

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

At the Tribunal
On 21 January 2019
Judgment handed down on
01 March 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

ACETRIP LIMITED

APPELLANT

MR ABHISHEK DOGRA

RESPONDENT

JUDGMENT

APPEAL AGAINST REGISTRAR'S ORDER

APPEARANCES

For the Appellant

MS NAOMI LING
(of Counsel)
Instructed (until 05/02/2019) by:
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For the Respondent

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SUMMARY

PRACTICE AND PROCEDURE – Time for Appealing

The appeal to the Employment Appeal Tribunal (“EAT”) was instituted out of time. The Appellant appealed against the Registrar’s Decision refusing to extend time.

A consultant working for the Appellant instructed direct-access counsel to draft the Notice of Appeal. An exchange with counsel’s clerk led him to believe that counsel or his clerk would deal with the actual filing of the Notice of Appeal as well. He was only informed that counsel was professionally unable to do this, a few days before the last day of the time limit. He was not specifically alerted at that point to the 4pm cut-off time. In all the circumstances, the fact that requisite documents sent to the EAT on the last day arrived at about 4.30pm was excusable.

However, in addition, copies of the ET1 and ET3 were not sent to the EAT at all on that day. They were provided only about four weeks later after the consultant telephoned the EAT to enquire as to progress of the appeal. Notwithstanding that, as the deadline approached, the consultant was also dealing with organising a family funeral, and had to use an agency to scan documents on the last day, the failure to send the ET1 and ET3 that day, or sooner than they were sent, was the result of carelessness which did not amount to a good reason or exceptional circumstances. The extension was therefore refused, and the appeal dismissed.

A **HIS HONOUR JUDGE AUERBACH**

Introduction

B 1. Following a Full Merits Hearing, the Employment Tribunal promulgated a decision upholding claims by the Claimant before it, Mr Dogra, against the Respondent before it, Acetrip Limited, of unfair dismissal because of protected disclosures and the assertion of a statutory right, and for unpaid wages. Acetrip seeks to appeal that decision, on various grounds. I will continue to refer to the parties, as below, as Claimant and Respondent.

C 2. The appeal to the EAT was not properly instituted in time. The Registrar refused an application for an extension of time. The Respondent appealed that decision. That appeal came before me at a hearing on 21 January 2019.

D 3. The Respondent runs a small Travel Agency and Tour Operator business. Mr Raj Kumar is the Managing Director. His brother, Mr Satish Kumar, was, at the relevant time, a consultant to the business.

E 4. Prior to the day of the hearing before me, the Respondent's solicitors had indicated that they were hampered by the fact that Satish Kumar, who had been responsible for organising the substantive appeal to the EAT, was not responding to their communications about the time-extension appeal. So, a witness statement had been tabled instead from Raj Kumar, although his knowledge of relevant events was limited. He was in India, but would be available to be cross-examined by Skype.

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A 5. However, on the day of the hearing Ms Ling of counsel, who appeared for the
Respondent, had Satish Kumar with her. I was told that he had recently returned from the USA
B and the Respondent now wished to call him as a witness. I had also caused both sides to be
provided with a copy of an email on the EAT's file, but which had not hitherto been mentioned,
which had been sent by the EAT to Satish Kumar at 18.00 on 23 April 2018. Ms Ling said
Satish Kumar's instructions were that he had never received that email.

C 6. It was ultimately agreed with both Ms Ling and Mr Lawrence, of counsel, appearing as
the Free Representation Unit ("FRU") representative for the Respondent, that the way forward
was to adjourn the hearing to 2pm. This would enable final preparations to be completed,
D including a written statement from Satish Kumar, and completion of disclosure from his emails.
When we reconvened in the afternoon, both counsel confirmed that they were ready and content
for Satish Kumar to give evidence, and to proceed with the hearing.

E 7. Satish Kumar then gave evidence and was cross-examined. Ms Ling then confirmed
that she no longer wished to call Raj Kumar, so we proceeded to oral submissions. I also had
the benefit of written skeletons that both counsel had prepared prior to the hearing, and various
F authorities in addition to the EAT's familiar authorities in this area.

G 8. I reserved my decision.

9. In one further twist, Ms Ling understood that the Court of Appeal was due to hand down
its decision in a case concerned with this jurisdiction, the day after this hearing. It was
H therefore agreed that both counsel should be permitted to table written submissions on the
implications of the Court of Appeal's decision, once to hand. I made Orders accordingly.

A Following the hand-down of that decision – **J v K and another** [2019] EWCA Civ 5 – written submissions and then reply submissions were tabled on both sides. The second round included a side dispute about what I may call the GMT/BST point, of which more later.

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C 10. As indicated in the authorities, it fell to me to consider the question of extension of time completely afresh; and in view of how matters unfolded I had a good deal more evidence available to me than the Registrar had available to her. With no disrespect to her, it is therefore unnecessary for me to set out the content of her decision.

The Legal Framework

D 11. Rule 3(1) of the **Employment Appeal Tribunal Rules 1993** sets out the documents required to institute an appeal. In the case of an appeal from an Employment Tribunal judgment these include copies of the claim and response, or an explanation as to why either is not included. The effect of Rule 3(3) is that, in a case such as the present, the appeal must be instituted within 42 days of the date on which the written Judgment and Reasons were sent to the parties. Rule 37(1A) provides that where something must be done on or before a particular day, it must be done by 4pm on that day. The EAT may exercise the power conferred by Rule **E**
F 37(1) to extend time for the institution of an appeal, including in a case where it has already expired.

