Appeal No. UKEAT/0094/19/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 July 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MISS M LIMOINE — APPELLANT

MS R SHARMA — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS IMOGEN EGAN (of Counsel) Instructed by: Free Representation Unit 5th Floor Kingsbourne House 229-231 High Holborn London WC1V 7DA
For the Respondent	No appearance or representation by or on behalf of the Respondent

SUMMARY

PRACTICE AND PROCEDURE – Appearance /response

PRACTICE AND PROCEDURE – Right to be heard

The Claimant in the Employment Tribunal presented claims for wages and breach of contract damages. The claim was defended and the Respondent presented an employer's breach of contract claim arising out of the same facts. The Claimant overlooked to enter a response to that claim. No judgement was entered under rule 20(2) of the **Employment Tribunal Rules of Procedure 2013**. Both parties prepared for the hearing in respect of both claims. At the hearing the Judge gave Judgment on the Respondent's claim because it was undefended, and dismissed the Claimant's claim upon the Respondent agreeing to a set off.

Held:

(1) It is an error of law to enter Judgment under rule 21(2) simply on the basis that a claim (whether of a claimant or respondent) is undefended. The Judge must first consider, and be satisfied, treating what is asserted in the claim as uncontested, that the essential factual elements of it are properly made out on the material presented to the Tribunal.

(2) Where the respondent to an undefended claim (brought by either party) wishes to be permitted to participate in a hearing in relation to that claim, under rule 21(3), it is an error of law not to consider, and decide judicially, whether, and if so, to what extent, they should be permitted to do so. **Office Equipment Systems Limited v Hughes** [2019] ICR 201 considered. Observations on the approach to be taken to an application by a respondent to an undefended claim to be permitted to participate in a liability hearing.

(3) The appeal was allowed in respect of the Judgment on the Respondent's claim, but also in respect of the Judgment dismissing the Claimant's claim. The Judge had done so on the basis that the Respondent had conceded that the amount of the Claimant's claim could be set off

against the award on the Respondent's claim. However, it was not appropriate to substitute a Judgment allowing that claim. Both claims would be remitted.

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 Claimant. It was considered on paper by His Honour Judge Shanks to be arguable and was listed by him for a Full Hearing which has come before me today.

2. Although the Respondent initially sought to cross appeal, that was considered by me on paper not to be arguable; and the Respondent did not seek to pursue that further at a Rule 3(10) hearing. However, more of that later.

3. The Claimant presented a claim form to the ET in which she indicated that she was claiming arrears of pay and other payments. She was a litigant in person.

4. The Claimant had been employed by the Respondent to accompany her and her two very young children during flights from London to Phuket, Thailand and in due course back again, as the children's nanny on the journeys. She had found the job through an agency.

5. The Claimant set out in her claim that it was agreed that she was to be paid for settling in time as well as for the flight time, and reimbursed for her train tickets, being £35.70. The agreed rate was £14 per hour on a 24-hour basis for each flight, thus total pay of £672. The Respondent was to pay for her flights and the cost of her hotel in Thailand in the period between the flight out and the return.

6. The Claimant claimed that the Respondent had failed to pay her, and had complained about her competence and performance to the agency, but, on the Claimant's case, without any good cause. She claimed the £672 plus the £35.70 totalling £707.70.

7. The Respondent entered a response defending the claim. She too was a litigant in person. She asserted that she had paid for the Claimant's accommodation in Thailand on the understanding that she would be available on an ad hoc basis to babysit. She attached a document setting out her case that the Claimant had been incompetent and not provided the service contracted for and giving a detailed account of various alleged incidents and episodes. She also asserted that her father had paid the Claimant for the taxi cost.

8. Her case was that the Claimant had effectively acted merely as a porter, not a nanny. She acknowledged that she had nevertheless provided some useful service and offered to pay her at the rate of £10 per hour, that is, £480. The Respondent also attached a document setting out an employer's contract claim seeking to claim from the Claimant what the Respondent had spent on the Claimant's flights and accommodation in Thailand – £1,494.77 and £450 respectively – as well as the sum that she said her father had paid the Claimant for taxi fare, being £25. Therefore, the total she sought to claim from the Claimant was £1,969.77.

