Appeal No. UKEAT/0035/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDINGS, 7 ROLLS BUILDING,FETTER LANE LONDON EC4A 1NL

At the Tribunal
On 28 May 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

RED NINJA LTD — APPELLANT

MR R SUCCU — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR LEE OMAR (The Appellant in Person)
For the Respondent	MR RICCARDO SUCCU (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE – Appearance/response

Following the termination of his employment, the Claimant in the Employment Tribunal claimed in respect of unpaid wages for the final month of employment and three days' accrued but unused holiday pay.

A proposed response form was submitted late. The Respondent also applied for a postponement of the date fixed for the Full Merits Hearing. The Respondent was only notified the working day before the hearing that that application would be considered at that hearing itself. At the hearing (which the Respondent, whose two employees were both in the USA, did not attend) the Judge rejected the out of time response, and refused the postponement application. The Judge made awards in respect of the wages and holiday pay claims, but also, on his own initiative, made a further award of four weeks' net pay in respect of notice.

The Respondent's appeal against the rejection of the late response failed. No application for an extension of time had been made and the Judge was obliged to reject it. Even had he had a discretion, he would have been entitled to reject it on the basis that no explanation for the response being late was advanced, and that there was no arguable defence to the wages and holiday pay claims.

The Respondent's appeal against the decision not to postpone the Tribunal hearing succeeded in part. In all the particular circumstances of this case, it was potentially unfair to have refused the application only at the hearing. However, the Tribunal was entitled, given the rejection of the late response, to make awards in the absence of the Respondent in respect of the wages and

holiday pay claims, the amounts of which were a matter of straightforward calculation. **Office Equipment Systems Limited v Hughes** [2019] ICR 201 applied.

However, the Tribunal erred in making a further award in respect of breach of contract damages notice monies to the Claimant, over and above the wages and holiday pay awards when (a) on examination no such additional claim appeared in the original claim form; (b) the Respondent was not on notice that such an award might be contemplated; and (c) the basis for it was in any case unclear, having regard to the contents of the Claimant's claim and witness statement. As the EAT could not be sure, however, that only one outcome on this aspect was possible, and the parties did not agree to the EAT finally determining the matter, this award would be quashed and this aspect, only, remitted to the Employment Tribunal.

HIS HONOUR JUDGE AUERBACH

1. I shall refer to the parties as they were in the Employment Tribunal ("ET") as Claimant and Respondent. This appeal is brought by the Respondent.

2. The Claimant presented a claim form on 20 July 2018. He claimed that he was employed by the Respondent as a Project Manager from 1 January 2017 to 31 March 2018. He ticked the boxes to indicate that he was claiming notice pay and holiday pay. He gave his pay as £2,500 per month. In answer to the question, "Did you work (or were you paid for) a period of notice?" he ticked the "Yes" box. In box 9.2, which asks: "What compensation or remedy are you seeking?", he wrote: "I'm seeking to receive my final salary (March 2018) and holiday pay for a total of £2,208.81. This amount has been calculated by Red Ninja Limited."

3. In his particulars of claim, the Claimant asserted that the Respondent's CEO, Mr Omar, had informed him on 22 February 2018 that it had decided to terminate his contract because of lack of work coming in and the need to save money. He went on to assert that it was subsequently agreed that his contract would terminate on 31 March 2018 and that he, "worked throughout my notice period." He also wrote that he should be paid for three days' unused holiday entitlement, "outstanding at the effective date of termination." The particulars went on to assert that on 29 March 2018 the Claimant did not receive his salary and payslip. He referred to his contract providing that his salary was £30,000 per annum payable monthly on the last day of each month in arrears. He wrote, "The company breached my employment contract by failing to pay my final salary including holiday pay."

4. The Claimant went on to refer to allegations being raised about his conduct, which he denied, and that it was asserted that he had received compensation for a delayed flight that he should have paid into the business, which he also disputed. He reasserted at the end of his narrative that he sought, "the payment of all outstanding wages and the holiday pay," and that he had not authorised or consented to any deduction from his wages, and that there was no provision in the employment contract, or any other reason, for the company to make reductions or retain his final wage payment or holiday pay. The Claimant did not have a representative. He was acting in person.

5. Notice of the claim was served on the Respondent requiring it to submit any response by 24 August 2018, but it did not do so. The parties were also given notice that a date had been set for the hearing of 8 October 2018. A proposed late response form was submitted to the Tribunal on 11 September 2018. In the box which asks a question about the ACAS early conciliation process, this asserted that the Claimant had failed to mention, "the reason we have withheld payment," being that he had dishonestly withheld $10,000 due to the Respondent.

6. The Respondent set out its case that the Claimant had secured new business for it from a customer in Mexico City, but then signed the contract in his personal capacity. It asserted that because it had not received payment of $10,000 from the customer, which should have come to it, it had to, "close our office and lay off most of our staff." It indicated that it wished to counter claim, and that it intended to issue a counter claim, for that sum. The Respondent also had no representative and was acting in person through Mr Omar. In the box which asks, "Do you have a disability for which the tribunal might need to make some adjustment?", "Yes" was ticked and "ADHD and Autism spectrum disorder" was written.

7. On 11 September 2018 Mr Omar also emailed the Tribunal. As I have explained, he was already aware that a Hearing date had been set for 8 October. He wrote,

> **"We have had to close our office in Liverpool while I am based in the US until December. We are currently working with ACAS as we have issued a counterclaim to the Claimant for breach of contract. I would like to attend the ET in person in Liverpool. I will not be able to be in Liverpool for the proposed date in October and request we postpone the ET for a date that I can attend. Is it possible to arrange a date that is suitable so that I can attend, please?"**

8. He received initially an auto response. As part of his appeal, he has indicated that he attempted to follow up on this request with the Tribunal by telephone, but was told initially that the IT systems were down and that his call could not be logged; and that he followed up with three more calls, but got the same response.