G 12. The EAT's **Practice Direction (PD) 2013**, which was the version in force during the time window for presentation of this appeal, contains provisions concerning the institution of an appeal and the extension of time. These include reference (at paragraph 1.8) to the 4pm cut off for filing an appeal on the last day; and reiteration (at paragraph 3.1) of what must be in, and **H**

A must accompany, a Notice of Appeal; and reiteration (within section 5) of the 42-day time limit for presenting an appeal and when it begins to run in different types of case.

B 13. Section 5 also contains provisions concerning applications for extension of time, including the following at paragraph 5.7:

C “In determining whether to extend the 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.”

D 14. The 2018 PD is to similar effect, although it also cites another authority – **Muschett v London Borough of Hounslow** [2009] ICR 424. I note also that in **Green v Mears** [2018] EWCA Civ 751 the Court of Appeal has recently confirmed that the principles established by the earlier leading authorities continue properly to govern the EAT’s particular approach to applications for extension of time in relation to late appeals to it.

E 15. I will consider further, the guidance in the authorities concerning the exercise of the discretion to extend time for the presentation of an appeal, later in this decision.

F **The Facts**

G 16. The Employment Tribunal’s Judgment and Reasons were sent to the parties on 12 March 2018 so that (and this was not disputed before me) the period for instituting the appeal expired at 4pm on Monday 23 April 2018. On that day, Satish Kumar, on behalf of the Respondent, sent the following four emails to the EAT from his personal email address.

H 17. First, there was an email timed as sent at 15.14 on the Respondent’s hard copy printout, and timed as received by the EAT, on its hard copy printout, at 16.14. That email had the

A subject line “Appeal” and read: “Please find attached a copy of our Appeal part 1. Part 2 follows this email.” Attached to that email was the Notice of Appeal, including grounds of appeal, consisting of three pages, together with the first two pages of the Employment Tribunal’s decision, consisting of the Judgment and the first page of the Reasons.

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18. Then, he sent a further email, timed as sent at 15.27 and timed as received at 16.28. That had the subject line: “Appeal part 2” and began: “This is a continuation of our earlier email.” It also asked a question about fees (although, of course, those no longer applied). That email attached the remaining pages of the Employment Tribunal’s Reasons.

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19. The third email was timed as sent at 18.16 and received at 19.16. That had the heading: “Fw: page 31 to 43 / Part 4 Appeal Dogra v Acetrip.” It read: “This is the final part 4 of our supporting documents. Please accept our apologies for any inconvenience caused.” Attached to it was a copy of an application that the Claimant had made, in the course of the Tribunal litigation in 2016, to amend his claim, copies of two Decisions arising from a Preliminary Hearing that had been conducted by the Employment Tribunal in November 2016, and also what appears to have been one page from some version of the Grounds of Resistance in the Employment Tribunal.

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20. It is apparent from the printed chain, that this particular email had a subject heading beginning “Fw” because Mr Kumar was, on this occasion, forwarding to the EAT an email he had earlier been sent by his colleague Arun Kapur. Arun Kapur’s email was timed as having been sent to Mr Kumar at 13.56 that day. It had a subject line referring to “page 31 to 43”, but it is apparent that, when later forwarding it to the EAT, Mr Kumar added to the subject line the reference to the appeal.

A 21. The final email to the EAT was timed as sent at 18.23, and timed as received at 19.24. It was headed: "Appeal part 5 / Dogra v Acetrip Ltd." That read: "We apologise but just realised 3 pages failed to transmit." It attached a signed copy of the last page of the Notice of
B Appeal, and copies of pages 1 and 2 of the Employment Tribunal's Decision (even though, I interpose, those pages had in fact been sent with one of the earlier emails).

C 22. What was not sent to the EAT that day were copies of the ET1 and ET3. To that I will return. However, next I need to refer to certain emails sent *by* the EAT *to* Mr Kumar on 23 April 2018.

D 23. First, among the emails added to my bundle on the day of this hearing, were three automated acknowledgement emails Mr Kumar received from the EAT that day, timed, according to his hard copies, as received at 15.14, 15.28 and 18.16.

E 24. Secondly, on the EAT's paper file was a hard copy of an email recorded as sent by the EAT at 18.00 that day, and by way of a substantive reply to the second email from Mr Kumar (that can be seen because it was in a chain with it). This was the email, copies of which I
F provided to both counsel at the start of the hearing. This email stated that the appeal was not properly instituted because Mr Kumar had not provided the ET1 and ET3, but only the appeal form and Employment Tribunal Judgment and Reasons. It attached a fact sheet: "Your Appeal
G is Not Properly Instituted." It explained that, if the sender was unable to supply those documents, a written explanation was required, and that the time limit clock would not stop running because of this omission, and about the possibility of an application to extend time.

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A 25. Mr Kumar's evidence in his statement was that he had checked his inbox (on the day of the hearing before me) and he did not receive that email. I will return to this.

B 26. As I have said, copies of the ET1 and ET3 *were* sent to the EAT on 22 May 2018. That came about in this way. On that day Satish Kumar called the EAT to enquire as to the progress of the appeal. He was told that the EAT did not have copies of the ET1 and ET3. He then sent a series of emails to the EAT. The first was timed as received at 16.30, had the subject line of the case number, and read: "With reference to our conversation earlier today in relation to our appeal, as requested I am re-sending ET1 and ET3."