9. In April 2018 the ET wrote to the Claimant. That letter informed her that the Respondent's employer's claim against her had been accepted. It also notified her that if she wished to contest that claim she needed to respond within 28 days, but if she did not do so Judgment in respect of it might be entered against her and she would only be permitted to participate in any hearing relating to it to the extent allowed by a Judge. The Claimant did not at any point respond to that notice.

10. A hearing took place before Employment Judge Wright sitting at Southampton on 26 October 2018. The Claimant was represented by a Free Representation Unit ("FRU") representative, Miss Jagroo. The Respondent was in person.

11. A Decision was given orally at the hearing. The Claimant's representative requested Written Reasons and a Written Judgment and Reasons were promulgated together on 2 November 2018. The Judgment was in the following terms: "It is the Judgment of the Tribunal that the Respondent's employer's contract claim succeeds and the sum of £1,285.00 is to be paid to the Respondent, by the Claimant. The Claimant's claim was dismissed."

12. The Reasons were very short and it is most convenient simply to set them out in full:

> **"1. Oral judgment was given at the hearing and Miss Jagroo requested written reasons in accordance with Rule 62(3). This was a short hearing and no evidence was heard. In accordance therefore with Rule 62(4), these written reasons are succinct.**
>
> **2. The claimant presented a claim form on 22/2/2018, claiming breach of contract. The respondent responded to that claim on 20/3/2018 and additionally, presented an employer's contract claim. That claim was accepted by the Tribunal and on 14/4/2018 the claimant was informed of that decision.**
>
> **3. The Tribunal's letter stated if the claimant wished to contest the employer's contract claim, she needed to respond within 28 days. The claimant was informed that if no response was received, then she will only be permitted to participate in any hearing relating to that claim, to the extent permitted by the Employment Judge. The claimant was also advised a default judgment may be issued against her.**
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> **4. Miss Jagroo said she became involved in the case in June 2018, or alternatively in July 2018. No application was made to present a response to the employer's contract claim out-of-time once Miss Jagroo became involved.**
>
> **5. The respondent seeks £1,970.00 by means of the employer's contract claim.**
>
> **6. Default Judgment was therefore granted in the respondent's favour.**
>
> **7. The respondent very sensibly agreed to off-set the sum sought by the claimant of £685.00. Judgment was therefore granted in the respondent's favour for the sum of £1,285.00. In view of this, it was not in accordance with the overriding objective to hear evidence in respect of the claimant's claim and taking into account the off-set, her claim is dismissed.**
>
> **8. The parties were advised of the time limit for appealing this judgment and that it is the claimant's decision whether or not to appeal. They were also informed that the respondent does not have to enforce the Judgment if she does not wish to do so and is merely satisfied with Judgment in her favour. In the alternative the respondent could accept a lower payment than provided for in this Judgment and/or the parties could agree a sum between themselves and repayment terms."**

13. It is against that Decision that the Claimant appeals. Her Notice of Appeal was settled by the FRU.

14. The grounds of appeal include the Claimant's account of events in the litigation leading up to the hearing on 26 October 2018. They acknowledge that there was no written response to the Tribunal's notice in respect of acceptance of the employer's claim, and indicate that the need to attend to that was simply overlooked. However, they go on to assert that no formal action or application in relation to that claim was taken by either party or the Tribunal prior to the hearing, and that the parties did exchange witness statements in relation to the factual substance of that claim and corresponded in relation to it. They acknowledge that, on consideration, the Claimant's FRU representative, who became involved during the course of the litigation, accepted that the Respondent was entitled to bring an employer's contract claim, as such, because the Claimant had included a contract claim in her claim form.