9. On 5 October 2018 the ET emailed the parties as follows: "Regional Employment Judge Parkin has instructed me to advise the parties that the Hearing listed on Monday 8 October 2018 will proceed and the application to present the response and counterclaim out of time will be considered at the Hearing in the absence of the Respondent." The hearing indeed went ahead on 8 October 2018 before EJ Tom Ryan. The Claimant attended in person. There was no attendance or representation for the Respondent. The Tribunal's Written Judgment and Reasons were produced and signed by the Judge that same day and sent to the parties on 10 October 2018.

10. The Judgment was as follows:

> **"1. The response submitted to the tribunal on 11 September 2018 is rejected.**
>
> **2. The application by the respondent for a postponement of the hearing is refused.**
>
> **3. The claimant's complaints of unauthorised deductions from wages, unpaid holiday pay and breach of contract are well-founded.**
>
> **4. The respondent is ordered to pay the claimant compensation in respect of those complaints collated as follows:**
>
> **<u>Unauthorised deduction from wages</u>**
>
> **Salary for the month of March 2018 (gross) £2,500.00**

Unpaid holiday pay

Three days' gross pay (based on weekly pay of £576.92) £346.15

Unpaid contractual notice pay

Four weeks' net pay (based on weekly pay of £455.40) £1,821.40

5. The respondent is ordered to pay the resulting sum of £4,667.55 to the claimant on or before 16 October 2018."

11. The Reasons were short and it is most convenient simply to set them out in their entirety.

"1. By a claim presented to the tribunal on 20 July 2018 the claimant alleged that the respondent had made unauthorised deductions from his wages by failing to pay salary for the month of March 2018, notice pay or accrued but outstanding holiday pay.

2. The claim was served upon the respondent which was required to submit a response by 24 August 2018. It failed to do so. A response was submitted on 11 September 2018. The response disputed the claims but did not set out any basis upon which it was entitled to do so maintaining only that it had a counterclaim for breach of contract. No explanation was given for the late service of the response nor•was any application for an extension of time to serve a response made.

3. The respondent by an email of the same date applied for a postponement of the hearing on the ground that it was trading in the United States of America until December. Again, no factual basis was given to establish why the proceedings could not be conducted by someone acting on behalf of the respondent.

4. Accordingly, I considered whether the response should be accepted having regard to the provisions of rule 18 of the Employment Tribunal Rules of Procedure 2013. In the absence of an explanation for the delay in serving the response nor any application for an extension of time to do so, I rejected the response. In doing so I had regard to the overriding objective, the failure to plead any basis to contest the claims on their merits and the fact that the respondent has the right to request a reconsideration of the rejection of the response and indeed this judgment.

5. The attention of the respondent is drawn to rules 19, 20 and 21 which set out the procedure for a respondent whose responses been rejected to apply for reconsideration, an extension of time and the effect of rejection of a response on the proceedings.

6. Substantially, for the same reasons I rejected the application to postpone the hearing. In addition, I did so for the matters set out in paragraph 3 above.

7. In reaching those conclusions I had regard to the fact that a claimant is entitled to establish a claim and the respondent a counterclaim if they can do so but the tribunal will enter judgment for both parties leaving any matters of set-off to be resolved between them.

8. Although the claimant provided me with an argument for maintaining that the counterclaim was manifestly ill founded I did not make the decisions to reject the response (and the counterclaim which is included within it) or to refuse the application to postpone for that reason. Because the response has been rejected and the counterclaim is therefore treated as not having been made it would be open to the respondent, for example, to pursue its counterclaim as a freestanding claim for breach of contract in the civil courts. I therefore consider that its rights were fully protected in respect of the counterclaim.

9. Furthermore, proceeding in this way protected the claimant's rights to have a remedy for the elements of his claim since they had not been separately disputed upon their merits.

10. The claimant produced before me a witness statement and a small bundle of documents. His account was that he had not been paid for his final month's salary. Mr Omar for the

respondent had not suggested this was because of any breach of contract but the lack of the means to pay.

11. I accepted the claimant's account that he had worked for that month. His annual salary was £30,000. He was entitled to £2500 per month which I awarded gross and which may be taxable in his hands.

12. I also accepted the claimant's account that he was not given contractual notice. The contract provided for four weeks' notice. I derived the claimant's net weekly pay using the payslip for February 2018 which the claimant produced before me. The sum set out above reflects four weeks' net pay.

13. The claimant accepted that he had taken all of his contractual holiday entitlement in the holiday year 1 April 2017 to 31 March 2018 except for, so far as he recalled, three days. He was unable to access his records showing the amount of holiday he had taken since his access to his email account had been deleted upon termination. I thought it probable that the claimant's account of three days holiday owing to him was truthful and likely to be accurate and therefore awarded him three days' gross pay on that basis."

12. The Respondent appealed that decision to the EAT, again acting in person. The Notice of Appeal challenged the Tribunal's Decision to reject the late response. The Notice of Appeal accepted that the response was late, but set out a number of reasons why. These included steps that the company had to take during the period leading up to the deadline, to rationalise its operations, including in relation to staff and the lease of some premises, relocating the remaining team to the USA, Mr Omar also having to move home during this period suffering from stress related exhaustion and the effects of the impact of his autism and ADHD. It went on to say that he was also having to deal with matters being raised by the Claimant allegedly on the internet and GDPR requests which had been put in by the Claimant.

13. The Notice of Appeal also challenged the decision not to postpone the hearing. Again, it set out a supporting case saying that the two employees of the Respondent, which was a very small business and details were given, had had to relocate to the USA around this time; and it set out the Respondent's account of the various phone calls to the Tribunal and being told that the IT systems were down and the eventual email received on Friday, 5 October 2018.

