is to seek itself to mount an appeal. One appeal therefore becomes

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responsive to another. If the other appeal were not brought, neither would be within time. The parties, though not wholly content, would not have their differences maintained and exacerbated by a continuing system of appeal and argument.”

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52. With all due respect to HHJ Burke QC, the analysis of the nature of a cross-appeal and the practical and policy reasons why such a step is reactive explained by Langstaff P illustrates why in my judgment the strict approach to time limits for initiating an appeal do not apply to cross-appeals. Although their “*juridical basis*” may be similar to appeals, in practical and policy terms they differ. There is only a cross-appeal if an appeal has been initiated. It would be wrong to reason that because a Respondent has had an ET Decision for some time they should be bound by the strict approach to timing which applies to appeals. Knowing that an adverse decision has been made is different from deciding to challenge it.

53. There is nothing in the **PD** which suggests that the same approach to the exercise of discretion in deciding whether to extend time for an appeal should be applied to a cross-appeal. Whilst according due respect to a decision of the EAT, I cannot reach the same conclusion. In my judgment Slingsby should not be followed. Accordingly, in my judgment the Registrar erred in applying the strict approach to extension of time for appeals to cross-appeals. The general approach to the exercise of discretion under EAT Rule 37 is to be applied.

54. In addition, in my judgment the Registrar erred in holding that misunderstanding the effect of the Order of 15 December 2017 was not a good excuse for not delivering the cross-appeal by the date originally set for lodging the Answer, 21 December 2017. Whilst on a close analysis, the Order extending time for the Answer only applied to the basis on which consent was given, for the response to the appeal, the view of Mr Aplin that the extension applied to all that could be included in the Answer is reasonable and constitutes a good excuse for not lodging a cross-appeal by 21 December 2017.

A 55. Ground 2 succeeds.

**Disposal**

B 56. The appeal is allowed. The Order of the Registrar of 15 February 2018 refusing the application by email dated 19 January 2018 for an extension of time in which to file a cross-appeal is set aside.

C 57. The application of 19 January 2018 was to be determined on the basis of Mr Aplin's email of that date and the school's response of 24 January 2018.

D 58. This EAT is in as good a position as the Registrar would be to consider the application for an extension of time for lodging a cross-appeal. In exercise of the powers of the EAT under **Employment Tribunals Act 1996** section 35(1) and in accordance with the overriding objective, I will determine this application.

E 59. The basis of the application made on 19 January 2018 for an extension of time to lodge a cross-appeal was that Mr Aplin understood that the Order of 15 December 2017 which extended the time for lodging the Answer to 4 January 2018 extended time for the entire document including the section by which a Respondent may cross-appeal. In addition, Mr Aplin relied on the reasons set out in his original application of 13 December 2017 and the balance of prejudice of granting or refusing the extension.

F 60. The school replied to the application of 19 January 2018 with submissions prepared by counsel, Mr Howells. Counsel advanced the submissions which were relied upon to resist Mr Aplin's appeal.

**A** 61. Mr Aplin lodged his Answer on 3 January 2018, within one day of the extended time for  
its service. In my judgment the Order of 15 December 2017 extending time for service of the  
**B** Answer to 4 January 2018 could be reasonably understood as extending time for lodging all parts  
of the document, both resistance to the appeal and making a cross-appeal. The Order did not  
make clear that there would be different time limits for the two. Where the decision maker intends  
different time limits to apply to different parts of the same pleading, it may be prudent to do so.  
**C** In this case the application for an extension of time did not make clear that the application was  
made in respect of both resistance to the appeal and the cross-appeal. However, the basis of the  
application was that the Claimant wished to obtain legal advice, the Christmas holiday period  
was approaching and counsel was unable to give such advice by 21 December 2017. On this  
**D** basis and by consent the Registrar granted the application. It may be that Mr Aplin had not  
formed a view at that stage whether or not he would cross-appeal. All he knew was that his  
application for an extension of time for an Answer had been granted.

**E** 62. What was in issue in this appeal is whether the application of 19 January 2018 should  
have been granted. What is not in issue nor has it been suggested by Mr Howells is that the  
original extension should not have been granted on the grounds advanced. The school had  
**F** consented to an extension on those grounds.

**G** 63. It has not been suggested that the school has suffered any prejudice by the cross-appeal  
being lodged at the same time as the response to the appeal. The cross-appeal will be subjected  
to scrutiny in the sift system and may or may not be permitted to proceed. However, in exercising  
the discretion whether to grant an extension of time to enable the cross-appeal to be lodged at the  
**H** same time as the resistance to the cross-appeal, in my judgment, the excuse for not lodging it on  
21 December 2017 is both reasonable and understandable. In addition, no particular prejudice in

**A** allowing the extension has been advanced by the school. Mr Aplin may possibly suffer prejudice if he were unable to advance his cross-appeal.

**B** 64. In exercise of powers under **Employment Tribunals Act 1996** section 35, I substitute a decision to allow the application of Mr Aplin by email of 19 January 2018 for an extension of time in which to file a cross-appeal.

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