15. There are two specific grounds of appeal, although ground 1 has two elements to it. The gist of ground 1 is that the Tribunal's Decision to grant Judgment on the Respondent's claim was perverse or in error of law because the Tribunal had failed to consider whether that claim was made out on the basis of the Respondent's case, and/or because the Tribunal had failed to consider whether the Claimant should be permitted to participate in the hearing of that claim. Concluding this ground, the grounds of appeal say as follows:

> **"By concluding that the counter claim could properly be determined without hearing evidence or submissions the tribunal erred in law. No reasonable tribunal could have reached this conclusion in these circumstances given;**
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> **(a) No point had been raised in relation to default Judgment prior to the hearing by either of the parties or the tribunal;**
>
> **(b) Both parties had attended anticipating that the counter claim would be heard;**
>
> **(c) The Claimant's position on the counter claim had been set out in detail in the witness statement and correspondence, notwithstanding the lack of formal response;**
>
> **(d) That the counter claim was fatally flawed on its face for the reasons set out below."**

16. That last point trails ground 2, which is to the effect that the Tribunal's Decision was perverse or in error of law on the basis that, even on the Respondent's case, the Respondent could not properly have recovered payment from the Claimant in respect of the cost of her flights and accommodation, as these were inevitable and agreed expenses of engaging her as a flight nanny, not loss that could have flowed from her alleged wrong doing. At its highest the pleading suggested that the basis of this claim was that the Claimant had caused the Respondent distress and unhappiness. The Respondent entered an Answer in which she referred to events during the course of, and leading up to, the hearing, and maintained that the Judge's Decision was right.

17. As I have indicated, embedded within ground 1 of the grounds of appeal are two distinct issues. The first is whether, in a case where there is no timely response, a Tribunal can properly grant Judgment on a claim, simply for that reason, without any consideration, either on paper or at a hearing, of the basis on which the claim is advanced. The second concerns the approach that should be taken where there is a hearing in respect of an undefended claim, and the Respondent wishes to be allowed to participate in some way in that hearing, despite the lack of a response.

18. At the hearing of this appeal before me today, the Claimant was represented by Ms Egan, of counsel, instructed by the FRU. In the run up to this hearing, the Respondent wrote into the EAT indicating that, for reasons she explained, she would be unable to attend. However, she tabled a written skeleton argument setting out her account of what had happened at the Tribunal hearing and maintaining that the Judge's Decision had been right. Documents referred to by her were also included in my appeal bundle. I also had the benefit of a written skeleton argument from Ms Egan and hearing oral argument from her this morning.

19. I turn to the relevant rules of **Employment Tribunals Rules of Procedure 2013**, which are as follows:

> **"Overriding objective**
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> **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.**
>
> **…**
>
> **Presidential Guidance**
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> **7. The Presidents may publish guidance for England and Wales and for Scotland, respectively, as to matters of practice and as to how the powers conferred by these Rules may be exercised. Any such guidance shall be published by the Presidents in an appropriate manner to bring it to the attention of claimants, respondents and their advisers. Tribunals must have regard to any such guidance, but they shall not be bound by it.**
>
> **…**
>
> **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.**
>
> **…**
>
> **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.

Notification of acceptance

22. Where the Tribunal accepts the response it shall send a copy of it to all other parties.

EMPLOYER'S CONTRACT CLAIM

Making an employer's contract claim

23. Any employer's contract claim shall be made as part of the response, presented in accordance with rule 16, to a claim which includes an employee's contract claim. An employer's contract claim may be rejected on the same basis as a claimant's claim may be rejected under rule 12, in which case rule 13 shall apply.

Notification of employer's contract claim

24. When the Tribunal sends the response to the other parties in accordance with rule 22 it shall notify the claimant that the response includes an employer's contract claim and include information on how to submit a response to the claim, the time limit for doing so, and what will happen if a response is not received by the Tribunal within that time limit.

Responding to an employer's contract claim

25. A claimant's response to an employer's contract claim shall be presented to the tribunal office within 28 days of the date that the response was sent to the claimant. If no response is presented within that time limit, rules 20 and 21 shall apply."

20. Pursuant to Rule 7 Presidential Guidance was issued by the President of Employment Tribunals England and Wales in relation to Rule 21 on 4 December 2013. This includes the following:

"Action by the Employment Judge:

1.The Employment Judge will review all the material that is then available. This will normally consist of the claim form and any response form that has been validly submitted and any other supplementary documents.

2 They will consider whether the matter requires more information. If so, they will cause a letter to be written to the party/ies specifying the further information that is required.