14. The Notice of Appeal was in the usual way referred to a Judge for initial consideration on paper. On this occasion, the Judge happened to be me. Upon consideration, my opinion was that the challenge to the decision not to accept the late response was not arguable, but the appeal was arguable in relation to the decision not to postpone the hearing.

15. Unfortunately, by oversight, the Respondent was not notified at the time of my view in relation to the decision not to accept the late response and, therefore, was not told of the right to seek a hearing under Rule 3(10) of the EAT's rules.

16. The Claimant put in an Answer, he too acting, in relation to this appeal, in person. In that Answer, he indicated that he would rely on the ET's Reasons for its decision, but also made a number of further points. In particular, he noted that, regarding the refusal to accept the late response, the Respondent could have requested a reconsideration under Rule 19 of the **Employment Tribunals Rules of Procedure 2013;** and said that the Respondent had failed to inform him of its application for postponement and had not followed the **Presidential Guidance 2013** on postponement requests. He also disputed various other allegations made against him in the Notice of Appeal.

17. Written skeleton arguments were tabled by both parties in the run up to this hearing and I have heard oral arguments from them both during the course of this morning.

18. The Respondent's skeleton argument, as well as addressing the Decision not to accept the late response and the Decision not to postpone the ET hearing as such, also raises issues about the Tribunal's Decision to make a breach of contract award in respect of four weeks' notice pay, over and above the wages and holiday pay awards, which the Respondent says was

wrong. I should note that the Claimant's Answer and skeleton argument also raises issues about the enforcement of the judgment, but these are not relevant to my consideration of this appeal as such.

19. When I was preparing for this hearing, it came to my attention that the Respondent had not been notified of my preliminary view on the grounds of appeal relating to the rejection of the late response and, hence, had not had the opportunity to seek a Rule 3(10) Hearing. I caused an email to be sent to the parties alerting them to this and I discussed this matter with them both at the start of this hearing. That was, in particular, because it was clear to me that, whilst the Respondent in his skeleton had advanced and prepared arguments in relation to both grounds of appeal, the Claimant had focussed mainly on the ground relating to postponement, although he did also touch on the ground relating to the rejection of the late response.

20. At the start of the hearing, the Claimant confirmed, however, that having been alerted to this matter, he had come prepared to argue both points; and after discussion with both parties, it seemed to me that the sensible and fair way forward was simply for me to hear argument from both sides on both grounds before coming to a decision. It was not necessary first to take the fence of reconsidering, having heard from the Respondent only, whether the ground related to rejection of the late response was arguable, as there was no prejudice to either side in simply hearing arguments from both of them on both grounds and then deciding them both. I did indeed hear full oral argument from both parties during the course of this morning.

21. I turn to set out the relevant provisions of the **Employment Tribunals Rules of Procedure 2013**, which are as follows.

Overriding objective

2.--The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

…..

Response

16.— (1) The response shall be on a prescribed form and presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal.

(2) A response form may include the response of more than one respondent if they are responding to a single claim and either they all resist the claim on the same grounds or they do not resist the claim.

(3) A response form may include the response to more than one claim if the claims are based on the same set of facts and either the respondent resists all of the claims on the same grounds or the respondent does not resist the claims.

…..

Rejection: form presented late

18.— (1) A response shall be rejected by the Tribunal if it is received outside the time limit in rule 16 (or any extension of that limit granted within the original limit) unless an application for extension has already been made under rule 20 or the response includes or is accompanied by such an application (in which case the response shall not be rejected pending the outcome of the application).

(2) The response shall be returned to the respondent together with a notice of rejection explaining that the response has been presented late. The notice shall explain how the respondent can apply for an extension of time and how to apply for a reconsideration.

Reconsideration of rejection

19.— (1) A respondent whose response has been rejected under rule 17 or 18 may apply for a reconsideration on the basis that the decision to reject was wrong or, in the case of a rejection under rule 17, on the basis that the notified defect can be rectified.

(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and it shall state whether the respondent requests a hearing.

(3) If the respondent does not request a hearing, or the Employment Judge decides, on considering the application, that the response shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the respondent.

(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the response shall be treated as presented on the date that the defect was rectified (but the Judge may extend time under rule 5).

Applications for extension of time for presenting response

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

(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.

(3) An Employment Judge may determine the application without a hearing.

(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside.

Effect of non-presentation or rejection of response, or case not contested

21.— (1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.

(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.

(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.

…..

Correspondence with the Tribunal: copying to other parties

92. Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.

22. There is **Presidential Guidance** in relation to Rule 21. As has been correctly raised by the Claimant, there is also **Presidential Guidance** on applications for postponement issued in 2013. I do not need to set it all out, but, in summary, the salient points are that it indicates that a party seeking a postponement should, if possible, raise the matter and seek agreement from their opponent in the first instance; and it also refers to the need to notify the other party of the application to the Tribunal and to give reasons for it.

23. I turn first to the appeal against the decision to reject the response. As I have described, in its Notice of Appeal, the Respondent accepted that the response was tabled two weeks late. In fact, it was about two and a half weeks, but in its Notice of Appeal it put forward an explanation for why that had occurred. In its skeleton argument, the Respondent refers to the case of **Kwik Save Stores Ltd v Swain** [1997] ICR 49 and also to the case of **Office Equipment v Hughes**, the pertinent decision on this point being the Decision of the Employment Appeal Tribunal, UKEAT/0183/16, although as I will describe, the case went on to the Court of Appeal [2019] ICR 201.

24. The **Kwik Save** Decision is relied upon in support of the proposition that, in deciding whether or not to grant an application to extend time for entering a late response, the absence of a good explanation for why the response was entered late is not necessarily in all cases, by itself, determinative. Other potentially relevant matters include the merits of the proposed defence, the length of delay and overall potential prejudice to the parties of granting or refusing the application. In the case of **Hughes**, there had been two strands to the respondent's proposed case and the Tribunal below, when deciding whether to extend time, had considered the merits of only one of them, and was found to have erred in failing to consider the merits of the other. In oral argument today, Mr Omar also referred to the similarly named, but different case of **KLT Construction v Swain** UK EAT 0527/09, but it makes essentially the same point.