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D 27. Then, Mr Kumar forwarded to the EAT an email he had sent to Arun Kapur at 13.32 (according to his printout) on 23 April 2018, which in turn had forwarded to Mr Kapur an email from Mr Kumar to Print Plus Ealing Common that day timed at 13.17. When forwarding this to the EAT (on 22 May 2018) Mr Kumar added to the subject line the words "Appeal Dogra v Acetrip Ltd / part 3." The email (of 22 May to the EAT) reads: "This is in reference and in conjunction with our previous emails sent this afternoon." That email is timed on Mr Kumar's copy at 15.31 and on the EAT's copy at 16.32.

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F 28. Then Mr Kumar sent a further email to the EAT, a few minutes later – timed at 15.36 on his copy – forwarding the email chain he had already sent the EAT at 15.31/16.32 that day and reading: "With reference to our conversation earlier today I am forwarding our email sent on 23/4/2018 with attached ET1 and ET3."

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H 29. The last of these emails of 22 May 2018 certainly had a PDF containing the ET1 and ET3 attached to it, and it appears that either or both of the first two may have done so as well.

A As these documents were timed as received by the EAT after 4pm that day, the appeal was (correctly) deemed properly instituted on 23 May 2018.

B 30. I now need to go back to events following the promulgation of the Employment Tribunal’s Decision, and to set out some further findings of fact, so as to complete the picture of how matters unfolded after that. It is necessary to do so in some detail.

C 31. In the Employment Tribunal proceedings, the Respondent was represented by Peninsula Business Services. Accordingly, the promulgation copy of the Tribunal’s Decision for the Respondent, with the usual covering letter, was sent to Peninsula. A copy of the Decision itself was forwarded by Peninsula to Raj Kumar, by email on 14 March 2018. It was forwarded by him the next day to Satish Kumar. As for the Tribunal’s covering letter, in evidence Satish Kumar said he did not recall ever seeing that. From the copies in the bundle it appears to have been copied by Peninsula to Raj Kumar, albeit possibly not until 16 March. It alerts the reader to the existence of a 42-day time limit, and explains that there is important information in the booklet “The Judgment”, and where to view it online, and how to obtain hard copies.

F 32. Although Peninsula continued to represent the Respondent before the Employment Tribunal (where a Remedy Hearing was pending), it was decided to look elsewhere for advice and assistance in relation to an appeal against the Liability Decision. For family reasons, Raj Kumar was having to spend a lot of time in India. Satish Kumar therefore took on responsibility for taking this forward. However, Raj kept in periodic touch with Satish.

H 33. It appears that three different counsel who were open to instruction on a direct access basis were considered. It was then decided to go ahead with one of them. On 5 April 2018

A Satish Kumar emailed his clerk a copy of the Employment Tribunal’s Decision and asked for a costs estimate. On 6 April the clerk replied that counsel “could assist with drafting the grounds of appeal by Friday 13th April.” He quoted a fee based on an hourly rate. Mr Kumar replied that day: “Please could you clarify that the price includes filing the Appeal with the ET [*sic*].”

B The clerk replied that day: “I can confirm that price includes filing the Appeal with the ET [*sic*].” On 9 April the clerk chased for a response. Mr Kumar replied that as they planned “to instruct [counsel] for the Appeal hearing as well” they were seeking a discounted rate. The

C clerk replied that day proposing a reduced rate, attaching a client care letter and dealing with other protocols. Over the next couple of days further emails were exchanged, including the clerk indicating what further documents counsel required, and Mr Kumar indicating, on 11 and

D 12 April, that he would be sending these.

E 34. While all of this was going on, I accept, Mr Kumar was also preoccupied with the fact that his mother-in-law was in the last stages of terminal illness. On 13 April she moved to a hospice and on 14 April 2018 she passed away.

F 35. On 17 April 2018 counsel emailed Mr Kumar, beginning: “The time limit for filing an appeal is fast approaching.” He asked when the papers would be sent through and indicated that if they were not coming he could draft the appeal on the information he had. “However, it is important that we do not miss the time limit (42 days) for submitting an appeal.” On 18 April

G Mr Kumar emailed apologising for the delay “due to a bereavement in the family”. He then sent papers via the clerk, which the clerk acknowledged and confirmed that he had forwarded to counsel, on the morning of Thursday 19 April 2018.

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A 36. That evening, at around 5pm, Mr Kumar telephoned counsel's clerk. I accept his
evidence that, up to this point, he believed that counsel, or his clerk, would deal with the actual
B submission of the appeal, specifically because on 6 April the clerk had confirmed that the fee
would include filing the appeal. (Nor, he said, did the client care letter touch on this issue.)
When he called the clerk on the evening of 19 April, Mr Kumar asked whether the appeal had
now been filed, but was then told that he would have to deal with this. I accept that this came
as a shock to him, and he was angry about it.

C 37. Later that evening counsel emailed Mr Kumar draft grounds of appeal. Included in his
covering email he wrote: "Please note the documents that will need to be lodged with the appeal
D (which are referred to in para 5 of the Notice)." On Friday 20 April counsel also sent Mr
Kumar a further email explaining: "Unfortunately under my professional rules I am not allowed
to lodge your appeal. Please make sure that you lodge with the appeal the documents that are
E referred to."

F 38. I accept Mr Kumar's evidence that he did not see those emails until the evening of 20
April, because he was out and about that day, sorting out his late mother-in-law's funeral
arrangements. He had in mind that he would have the weekend to deal with the appeal, the
deadline being the following Monday. He organised for documents to be sent from the
Respondent's East London office to his home in West London. He planned to scan them in
G using a scanner at home. But, when they arrived over the weekend, and he saw the very large
number of pages involved, he concluded that was not doable, and decided to take them to be
scanned at the Print Plus facility in his local Post Office on the Monday.