3. If no such information is required, or once such information has been received then the Employment Judge will consider whether it is appropriate to: -

a. issue a Judgment in full for all claims and remedy; or

b. issue Judgment in full for all liability issues and hold a hearing for remedy or request further details of remedy matters; or

c. issue a Judgment in part for one or more of the items claimed, together with any remedy issues arising; or

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

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

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

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

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

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

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

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

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

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

21. Where, as in the present case, no response has been entered to an employer's contract claim within the required time then, as Rule 25 makes clear, Rules 20 and 21 apply, just as they do where there is no response to the original claim. Accordingly, when I speak of an undefended claim, what I say in principle equally applies whether that be a claim brought by a claimant or an employer's claim brought by a respondent in response to a claimant's contract claim. However, whilst in principle the same rules apply in either such case, a significant feature in this case was

A that there was a Claimant's claim that was defended, and an *overlapping* Respondent's claim in respect of which no response had been entered, but which the Claimant in fact wished to contest.

B 22. It should be noted that Rule 20 enables a party who has failed to enter a timely response to apply for an extension of time to do so. That should be the first port of call for such a party who still in fact wishes to resist the claim to some degree. Where such an application is made, and granted, the draft response which accompanied the application then provides the basis for the C defence going forward. In the present case, however, no application for an extension of time to present a response to the employer's contract claim was made. So, I can turn to Rule 21.

D 23. Rule 21 replaces more complex and rigid Rules that were found in the **2004 Rules of Procedure** and which notoriously gave rise to challenging points of interpretation. Rule 21 eschews the term "Default Judgment," but remains designed to enable claimants to obtain a rapid E Judgment without a hearing in respect of straightforward undefended claims, whilst ensuring that the Tribunal retains the flexibility to do justice, by calling for further information and/or holding a hearing in the more complex cases, including, if it thinks it should, enabling some input from a respondent. The provisions of Rule 21 need to be considered with some care. A number of points F may be noted.

24. It is worth starting by spelling out the structure of the Rule. Rule 21(1) sets out the G circumstances in which the remainder of the Rule is engaged. I shall refer to them compendiously as a case in which the claim, which to repeat may be an employer's claim, is undefended or uncontested. In any such case Rules 21(2) and 21(3) both apply.

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25. As to Rule 21(2), that requires a Judge to decide whether, on the available material, a *determination* of the claim can *properly* be made, and, to the extent that it can, to issue a Judgment accordingly. Otherwise a hearing *shall* be fixed. However, the Judge may, to enable such a decision to be made on paper, seek further information from either or both parties. Clearly, this is intended to enable a Judge in a straightforward case, if appropriate, to issue a Judgment in favour of a claimant without the need for a hearing, avoiding the expense, consumption of Tribunal resource and delay of having to have a hearing in a straightforward undefended case. Although the scope of the Rule is not confined to any particular type of claim, that most naturally and commonly occurs in relation to straightforward undefended money claims for wages, holiday pay and/or notice monies.

26. However, the Rule neither requires nor permits the Judge to enter Judgment simply because the claim is undefended and without giving any further consideration to the matter. As the words that I have emphasised reflect, the Judge needs to be satisfied that a determination can properly be made. Otherwise there has to be a hearing. That means, it seems to me, that the Judge needs to be satisfied, on the information contained in the claim form and any other documents or materials before them, and, in view of the claim being undefended, treating what the party advancing the claim says as undisputed fact, that the factual elements necessary to make good the claim in law are made out.

27. The Judge needs to be satisfied of that before granting a paper Judgment whether on liability or, as the case may be, remedy. In order to carry out this task the Judge is empowered to require the parties to provide further information – and the use of the word "parties" makes clear that this could be either or both of them. However, if this process does not resolve any uncertainty then a paper Judgment should not be issued and instead a hearing must be held.

28. I note also that, pursuant to Rule 7, where there is relevant Presidential Guidance, while the Tribunal is not bound to follow it, it must have regard to it. It follows that, whenever considering what to do in a case to which Rule 21(1) applies, the Judge should consider the Presidential Guidance, even if they decide for some reason not to follow it in some respect. While much of that guidance may be said to be procedural in nature, it draws attention also to substantive issues that could, in a given case, affect the Judge's decision as to whether further information and/or a hearing is needed, such as whether the claim is clearly stated, where the burden lies and whether there is an obvious jurisdictional problem. It rightly suggests that if there is reasonable doubt about any material matter a hearing should be listed.