25. Mr Omar submitted that, here, the ET erred in not considering the merits of his proposed response when deciding not to accept it. The Claimant says that the Tribunal was right to conclude that the Respondent simply did not raise any proper or valid defence in the proposed response, because, even if his company had a claim against the Claimant (which was

itself disputed), Mr Omar was wrong to suppose that any award on such a claim would fall to be set off against any award on the Claimant's claims, if well-founded.

26. My decision is this.

27. Firstly, I refer to the guidance given in **Hughes** in relation to the approach to be taken to an application to extend time in respect of a late response, including citation by the EAT of the relevant passage from **Swain**, as follows.

> **22. It was common ground before the ET that the principles to be applied when considering an application for an extension of time for presenting a response are those set out by Mummery J (as he then was) in Kwik Save. Those principles require that all relevant documents and other factual material must be put before the ET to explain both the non-compliance and the basis upon which it is sought to defend the case on its merits, and an Employment Judge, exercising their discretion, must take account of all relevant factors, including the explanation, or lack of explanation, for the delay, the merits of the defence and must reach a conclusion that is objectively justified on the grounds of reason and justice, taking into account the possible prejudice to each party. Specifically, Mummery J provided the following guidance:**
>
> **"*The discretionary factors***
>
> **The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default. In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.**
>
> **In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. The process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice. An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer if the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour in granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgment that often renders the exercise of a discretion more difficult than the process of finding facts in dispute and applying to them a rule of law not tempered by discretion.**
>
> **It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham MR in *Costellow v Somerset County Council* [1993] 1 WLR 256, 263:**
>
> **"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate."**

> **Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a notice of appearance, the industrial tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. This does not mean that a party has *a right* to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case."**
>
> **23. Before me, for the Claimant it has been urged that following the stricter approach to breach of Court rules and directions now taken in the Civil Courts (see, for example, Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537) it would be legitimate for the ET and the EAT to determine an application for an extension of time solely on the basis of the Respondent's default. Allowing that the Civil Procedure Rules do not directly apply in ET proceedings, there is certainly authority for stating that ETs are entitled to take a stricter line than previously (see Harris v Academies Enterprise Trust and Ors [2015] ICR 617 EAT per Langstaff J, in particular at paragraphs 39 and 40; and, in relation to Tribunals more generally, see BPP Holdings v Commissioners for Her Majesty's Revenue & Customs [2016] EWCA Civ 121, per Ryder LJ (Senior President of Tribunals), in particular at paragraphs 37 and 38).**
>
> **24. Where a Respondent seeks to appeal to the EAT in respect of an extension of time, paragraph 19 of the EAT Practice Direction 2013 applies. The Notice of Appeal must then include particulars showing that there is a good excuse for the Respondent's failure to present its response and that there is a reasonably arguable defence to the claim. In order to satisfy the EAT on these matters, the Respondent needs to lodge, together with the Notice of Appeal, a witness statement explaining in detail the circumstances of the failure, the reason for it and the facts and matters relied on for contesting the claim on the merits. There is also to be exhibited to the witness statement all relevant documents and a completed draft response.**

28. Reference is made there to the EAT's then **Practice Direction 2013,** and I interpose that the **EAT's 2018 Practice Direction** makes similar provision at paragraph 18.

29. In the present case, the Appellant did not put in a response in time. Further, its email to the Tribunal of 11 September 2018 did not, in fact, apply for an extension of time to do so, as opposed to the distinct matter of seeking a postponement of the 8 October hearing date. Mr Omar confirmed today, as reflected in his documents, that, when he rang the Tribunal, it was to chase and follow up on his request for a postponement of the hearing, not to advance an application for an extension of time in relation to the late response. I do note that the contents of the email from the Tribunal of 5 October suggest that EJ Parkin may have been under the impression that there was an application for an extension of time in relation to the late response,

A but, be that as it may, there was none. Rule 20 of the 2013 rules states in terms, furthermore, that such an application, if made, shall be in writing and, indeed, copied to the claimant and also, shall set out the reason why the extension is sought as well as providing a draft response. The Respondent only did the last of these, by sending in its proposed response form.

B

30. I note that one consequence is arguably that, in relation to this appeal, paragraph 18 of the EAT's Practice Direction applies and the Respondent has not fully complied with it. However, I bear in mind again that he was not given notice that, after consideration on paper, I considered this part of the appeal to be unarguable. Hence, there has been no Rule 3(10) Hearing in this case at which such matters might have been raised, and thereafter addressed.

C

D

31. But in any event, I do not have to come to any final view about these procedural aspects of the conduct of this appeal in the EAT, as I have concluded that this limb of the appeal, namely challenging the decision to reject the response, must fail on its merits. That is for the following reasons. Firstly, to repeat, the Judge was correct to say that there was, in this case, no application for an extension of time in respect of the late response, whether accompanying or contained in the late response form itself. That was not addressed either in that document or in the email of 11 September 2018. As I have noted, the rule required any such application to be made in writing, to be supported with reasons as well, and copied to the other party.

E

F

G 32. The wording of Rule 18(1) begins, "A response shall be rejected by the Tribunal if it is received outside the time limit … unless an application for extension has already been made or the response includes or is accompanied by such an application." That is mandatory. The rule did not merely empower the Judge to reject the response. He was required by Rule 18(1) to do so. In my judgment, that point in and of itself disposes of the appeal in respect of the rejection

H

of the response. The Judge was right to reject the response because it was late and there was no application for an extension of time, or certainly no compliant application.