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A 39. I further find that Mr Kumar went to Print Plus on the Monday morning and was told that it would take some considerable time to scan all the documents in, so he left them there for scanning, which, in the event, took around two and a half hours to complete. I also accept that he was, at the same time, also dealing with some matters to do with his mother-in-law's impending funeral, which was now set to take place the next day.

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C 40. Mr Kumar's evidence, which I also accept, was that he knew that that Monday was the last day for submitting the appeal and supporting documents, but he did *not* actually appreciate at that point that the deadline was 4pm. I note, in particular, in this regard, that he had not, *himself*, seen, or been told about, the literature which includes reference to the 4pm cut off, nor was it mentioned in any of the emails from counsel, or counsel's clerk.

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E 41. There are the following further important matters that I need to make findings about, in terms of events that day.

42. The first concerns the role of Arun Kapur and what happened in relation to the ET1 and ET3. As to that, drawing on all the evidence I had, I find as follows.

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G 43. First, Mr Kumar was, that day, partly at home, and partly on the move, communicating via his phone. Mr Kapur was in the office in East London. While Mr Kumar was in touch with Print Plus, as the scanning was being progressed, he was also keeping Mr Kapur in the loop. That was reflected in Mr Kumar forwarding to Mr Kapur, at 13.32, an email which he, Mr Kumar, had sent to Print Plus. That is the email which I have referred to already, which was, on 22 May, forwarded to the EAT. The original email to Print Plus began: "With ref to our

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A conversation please scan P1 – 43 only and send it to me...” and referred to payment arrangements, and asked them to call him when done, on a given number.

B 44. However, it also appears to me that Mr Kapur had at least some involvement in the processing of the documents. In particular, as I have described, the third email that Mr Kumar sent to the EAT on 23 April, forwarded an email and attachments that had been sent earlier that day by Mr Kapur to Mr Kumar. I note that Mr Kumar had asked Print Plus to scan “pages 1 –
C 43”, and that the email from Mr Kapur to Mr Kumar referred to “pages 31 to 43”. It therefore rather looks as if at least this instalment of the documents scanned by Print Plus was sent to the Respondent’s business email, picked up by Mr Kapur, and then forwarded by him to Mr
D Kumar’s personal email.

45. I turn specifically to what happened in relation to the ET1 and ET3.

E 46. I note, first, that, while he had not had his attention drawn to the 4pm deadline, Mr Kumar *had* been specifically alerted by counsel to the list of documents that had to be sent to the EAT (set out in the standard Notice of Appeal), and he set about assembling these.
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47. Mr Kumar’s evidence was that the ET1 and ET3 were attached to the email that he sent to Mr Kapur timed at 13.32. His evidence was that he had intended to send that email to the EAT, and had sent it to Mr Kapur in error. Even when the EAT told him on 22 May that they were missing, initially he thought the EAT had simply got that wrong. That, he said, was why, in his subsequent emails to the EAT that day, he forwarded the email that he had sent at 13.32 on 23 April and wrote that he was “re-sending” the ET1 and ET3.
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A 48. Mr Kumar also said in his statement that he had never received the email sent to him by
the EAT at 18.00 on 23 April. Under cross-examination he said: "I didn't look at it. I didn't
receive it." His evidence was also that he called the EAT the next day, who told him that the
B Notice of Appeal had been received, and gave him a case number. So, at that point he believed
all was well. Further, he said, even after 22 May, he only finally realised his mistake when
C counsel instructed in relation to the out-of-time appeal, drew to his attention that the 13.32
email had been sent to Mr Kapur, at which point Mr Kumar then acknowledged to the EAT that
he had erroneously misaddressed an email meant for them.

D 49. As to all of that, I find as follows.

E 50. Firstly, I do accept that, until he spoke to the EAT on 22 May, Mr Kumar *thought* that
everything was in order, and did not realise that the EAT was not, or might not have been, sent
everything that was required, during the course of 23 April.

F 51. I also accept that he did not see, or read, the EAT's email sent at 18.00 that day; and that
when he looked on the day of the hearing before me, he could not find it. However, it does not
necessarily follow that that email did not reach his Hotmail account that day. It could, for
example, have been overlooked by him, and/or accidentally deleted. Further, while emails can
sometimes disappear entirely, I note that auto-replies sent by the EAT that day *did* reach his
G Hotmail account. On the balance of probabilities, I think the 18.00 email did as well, but for
whatever reason was not seen or read by him at that time.

H 52. I also accept that, when he obtained a case number from the EAT, he was not alerted to
the fact that the ET1 and ET3 were missing, though it appears that the call was on 25 (not 24)

A April. That is corroborated by the email he sent to Peninsula that day, attaching a copy of the Notice of Appeal and informing them of the case number he had been given that day.

B 53. However, reverting to the events of 23 April, I do not think that the email sent to Mr Kapur at 13.32 was sent erroneously to him and intended for the EAT. It is noteworthy that the first of the emails which Mr Kumar did send, later that day, to the EAT was headed “Appeal” and referred to “copy of our Appeal part 1 with part 2, to follow”, which indeed it did. The email to Mr Kapur originally had no similar header or text, and it forwarded an email which Mr Kumar had sent to Print Plus. There would be no reason for Mr Kumar to share with the EAT, an email he had sent to Print Plus, as such. He might well, however, want to copy it to Mr Kapur, to keep him in the loop, and/or if Mr Kapur was helping him.