29. If no Judgment is issued under Rule 21(2) then, to repeat, the sub-rule requires that there be a hearing. As the Presidential Guidance also points out, ordinarily that will be, in principle, an ordinary final hearing under Rule 57, although it might be solely a remedy hearing, but with two differences. First, in all cases, as provided by Rule 21(2), the hearing will be before a Judge alone, even if the complaint is of a type which, had it been defended, would have been heard before a full three-person Tribunal. Secondly, in accordance with Rule 21(3), the respondent shall only be entitled to participate in the hearing to the extent permitted by the Judge. However, that will still be a substantive hearing, and, once again, Judgment should not be granted at such a hearing unless, taking account of the fact that what the party advancing the claim asserts is uncontested, the Judge is satisfied that, in law, the factual basis for doing so is made out.

30. What if there has been no consideration of the matter by a Judge under Rule 21(2) and it has simply proceeded to a Full Hearing? In principle that ought not to happen, because the words "shall decide" in Rule 21(2) mean that in every case where Rule 21(1) applies the matter should be referred to a Judge to make a decision under Rule 21(2).

31. However, in practice, realistically, there will be instances where, for one reason or another, this does not happen. In addition, given the practice of listing claims which are solely for wages, holiday pay and/or contractual damages for a Full Hearing upon notification of the claim under Rule 15, the net result may sometimes be that the matter proceeds to a Full Hearing without any Rule 21(2) decision having been taken. However, in such a case the Judge will still need to be satisfied at the Full Hearing that it is appropriate to grant Judgment, or to do so in particular terms, because the essential factual basis for doing so has been made out. It is not appropriate for the Judge at such a hearing merely to grant Judgment because the claim is undefended.

32. I turn to Rule 21(3). That, on its face, applies in respect of any and every hearing in an undefended case. That is, it does so, when the matter has been considered, as it should be, under Rule 21(2) and a Judgment has been given on some aspect such as liability, but with a hearing being directed on another aspect such as remedy; equally, when the matter has been considered under Rule 21(2) and no Judgment has been given under that sub-rule at all; and equally where, though this ought not to happen, there has been no Judgment under Rule 21(2) because the matter has not been considered by a Judge under that Rule hitherto at all.

33. In all such cases, if the respondent to the claim wishes to participate in the hearing, they will need to proactively seek, and obtain, permission to do so. However, if they do seek permission to participate, the Judge must consider and decide, judicially, whether or to what extent to permit such participation. That will be so whether there is a formal application in advance of a hearing or in the event that the party concerned attends the hearing and indicates a wish to be permitted to participate there and then.

34. A common scenario is that, in the absence of a timely response (or, an application to extend time having been made, but refused), a Judgment on liability has been properly entered, but the Judge then has to decide what procedure to follow in order to determine remedy. The well-known authorities on the 2004 Rules, **D & H Travel Limited v Foster** [2006] ICR 4537, and **NSM Music Limited v Leefe** [2006] ICR 450, were both concerned with that scenario, as is the decision on Rule 21 to which Ms Egan referred in her submissions, that of the Court of Appeal in **Office Equipment Systems Ltd v Hughes** [2019] ICR 201.

35. **Hughes** indicates that in principle the fact that a Judgment has been given in respect of liability on an undefended claim should not be treated as an automatic bar to the respondent to that claim being entitled to contest issues in respect of remedy. Thus, even in a case where the Tribunal considers that a further remedy hearing may not be necessary, the power under Rule 21(2) to seek information should, in an appropriate case, be exercised to enable them to have their say on remedy.

36. I need not set out in more detail the guidance given in **Hughes**, for the purposes of my present decision, but it should be followed in every case where the Tribunal is dealing with remedy in respect of an undefended claim, whether on paper or at a hearing. However, I note that, as the discussion in **Hughes** reflects, in all cases a proper balance needs to be struck between avoiding the delays and costs associated with the holding, prolonging or possibly postponing of a hearing, given that the claim is indeed undefended, and, where appropriate, allowing the other party to participate to some extent.