33. The Judge also fairly and properly drew the Respondent's attention, by his decision, to the right to seek a reconsideration of that Decision, something which it could have done, notwithstanding that it was not present or represented at the hearing, once the Judge's written decision was received and it was promulgated on 10 October; just as, indeed, it could have done so had the Judge issued a Decision on paper rejecting the late response.

34. In any event, and for good order, I turn to consider the arguments as to whether the Judge erred in law in his substantive Decision, assuming, contrary to my view, that he had some discretion in the matter. As the Judge correctly noted, no explanation was provided to the ET for the lateness of the response at all. One has been advanced before the Employment Appeal Tribunal, but the Employment Judge had to reach his Decision on the basis of the information available to him at the time.

35. Further, the Judge did, in fact, engage with the merits of the proposed response. He noted that the Respondent had indicated that it intended to bring a counterclaim on the basis that the Claimant owed it money, but otherwise gave no basis for defending the claims. The view that this was not an arguable defence was one that the Judge was fully entitled to take. The Respondent acknowledged in the document that, "we have withheld his payment," and sought to rely solely on the proposition that it had a counterclaim. It said nothing else about the wages or indeed the holiday pay claims. The Judge was entitled to take the view that the assertion of a counterclaim did not provide an arguable defence to the claims for wages and holiday pay, because it was wrong to assume that the Respondent would have a right of set off.

It was not suggested or argued by the Respondent, in the proposed response, that the Claimant had agreed to deductions in respect of any such matters being made from his wages, whether in his contract or otherwise.

36. Although, as I have described, the Judge made a distinct award in respect of notice by way of damages for breach of contract, over and above the wages and holiday awards, there was, on examination, no such distinct and additional claim in the claim form. How this came about will be relevant when I turn to the appeal in relation to the postponement application, but for present purposes, the salient point is that the Judge was correct, as such, to take the view that the response form contained no arguable defence to the two claims in the claim form, being for the March wages and the holiday pay.

37. At best, for the Respondent, it might be argued that the Judge ought to have said something specifically about the extent of the lateness of the response and any potential prejudice to the Claimant arising from that, as such. However, the Judge referred to the dates when the response was due and when the proposed response was presented, so he plainly had them in mind; and in any event, he would have been entitled to proceed on the basis that the absence of any explanation for the lateness of response, or any arguable defence to the wages and holiday pay claims, were decisive against granting the extension in any event.

38. Even had I thought that the Judge had some discretion in the matter of whether to extend time, I would not, therefore, have considered that, in exercising that against the Respondent, he erred in law. But I repeat that, in any event, I consider that, there being no application to extend time, he was bound to reject the response.

A 39. For all those Reasons, the appeal against the Judge's Decision to reject the response is, therefore, dismissed.

B 40. I turn to the appeal against his Decision to refuse the Respondent's application to postpone the hearing. As I have said, the grounds of appeal expand on what was in the 11 September 2018 email, referring to the Respondent having only two employees, both of whom were in the US on the date of the listed hearing. The Respondent's skeleton argument also C emphasises that the first substantive response received from the Tribunal, despite efforts to chase, was on the working day before the hearing. It argues that this unfairly infringed its right to a fair trial. It also argues that the Claimant misled the Tribunal as to the amounts that he was D owed and refers to the CEO's disabilities mentioned on the claim form. Reference is also made to the case of **Hibbert v Apple Europe Ltd** [2012] UKEAT/0134/11, in which a Tribunal was found to have erred by not weighing in the balance, when going ahead to determine remedies in the absence of a claimant, the information it had about his inability to attend the hearing in E question because of an emergency involving his young child.

F 41. Specifically, in relation to the award for breach of contract, in respect of unpaid notice pay, over and above the wages and holiday pay awards, the Respondent says that this was wrong, because the Claimant had agreed to work a six-week notice period running to the end of March, and reference is made to email exchanges taking place in early March 2018 to that G effect.

H 42. The Claimant's Answer highlights a number of points, including that the Tribunal did not debar the Respondent from attending the hearing, but refused to postpone it. Again, it is noted that the Respondent did not inform the Claimant of its application for a postponement and

did not comply with the **Presidential Guidance**. Further, it is said, by reference to paragraph 19 of the **Hughes** Decision in the Court of Appeal, that there is no absolute rule that a debarred respondent is always entitled to participate in a Remedy Hearing. This, says the Claimant, was a straightforward claim for a small liquidated sum where such participation was not necessary. Further, the Judge had had regard in any case to the contents of the out of time response, and the Respondent could have sent in written submissions. The Claimant has also made the point that the autoreply to the 11 September email included a number of links to guidance available online, including the **Presidential Guidance** on postponements.

43. In oral submissions, the Claimant also referred to the recent Decision of the EAT in **Ace Trip v Dogra** [2019] UKEAT/0329/18, but I consider that is not of any assistance here, since it deals with the distinct jurisdiction of the EAT to extend time in relation to Notices of Appeal to the EAT.

44. Of relevance, however, is the **Hughes** Decision in the Court of Appeal [2019] ICR 201. At paragraphs 16 to 21 Bean LJ (Underhill LJ concurring) said:

> **"16. As I have noted, the liability judgment is now conclusive between the parties as to the issues it decides. But, subject to the effect of the debarring order to which I shall come in a moment, "the underlying principle is that on an assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a judgment following s full hearing on the facts or a default judgment" (per Jonathan Parker J in *Lunnun v Singh,* 1 July 1999, CA, unrep. but cited in *Workman v Forrester* [2017] EWCA Civ 73 at paragraph 34). That is the position in the civil courts, and I see no reason why it should not be the same in the employment tribunals.**
>
> **17. In *D & H Travel Ltd v Foster* [2006] ICR 1537 the respondents to a sex discrimination claim failed to enter a response within the time limit prescribed by the rules and judgment in default with regard to liability was entered. The claim had been made against the employers and their senior manager, a Mr Henderson. The manager attended the subsequent remedies hearing and sought to take part in it but was not allowed to do so. The EAT, Elias J presiding, held that the chairman had been correct to decide that there had been no valid application to review the default judgment on liability but had been wrong to assume that unless the default judgment was set aside the respondents could play no further part in the proceedings. Given that the respondent manager was present at the hearing and could have cross-examined the claimant and made submissions it would have been proportionate and in accordance with the over-riding objective of dealing with cases justly, to have allowed him to participate in the remedies hearing. That would have involved no prejudice to the claimant whereas there was obvious prejudice to the respondents in denying them the right to participate. The EAT said at paragraph 61:**