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E 54. I conclude that the email to Mr Kapur was *not* intended for the EAT, and the first email intended for the EAT was the first one in fact sent to it, a little later on 23 April.

F 55. Were the ET1 and ET3, nevertheless, attached to the email to Mr Kapur? I did not have the benefit of seeing it on a screen. Hard copy printouts can be hard to interpret. The body of the email does not mention any attachment. However, one hard copy printout in my bundle had an image of a PDF symbol with a document number that corresponded to the number of the PDF document containing the ET1 and ET3 eventually sent to the EAT on 22 May; and Mr Kumar had made a manuscript note on the hard copy identifying it as sent to the EAT, and specifically pointed to that when cross-examined.¹

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¹ In the hard copy printout in my bundle the image of one of these PDF numbers was incomplete, but the visible digits matched up.

A 56. I note also that Print Plus were told (in the email later copied to Mr Kapur) that they needed to scan only pages 1 – 43. Counting the total number of pages in the Notice of Appeal and Tribunal’s Decision, and taking account of the fact that pages 31 – 43 consisted of other
B identifiable documents, that total cannot have included the ET1 and ET3 as well. Doing the best I can, the overall picture tends to suggest that Mr Kapur realised he already had a PDF of the ET1 and ET3; so told Print Plus they did not need to scan the hard copies of those, then copied that email to Mr Kapur, and at the same time sent him the PDF ET1 and ET3.

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D 57. It is also noteworthy that the four emails Mr Kumar sent to the EAT that day were numbered by him: First, Second, Fourth and Fifth. While I do not accept that the email to Mr Kapur was intended for the EAT, this suggests that, by the time he sent the email marked as the Fourth, that evening, Mr Kumar may have thought that, one way or another, three emails had been sent to the EAT so far. But, if so, he was wrong.

E 58. I also accept, as such, that Mr Kumar’s initial reaction to being told by the EAT on 22 May that they did not have the ET1 and ET3, was that they had made a mistake, and that he then looked back at his emails from 23 April. He then, however, not merely forwarded to the
F EAT, the email he had sent to Mr Kapur, with the PDF of the ET1 and ET3 attached. He also added the case name and “part 3” to the subject line. But it would have been obvious to anyone looking at that email with any care, that it had been sent not to the EAT, but to Mr Kapur (as
G indeed it was to the Respondent’s counsel when he later saw it).

H 59. Since it was apparent to the EAT that it had not been sent the ET1 and ET3 before, by a letter of 8 June it notified the Respondent of that fact, that the appeal was not instituted properly until 23 May, and of the opportunity to apply for an extension. Initially, in further

A communications, Mr Kumar maintained that the EAT had made a mistake, and attached a further print of the 23 April email attaching the ET1 and ET3. But the EAT (entirely correctly) did not alter its stance, and sought clarification as to whether he was applying for an extension or not.

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60. As I have mentioned, Mr Kumar then instructed (different) counsel to assist with the application for an extension, and sent him the materials. Counsel then pointed out that the 13.32 email had been sent not to the EAT, but to Mr Kapur. After that, on 2 July 2018, Mr Kumar emailed the EAT the application for an extension of time (the application was erroneously dated 29 April, but was attached to an email of 2 July). In that application, for the first time, he wrote: “Having now double-checked my emails, I can see that I did not send the ET1 and ET3 to the EAT but sent them to a colleague by mistake.” He explained that this misapprehension had been corrected by counsel.

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61. On 16 July 2018 the Claimant’s FRU representative emailed comments in opposition to the extension application. The EAT then invited final submissions. On 17 August 2018 Satish Kumar emailed further submissions and attachments in support of the extension application. This included raising the fact that the Respondent’s first two emails to the EAT on 23 April were timed as having been sent before 4pm. A written submission summarised the Respondent’s factual case as to what had happened (including the impact of the death in the family) and made submissions by reference to the authorities.

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62. The Registrar’s Decision refusing the extension was issued on 25 October 2018. On 1 November 2018 solicitors came on record for the Respondent, indicating that it wished to appeal her Order, and making further submissions. It continued to be the Respondent’s case

A that the email sent to Mr Kapur, with the ET1 and ET3 attached, had been intended for the
EAT. That position was also maintained by Mr Kumar in cross-examination at the hearing
before me; although at one point he also suggested that there had been another email, not in the
B hearing bundle at all. But he was unable to find a copy among his own papers.

C 63. There is one last factual matter to address, concerning the timings of the emails sent to
the EAT on 23 April 2018. Taking the times on the hard copies at face value, each email would
seem to have taken about an hour to transmit. Mr Kumar also gave evidence that, on the day of
the hearing before me, he checked, and his Hotmail account was showing the correct time.
However, the auto-responses from the EAT were timed as received at Mr Kumar's end at 15.14,
D 15.28 and 18.16, that is, within the same minute, or one minute, of the timing (also at his end)
of the sending of three of his emails. That, it seems to me, clearly suggests that these emails did
not, in fact, take about an hour each to transmit, but were received, and the auto-reply then
E triggered, itself sent back, and received by him, all within the space of a minute, as happens
with most emails, most of the time.

F 64. Further, I observe – and I can take judicial notice of this – that on 23 April 2018 British
Summer Time was in operation. I conclude that the very likely explanation is that Mr Kumar's
emails were recording times as an hour early because they were still on GMT, as opposed to
BST. I add that Ms Ling accepted throughout, that the EAT's receipt times were accurately
G recorded. In any event, it could not be that the EAT were still on GMT, and Mr Kumar on
BST, as the timings would then have appeared the other way around.