> **"We bear in mind the observations of Burton J in *NSM Music Ltd v Leefe* [2006] ICR 450 that it will sometimes be proportional to allow a party to participate in a remedies hearing albeit that liability has been determined against him. All of us consider that this is plainly such a case. Mr Henderson was present; he could have cross-examined the claimant and made submissions. Whereas the chairman understandably did not think it right to re-open liability, with all the delays thereby involved, that very fundamental concern did not apply to the more limited participation in the remedies hearing. Had Mr Henderson sought an adjournment to produce witnesses or further documents there would have been every good reason to refuse it. But that was not suggested. He wanted to be able to make observations and submissions with respect to remedies, even if he could not put his side of the story with respect to liability. To exclude him in the circumstances seems to us simply a punishment for failing to comply with the Rules."**
>
> **18. I agree entirely with the approach taken by the EAT in the *D&H Travel* case, and although the 2013 Rules differ in some respects from the 2004 Rules which were then applicable I do not consider that this should lead to a different result.**
>
> **19. There is no absolute rule that a respondent who has been debarred from defending an employment tribunal claim on liability is always entitled to participate in the determination of remedy. At the lower end of the scale of cases employment tribunals routinely deal with claims for small liquidated sums, such as under Part 2 of the Employment Rights Act 1996 (still commonly called the "Wages Act" jurisdiction) where liability and remedy are dealt with in a single hearing. In such a case, a respondent who has been debarred from defending under Rule 21 could have no legitimate complaint if the employment tribunal proceeds to hear the case on the scheduled date, determines liability and makes an award. Even in that type of case it would generally be wrong for the tribunal to refuse to read any written representations or submissions as regards remedy sent to it by the defaulting respondent in good time, but proportionality and the overriding objective do not entitle the respondent to a further hearing.**
>
> **20. But in a case which is sufficiently substantial or complex to require the separate assessment of remedy after judgment has been given on liability, only an exceptional case would justify excluding the respondent from participating in any oral hearing; and it should be rarer still for a tribunal to refuse to allow the respondent to make written representations on remedy.**
>
> **21. This was not an exceptional case, and the draft award of compensation was of just under £75,000 (indeed Ms Hughes' solicitors argued that it should be increased to a figure in the region of £100,000 after grossing-up for tax). There was no reason why the company should have been precluded from making submissions on the quantum of Ms Hughes' claim following the judgment on liability. An appropriate course would have been to invite the company to make such submissions by a specified date and for an employment judge then to consider whether an oral hearing was required. It is unfortunate that this was not done: with the result that, through no fault of Ms Hughes or her solicitors, the resolution of her case has now been held up for two years."**

45. My decision on this ground is as follows. Firstly, the Claimant is right to say that the Decision under challenge is a Decision to refuse a postponement, not a decision to disbar the Respondent from being heard on remedy and such. However, in this case, there is an interrelationship that I will explain. But I turn first to the Judge's given Reasons for not granting the postponement. Those are set out, very briefly, in paragraph 6 of his Reasons.

46. Although the Claimant has made the points that the application for postponement should have been copied to him, and the Presidential Direction was not complied with, that does not appear to have been considered or relied on by the Judge. Rather, he says that he has refused the postponement for "substantially the same Reasons" and for those given in paragraph 3 of his Decision. The "same Reasons" must, I take it, mean the same Reasons as the reasons why he refused to accept the late response. However, it is not entirely clear to me whether the Judge meant that *since* the response had been refused, *therefore* he considered that the Respondent was not entitled to seek a postponement; or whether he was simply saying that the same substantive reasons informed his Decisions in relation to both matters. If it was the former, that would be an error, because it would amount to an automatic debarring, which would be contrary to the guidance in **Hughes**; but assuming that it was only the latter, I need to consider what the Judge's given Reasons were for refusing the Response, in terms, now, of their potential relevance of the postponement application.

47. I cannot see how the lack of explanation for a Response being entered late would be relevant to the question of whether to grant a postponement of the hearing, if there was or might *otherwise* potentially have been a good reason why the Respondent should still be heard, at least on the question of remedy. The same applies to the failure to give good grounds for resisting the claim. That is not necessarily a conclusive reason for refusing a postponement of the hearing, if there might still be some potential good reason why the Respondent should be heard on the question of remedy.

48. Pausing there, the Judge appears to me to have proceeded on the basis, at least in part, that there was no purpose in granting a postponement as there was no arguable defence to the wages and holiday pay claims. He seems, if not to have thought that the Respondent was not

entitled to be heard on remedy at all, to have thought at least that this was not the sort of case where any purpose would be served, or where it needed to be heard, on remedy, given the lack of any arguable defence, and the nature of the claims.

49. I note that the Tribunal also refers to what it says in paragraph 3, where it indicated that there was no factual basis given to establish why the proceedings could not be conducted by someone acting on behalf of the Respondent. However, the Tribunal did have information, from the email of 11 September 2018, that the Respondent was saying that its Liverpool office was closed while Mr Omar was based in the US, and the obvious implication was that he was saying that there was no one there in the UK. Further, he had specifically identified that he wished to attend, and the Tribunal knew that he was the CEO and, therefore, someone who potentially might be able to give evidence or information on any disputed point.