H 65. This issue was revisited by Mr Lawrence in the exchange of further submissions
following my hearing. Ms Ling objected, on the basis that this strayed beyond the scope of

A those submissions, and Mr Kumar’s evidence about the Hotmail clock had not been challenged
in cross-examination. However, his evidence does not directly address or resolve the point – it
only shows that his Hotmail clock showed the correct time on the day of my hearing, a day on
B which BST was not in effect. Further, the evidence of the timing of the auto-replies really is
decisive. In any event, what this shows, namely that even the first two emails were sent after
4pm (rather than being sent before, and received after) is, as I will explain, not a basis on which
C I would have refused the extension of time, as such.

Case-law

D 66. I turn to the guidance in the authorities, on the exercise of the discretion to extend time
for presentation of an appeal to the EAT. Both counsel also cited some authorities as providing
examples of similar fact scenarios, which they each claimed supported their own case.

E 67. The EAT (Mummery J) in **United Arab Emirates v Abdelghafar & Anor** [1995] ICR
65 (approved by the Court of Appeal in **Aziz v Bethnal Green City Challenge Co Limited**
[2000] IRLR 111) stated that a stricter approach is warranted where a procedural default as to
F time arises at the appeal stage. A party who is refused an extension will still have had the
benefit of a trial, and there is a significant interest in certainty and finality in litigation. The
party seeking the indulgence of an extension should provide a “full, honest and acceptable”
G explanation of the delay. The key questions to consider in each case are: (a) what is the
explanation for the default? (b) Does it provide a good excuse for the default? (c) Are there
circumstances, which justify the exceptional step of granting an extension of time?

H 68. It was also said in that case that, while more sympathy may be shown to an
unrepresented party, there is no excuse for ignorance of the time limit or the importance of

A compliance. It was also stated that the merits of the appeal may be relevant, but are usually of little weight; and it is not appropriate in this context to investigate them in any detail.

B 69. The Abdelghafar guidance was also approved in Jurkowska v HLMAD Ltd [2008] ICR 841 (CA), which added the clarification that the existence of a good excuse for the delay may not be a precondition for success, although in the ordinary run of cases it probably will be. Each case turns on a fact-sensitive assessment of all of its relevant circumstances.

C 70. Cases such as Muschett v London Borough of Hounslow [2009] ICR 424 and Farmer v Heart of Birmingham Teaching PCT, EATPA/0896/14/LA indicate that consideration
D needs to be given to how matters unfolded in the whole of the 42-day period; but, in practice, often the earlier part of the period is less likely to be of significance than what occurred in the later period as the deadline approached.

E 71. A failure to provide, on time, all the necessary accompanying documents is as much a default as a failure to provide the Notice of Appeal itself (although rule 3 allows for the provision, instead, of an explanation for why a document such as an ET1 or ET3 is missing).
F That said, a more lenient approach may be taken where there is a very minor irregularity, as in Sud v London Borough of Ealing [2011] EWCA 995 where one page of the ET1 was omitted, which added nothing in substance to the content of an earlier ET1 also under appeal, and which
G had been provided in time.

H 72. There is no duty on the EAT to alert an Appellant to problems. There is, rather, a duty on an Appellant, if in doubt, to check that everything has been received: Haydar v Pennine NHS Acute Trust [2018] EWCA Civ 1435.

A 73. In Jurkowska the Registrar, and then the Judge, allowed a 33-minute extension for
B sending the EAT a copy of the Tribunal's Judgment where the Reasons had been sent in time,
and solicitors had failed to appreciate that the separate terms of the Judgment itself had been
C given to counsel at the Tribunal hearing, but not passed on. The Court of Appeal upheld this
exercise of the discretion, but, it is plain from their judgments, not without some hesitation.

74. Extensions have been upheld, or granted, on appeal, with less hesitation, in cases where
C it has been concluded that, for one reason or another, the would-be Appellant has been undone
by a turn of events which was not reasonably foreseeable and/or not sufficiently within their
control, as in Peters v Sat Katar Limited [2003] ICR 1547 (Notice of Appeal took eleven days
D to arrive in the post) and Farmer (above) (appeal 8 minutes late following a series of
unforeseen developments, thwarting plans A, B and then C). J v K and another (above)
E provides, in my view, a further such example. There, the institution of the appeal was only
completed one hour late, because of the limits to the size of an attachment to a single email, that
the EAT's server could accept. The Court of Appeal considered, having regard to the fact that
this could not be reasonably anticipated by the Appellant, and was not within his control, but
F was a feature of the EAT's own systems, that he should have been granted an extension.

Submissions

G 75. I have considered all the points made in the written skeletons prepared before the
hearing before me, oral submissions at the hearing, and the supplementary written submissions
tabled after. I do not set them all out here. The main points, in summary, were these.

H 76. For the Respondent, Ms Ling submitted that, until the Thursday evening before the
Monday on which the appeal deadline fell, Satish Kumar reasonably thought that the

A submission of the appeal papers was going to be dealt with by counsel or counsel's clerk. It was also not his fault that, when the task fell to him, he was having to deal with a family bereavement at the same time, and did not have the capacity to scan the documents at home.

B All of that fully explained why he ended up having to deal with the matter on the very last day.

C 77. Satish Kumar had also made a genuine mistake in sending the ET1 and ET3 to Mr Kapur, and, in all those circumstances, that should be forgiven. If the emails he did send to the EAT took an hour to arrive, he could not have foreseen that. In any event, his failure to appreciate that there was a 4pm deadline should, in these circumstances, be forgiven. There was nothing to alert him to the fact that the ET1 and ET3 had not been received by the EAT

D when he spoke to the EAT on 25 April. This case bore similarities to **Jurkowska, Peters, Farmer, Sud and J v K**. If there was not a good reason for the delay, then there were exceptional circumstances. This was also not a case where there were, in any event, no

E arguable grounds of appeal.

F 78. For the Claimant, Mr Lawrence submitted that Litigants in Person are not generally entitled to greater indulgence; and the Respondent had in any case had access to legal advice throughout the period allowed for an appeal. Even if it was right to focus on the period from the Thursday evening before the last day, then, notwithstanding the family bereavement that he was also dealing with, there was still ample time for Satish Kumar to have submitted the appeal

G notice, and all the required documents, on time. His explanations for the failures to submit the documents that were sent on the last day, on time, and in particular, for the failures to send the ET1 and ET3 to the EAT on 23 April, were not sufficiently clear or satisfactory. It was

H particularly concerning that he maintained in cross-examination that the email sent to Mr Kapur

A had been intended for the EAT, when that was simply not credible. His oral evidence on this was evasive.

B 79. This case was not similar to any of those relied upon by Ms Ling. Mr Kumar was not thwarted by events which could not have been foreseen, or technical problems which were outside his control. Albeit he was under some unforeseen pressure, at best for the Respondent, submitted Mr Lawrence, this was a case of simple carelessness and incompetence. That did not amount to a good excuse, nor to exceptional circumstances.

C
Discussion and Conclusions

D 80. This appeal was out of time for two reasons. Firstly, the documents which were sent to the EAT on the last day were only received after 4pm. Secondly, the ET1 and ET3 were not sent on that day at all, but only on 22 May 2018.

E 81. First, for completeness, I should say that this is *not* a case where it is obvious to me that all of the substantive grounds in the Notice of Appeal are so manifestly hopeless, that this is a case where such a lack of merit should militate against the exercise of the discretion in the Respondent's failure. I therefore need not go into the substantive grounds.

F
G 82. Next, while it may be said that it was perhaps somewhat imprudent for the Respondent to have taken as much time as it did to come to a decision as to who to instruct in connection with the appeal, there was still, once that was decided, comfortably enough time for the appeal to be prepared and submitted in good time. While it might be said that Mr Kumar could have been somewhat more diligent in sending counsel the papers, during this period he was also having to cope with extreme family circumstances, and there *were* regular communications

A with counsel and/or his clerk about this. Given his specific exchanges with counsel’s clerk, it
was also reasonable for Satish Kumar to believe that counsel, or someone at his chambers,
would be dealing with the actual business of submitting the appeal – until the conversation on
B the evening of Thursday 19 April 2018.

C 83. What really put a different complexion on matters, in a way which Mr Kumar could not
have reasonably foreseen up to that point, was being told, on the Thursday evening, that counsel
could not deal with the filing of the appeal – with the consequence that, one way or another, he
was going to have to sort out it out himself. I allow, in the Respondent’s favour, that Mr Kumar
had to deal with matters without personally having had the benefit of any warning, time to
D prepare, or guidance, until then.

E 84. As to Mr Kumar’s failure to appreciate that there was a specific deadline of 4pm on the
last day for filing the appeal, this, Mr Lawrence rightly submitted, is information that can be
gleaned from the EAT’s rules and procedures, by following the guidance to which the letter
sending out the Tribunal’s Decision directed the reader, and/or by searching online. Ordinarily
there can be no good excuse for a Litigant in Person failing to appreciate this.

F
G 85. However, in relation to this specific aspect, it was, in my view, significant that, until that
Thursday evening, Mr Kumar believed that the institution of the appeal was going to be dealt
with by counsel or counsel’s chambers. In those circumstances it seems to me entirely
understandable that he had not done any independent checking or research on the details of the
process himself. Further, while counsel reminded him of the importance of not missing the last
H day for filing the appeal, and of including all the required documents (and where the list of

A those was to be found), his attention was not specifically drawn at that point, by counsel or his clerk, to the 4pm deadline.

B 86. I also accept that it was not Mr Kumar's fault that, on the Friday, he had to devote time to attending to what was clearly a very important family matter, nor that he did not get the documents, or realise that he could not manage to deal with scanning the volume of documentation at home, until the weekend, so that he then had to deal with getting all of that
C done at Print Plus on the last day. I also consider that, *given* that he believed he had the whole day, Mr Kumar went to the Print Plus office reasonably promptly that morning. Nor was there anything that he could really do about the overall time that it turned out to take them to
D complete the scanning work.

87. Mr Kumar was not undone by emails taking longer to transmit than he could have predicted, nor by thinking that it was an hour earlier than it in fact was (there was no suggestion that he noticed, or paid any attention to, the timings being shown on any device). Rather, he simply failed to appreciate that there was a 4pm deadline at all. Further, apart from the ET1 and the ET3, in the event, all of the required documents were, in fact, received at the EAT by
E about half an hour after the deadline. The two further emails sent by Mr Kumar later in the evening did not in fact add any essential documents.
F

G 88. In all those circumstances I consider that there was a good excuse (or exceptional circumstances) in respect of the late receipt at the EAT of those required documents which were in fact sent to the EAT on 23 April 2018. If an extension had only been needed in respect of the required documents received that day, I would have granted it.
H

A 89. However, I turn to the failure in relation to the sending of the ET1 and ET3.