50. In addition, it was no fault of the Respondent that no substantive reply had been received to his email seeking a postponement until the working day before the hearing, and that was then to the effect that the application would itself be dealt with *at the hearing and in its absence*, the Tribunal itself apparently assuming that it would be at that point too late for the Respondent to attend. Since the application was for a postponement of the very hearing at which it was to be considered, there is an obvious potential unfairness to the Respondent, since if the application was, as indeed happened, not granted at the hearing itself, and then the hearing proceeded, the Respondent would not be there and not able to participate.

51. I have considered a number of points made by the Claimant in response to all of this. Firstly, that the Respondent did not give notice of his postponement application to the Claimant or comply with the Presidential Direction. However, the Tribunal had not actually written to

the Respondent at any point saying that it would not deal with his application on that account, or until he had rectified the matter by giving notice to the Claimant; and, of course, the Claimant was, in fact, present at the hearing and able, therefore, if he wished, to give his views on the application to postpone.

52. Secondly, the Claimant says that the Respondent could have picked up from the links in the autoreply, the link to the Presidential Guidance, which would have informed him of the need to do these things. That is strictly true, but nevertheless, it was still an autoreply with standard information and links, and clearly understood by the Respondent to be an autoreply, not a considered substantive response to his postponement application.

53. Next, the Claimant says that someone who has applied for a postponement, but has not yet had an answer, must assume that the hearing will go ahead and that they should make the necessary arrangements, unless or until they are notified of a decision. He says he himself made enquiries of ACAS and that was the guidance he received and he duly travelled to the hearing, in his case from Italy. He is absolutely right about that, in principle. However, the fact remains that the Respondent did regularly chase for a response to the postponement application. It was not the Respondent's fault that the Tribunal apparently had technical difficulties and was otherwise slow to reply and, it is a fact that both Mr Omar and his colleague were in the United States at the time and, importantly, had raised this problem in the email of 11 September.

54. If the Tribunal had processed his application within a reasonable time and given him a Decision in advance of the hearing that his application was refused, or would not be considered because he had not complied with the **Practice Direction** or notified the Claimant of his application, he would have had a chance to rectify that, and, if his application was refused, to

then consider his options, such as then to make arrangements to attend the hearing if he could; alternatively, to send a representative; alternatively, to make written submissions; alternatively, to apply to participate in the hearing perhaps by a video or Skype link; alternatively, to renew his application with further information.

55. In all the particular circumstances of this case, I consider that it was in principle, at least, potentially unfair to the Respondent, and an error, not to grant the application to postpone when, in particular, he had put forward cogent grounds for the application, and through no fault of the Respondent, no substantive response of any kind was received from the Tribunal until the working day before the hearing, and even then it was not a decision, and no meaningful decision was taken on the application until the hearing itself.

56. I bear in mind that, through no fault of the Claimant's, a grant of the application at the hearing might have meant that he had had a wasted trip from Italy, but all of this prejudice or potential prejudice to either side would not have arisen had there been an answer to the application before the hearing itself.

57. I am not saying, and it should not be inferred from this decision, that a party who applies for a postponement can make any assumptions that it may be granted or will, or ought to be, determined within a certain time; to the contrary, the advice which, evidently, the Claimant in this case had from ACAS, that a party should *not* assume anything other than that a hearing will go ahead, unless or until it is actually postponed and such a decision is notified, is plainly correct advice that should be followed in every case. But, nevertheless, in all the particular circumstances of this case, I consider that there was unfairness to the Respondent here.

58. That would not matter, however, in terms of the substantive outcome, if the Tribunal took a view, or would have been entitled to take a view, that in this case, in any event, it was not problematic for it to determine the remedy without the Respondent's input. The Claimant said that this was just such a case, as envisaged in paragraph 14 of the Court of Appeal's decision in **Hughes**. It was a routine, fairly small, wages and holiday pay claim, where the position in terms of what he was owed was clear-cut.

59. However, the difficulty here relates to the fact that the Tribunal also made an additional breach of contract notice pay award. That came about in this way. The Claimant, as I have said, was not, on examination, seeking a notice pay award in the claim form for breach of contract, over and above the wages award. It is true that he ticked the boxes on the claim form for notice pay and holiday pay, but he did also tick the box for arrears of pay. and the claim form gave an end date of 31 March 2018, and he had ticked box 6.3 to the effect that he had either worked or was paid his period of notice. Box 9.2 also stated that he was seeking his March pay and holiday pay, but did not claim any other money by way of notice pay.

60. All of that is consistent with the narrative in his particulars of claim: that after Mr Omar gave notice on 22 February, an end date of 31 March was agreed, and the Claimant then worked throughout "my notice period." So, it is clear that, in referring to the notice period, he is referring to the agreed notice period that he *worked* to the end of March; and that his claim arose from his not having been paid his *wages* for the last part of that notice period, namely, the month of March, together with his holiday pay accrued to the end of March. The specific reference to the Respondent having breached his contract is, it then appears, to the failure to pay those wages and that holiday pay.

61. The overall clear picture is, therefore, that in referring to a notice pay claim, the Claimant meant that he was claiming his wages for the part of the agreed notice period that he had worked, but not been paid for, namely the month of March. At most, that might be read as having been put as, in the alternative, a claim for damages for breach of contract, but even on that view, it still relates to the failure to pay wages for the month of March. There was no distinct and additional claim, over and above the claim arising from the non-payment of wages for March, for damages for breach of contract in respect of notice, arising from a summary or short notice dismissal.

62. The Claimant tells me that he agrees that he did not assert such a claim, nor did he come to the ET hearing with a view to advancing such a claim; and it is clear that the Respondent did not understand or appreciate that there was any such claim and, unsurprisingly, did not address it in the proposed response.

63. When I read the Tribunal's Decision, I was, therefore, unclear as to the basis on which the Tribunal had decided to make a notice money award, in addition to the holiday pay and the wages awards. The Claimant has told me that the Judge looked at his contract and told him that he was entitled to an additional notice pay award. He did not seek such an award, but nor did he resist when the Judge told him that he intended to make such an award. He does not accept that there was any misleading of the Judge by him, as he had set out the position clearly, both in his claim form and, indeed, in Clause 4 of his witness statement, which describes how it was agreed in an exchange of emails that he would work and be paid to the end of March.

64. I accept that the Claimant, who is a lay person, did not actively advance such a claim and did not think it appropriate or necessary for him to resist the Judge's proposal to make him

such an additional award when he had, as it were, put all of his cards on the table, and he was told he was entitled to it; and I do not criticise the Claimant for that.

65. However, the Tribunal in its Reasons appears to have treated the claim form as including a distinct notice pay claim, and, as I have said, went ahead to make an additional award for breach of contractual notice. However, the Tribunal does not address in its very brief decision, the basis on which it made this award, and how it reconciled that, if at all, with what it had been told in the specific narrative contents of the claim form, and, indeed, in the Claimant's witness statement, about the end date of 31 March having been agreed. Nor does the Tribunal appear to have given any consideration to whether the Respondent was fairly on notice of the possibility that such an award might be made. Had this been considered, it should have been apparent to the Tribunal that the Respondent was not fairly on notice of that.

66. This was not, as such, a separate and additional ground of appeal, but it is clear to me that in these circumstances, because the application to postpone was not granted, and because the Tribunal then went ahead to make an award that had not (as it appears, on examination to me) in fact been claimed by the Claimant in the original claim form, and the Respondent having not been fairly on notice that such an award might be made, the effect of refusing the application to postpone was that the Respondent lost the chance to make any submissions on this question. It is also fair to assume that, had he been aware that the making of such an award, in addition to the wages and holiday pay awards, might be considered by the Tribunal, Mr Omar would have raised some argument about that, just as he has raised it in his skeleton argument before the EAT.

67. I conclude that, not to postpone at least consideration of this point, to allow the Respondent by some mechanism to make submissions on the question of whether there should be a further award of breach of contract notice money, was unfair to the Respondent and an error of law. That said, it seems to me that the wages and holiday pay awards, as such, did fall into the category of straightforward money claims which, in line with paragraph 19 of the **Hughes** Decision in the Court of Appeal, the Judge did not need to allow the Respondent to make representations about, because it was already entirely clear that the money was owed, and how much, and the Respondent had no proper defence to those claims.

68. However, specifically because of the impact of the interaction with the notice pay award, a substantive injustice has been done to the Respondent by not postponing in that respect, and for those Reasons, this ground of appeal, in that respect, succeeds.

69. Following the Decision which I gave this morning on the substance of this appeal, I have discussed with the parties, and heard argument, about next steps. I have dismissed the appeal insofar as it challenges the Tribunal's Decision not to allow the late response. In relation to the challenge to the Tribunal's Decision not to postpone the hearing, I have concluded, for reasons I gave this morning, that, in relation to the wages and holiday pay awards, the Tribunal was entitled to proceed to grant the Claimant a remedy without needing to hear from the Respondent. Accordingly, the Tribunal's awards of £2,500 gross in respect of wages for the month of March 2018 and £346.15 gross in respect of three days holiday pay stand.

70. We have now discussed is the position in relation to the award for breach of contract damages in respect of notice pay of £1,821.40. Because I have allowed the appeal in respect of

the Decision relating to that, I will quash that award. That is on the basis that the matter now falls to be remitted to the ET for further consideration as to the next steps. That is the course that I must take in light of the guidance in **Jafri v Lincoln College** [2014] ICR 920 unless either it is clear to me that there is only one possible lawful outcome in respect of that matter, or I am in a position to take that decision as well as the Tribunal could, and the parties consent to me doing so.

71. There are, in fact, two aspects to this. First, is that there was no claim of this sort in the claim form, but the Judge took a decision effectively to add such a claim. Fairness would dictate that if the Tribunal were contemplating doing that, it ought to allow both parties a say as to whether such a claim should be additionally considered at all just as, of course, it would do, had there been an application by the Claimant to amend, to add such a claim. Only if, having given both sides a fair opportunity to be heard, the Tribunal decided that such a claim should be added, would it proceed. If so, as this was not in the original claim form, to which it failed originally to respond, I consider that the Respondent should then be entitled to respond to that claim.

72. At the moment, it is not clear to me, because it is simply not explained in the Tribunal's Reasons, why the Judge considered that there was such a valid claim that ought properly to be added. In particular, as I speak now, I have not actually seen a copy of the Claimant's contract, although he has indicated that he might be able with a wi-fi connection to get one electronically, but neither he nor Mr Omar has a hard copy with them here in Court. On present information, therefore, although I struggle to see on what basis the Tribunal could properly make such an award, I cannot entirely preclude the possibility that there might, in the wording of the contract, be some valid basis for such an additional claim that I have not appreciated.

73. I do not think I could resolve the matter without sight of the contract, and then, possibly only if both parties consented. The Claimant was keen, if possible, for me to allow more time for him to see whether at least an electronic copy of the contract could be obtained, but Mr Omar opposed that approach and in particular, was concerned that this would not allow him a sufficient opportunity to consider the terms of the contract and to marshal his arguments. In all the circumstances, I have concluded that we cannot get to a fair and definitive resolution on this point, by a decision from me this afternoon.

74. I will, therefore, allow the appeal in part on the basis that the awards in respect of wages and holiday pay stand. The award in respect of notice pay is quashed and the matter is remitted to the ET, specifically on the basis that if the ET is contemplating giving any further consideration to making an additional notice pay award, it must allow both parties a fair opportunity to be heard on the question of whether it should consider such an award at all, and if it decides to do so, it must allow both parties a fair opportunity to present evidence and argument in relation to whether such an award should actually be made at all.