B 90. First, for good order, I note that this was not a case where Mr Kumar did not have these documents at this point (in which case the Rules would have allowed him, instead, to send a timely explanation of that fact). Nor was there any technical or other practical reason why he (or Mr Kapur) could not have attached them to an email to the EAT.

C 91. Secondly, it was not suggested by Mr Kumar, that he did not know, on 23 April, that the required documents included the ET1 and ET3. On the contrary, his case – throughout – was that he did know this, and in fact for some time thought that he had sent them. Further, and in any event, unlike the position in relation to the 4pm deadline, he was specifically reminded by counsel of the importance of sending all the required documents to the EAT, as listed in the Notice of Appeal. So, had he not taken on board that these included the ET1 and ET3, and not sent them to the EAT for that reason, that would not have been an excusable failure.

D 92. Once again, I am prepared to accept that *some* allowance should be made for the fact that Mr Kumar was having to deal, at this time, with unavoidable and extreme family circumstances, which were demanding both in terms of his time, and, I entirely accept, emotionally and in terms of personal stress. However, while making all such allowance, I am also bound to say that, ultimately, it only required a modicum of care and attention – and not very much time – to go through the list of required documents, and to ensure that each of them was attached to an email to the EAT, correctly addressed to it, and duly sent.

E 93. I am also of the view that even if (contrary to what I have found to be the case) Mr Kumar *had* intended the email that he sent to Mr Kapur, to go to the EAT, and sent it to Mr

A Kapur by accident, that would simply have been an act of carelessness, which would have been wholly avoidable, and should have been avoided, given the importance of the matter, and the few moments it would have taken to check the addressee.

B 94. Nor has Mr Kumar's own account or evidence assisted me in fact to get to the bottom of precisely why these two documents were not sent to the EAT. As I have said, I accept that, until 22 May 2018, he did not realise that the EAT had not been sent them. But, even when it was raised with him that day, and he went back to look at the emails, he maintained that he *had* sent them to the EAT on 23 April, when it should have been clear to him that that was wrong; and when *that* was pointed out to him by his own counsel, he still maintained that it had been *intended* for the EAT, when, again, on careful consideration, it should have been obvious that that looked not to be right. Even when he was, in live evidence, taken to the documents in question, and all these points were put to him, he was still unwilling to acknowledge that this explanation was even problematic.

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D
E
F 95. Given that, for reasons which I have stated, I do not accept that misdirection *is* the explanation why the EAT was not in fact sent these documents, I am left without any clear or specific explanation for why they were not sent. I can speculate that Mr Kumar simply failed to take enough care to check what he had sent and what he had not sent, or possibly that, for whatever reason, he thought that Mr Kapur had sent them. But that would only be speculation. **G** In any event, once again making due allowance for all the circumstances, anything of that sort would, it has to be said, still amount also to avoidable carelessness.

H 96. What of Mr Kumar's failure to appreciate that the EAT was lacking these essential documents until 22 May? As to the email sent by the EAT at 18.00 on 23 April, as I have

A found, on balance I think the failure to see or read this was down to some form of carelessness
or inattention on the part of Mr Kumar. But, even if it was never received by him, that does not
assist the Respondent's case, nor does the fact that he was not alerted to their absence when he
B got the case number from the EAT a couple of days later. That is, essentially, for the following
reasons.

97. First, there was, in any event, no sufficient good reason why the documents were not
C sent in time in the first place. Secondly, it was not the EAT's responsibility to draw their
omission to the Respondent's attention. Thirdly, it would have been a simple matter for Mr
D Kumar specifically to ask the EAT, in a call, to confirm that *each* of the required supporting
documents (as well as the Notice of Appeal) had been received by it. Given that, not only had
it not received the ET1 and ET3, but it had already sent out an email raising this, there can
really be no doubt that, had it been asked *specifically* to confirm if it had those documents, the
EAT would have informed him that they were missing. Even making due allowance for him
E being preoccupied until the day after the funeral on 24 April, he could have done that when he
spoke to the EAT on that next day.

F 98. In summary, this case does have *some* similarities to some features of the other cases in
which an extension was granted, and on which Ms Ling relied. I accept that it was not
reasonably to be anticipated, or within Mr Kumar's control, that he would find himself having
G to deal with the submission of this appeal, only as of the Thursday before the Monday on which
it was due; nor that he would have to deal with this at the same time as attending to a distressing
and also time-critical family matter; nor that he would have to get documents scanned, before
they could be sent, on the very last day. The Respondent also had what amounted to an
H acceptable reason (or there were exceptional circumstances) justifying the grant of indulgence

A in relation to the failure to appreciate, and meet, the 4pm deadline in respect of those documents sent that day.

B 99. However, in respect of the failure to send the ET1 and ET3 on time, and/or indeed to realise sooner than Mr Kumar did, that they had not been sent, I am bound to conclude that, making all due allowance for all the circumstances I have described, this was the result of one or more acts of avoidable carelessness or lack of sufficient proactive attention to the matter.

C Applying the well-established, and recently again confirmed, approach to such matters taken in the EAT, I cannot conclude that there was a sufficient explanation for this as would excuse it, nor that there are any other circumstances, sufficiently strong to be treated as exceptional.

D

Outcome

100. For all these reasons I decline to grant the extension of time that would make the instigation of this appeal in time.

E

101. The appeal is therefore dismissed.

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