37. Importantly, participation may take different forms. It might be confined, as appropriate, for example, to the making of written or oral submissions or the cross-examination of witnesses, but not the introduction of evidence. In a case where only remedy is being considered at the

hearing, the absence of a written response document may be less significant, as the issues relating to remedy may be readily apparent; and some limited form of participation may be capable of being fairly accommodated in a way that the complainant can address and at little if any cost or delay.

38. However, where the hearing is concerned with liability, very different considerations are likely to apply. The fact that there has been no written response at all is likely in most cases to be highly significant to the practical implications of a request to participate. Further, the fact that such a party *can* still potentially be permitted to participate under Rule 21(3) should plainly not be treated as a ready substitute for the obligation to put in a timely response, or apply for, and obtain, an extension of time to do so, under Rule 20. The Rule 21(3) power cannot be lightly invoked in order to subvert or circumvent the essential framework of Rules which support the obvious importance of defences to claims being properly set out in a timely pleading, so that the party bringing a claim knows clearly what elements of it are contested and on what basis, and there is then fair and orderly preparation, and in due course trial, of the contested aspects.

39. If there is a Rule 21(3) application to participate in a Liability Hearing in an undefended case, the Tribunal will therefore need to give particularly close and careful consideration to the balance of prejudice and the practical implications of allowing such participation in one form or another, if at all, in that hearing. Certainly, it should not be assumed that the respondent to an undefended claim who simply turns up to a Liability Hearing of that claim will easily be able to persuade the Judge to allow it to participate, even in a limited way.

40. However, beyond those basic points, I do not think I need to give more particular guidance. What is essential is that, where there is an application or request for permission to participate, it be

given substantive consideration by the Judge and granted or refused judicially, having regard to the particular circumstances of the given case.

41. I turn then back to the grounds of appeal. They are alternatives in the sense that if either succeeds then the appeal should be allowed. I consider first ground 1.

42. As I have noted, ground 1 raises two different aspects being, firstly, whether the Judge was right to grant Judgment simply because there was no timely response to the claim. Secondly, if not, whether the Judge erred in not considering whether to allow the Claimant to participate in the hearing of that claim and/or not permitting her to do so.

43. As to the first of these, from paragraphs 3 to 6 of the Tribunal's Reasons, it does appear that Judgment was granted on the Respondent's claim simply because no timely response had been entered and no application made or granted for an extension of time. Certainly, the Judge gives no other reason there for having done so. This is reinforced by the Judge's use of the term "default Judgment." For the reasons I have explained, it was wrong for the Judge not even to give any consideration to whether, treating as uncontested the case and materials advanced by the Respondent herself, there was a proper basis to grant Judgment on her damages claim.

44. As to the second aspect, the Claimant had attended the hearing and was represented. She was entitled to participate in relation to the hearing of her own claim and plainly wished to be allowed to participate also in relation to the hearing of the Respondent's claim. Whether she should be permitted to do so to any extent should at least therefore have been actively considered by the Judge.

45. Further, unusually in this case, there was a live defended claim to be heard – that of the Claimant – with which the claim in question, that of the Respondent, substantially overlapped. Although no response had been entered, no paper Judgment had been given on the Respondent's claim; and it was being said that the failure to enter a response to it was by genuine oversight. It was clear that, as a matter of fact, the Claimant did not agree with the underlying premise of the Respondent's claim, namely that she had been at fault, and both parties had in fact prepared evidence in relation to both claims and were themselves present.

46. I do not say that the *only* proper course in this case was to allow the Claimant to participate in the hearing of the Respondent's claim. However, I do conclude that it was a further error for the Judge not to have given substantive consideration to whether she should, to any extent, have been permitted to participate in relation to the hearing of it, or at least to explain why not. Ground 1 therefore succeeds on the basis of an error of law, which is sufficient to mean that this appeal must be allowed.

47. It is not necessary therefore for me to decide ground 2. However, as I have noted, the premise of this ground is that even if the Claimant was (which she disputes) herself in breach of contract, the sums that the Respondent sought to claim could not properly be viewed as losses flowing from that breach.

48. However, having considered Ms Egan's submissions, it seems to me that, at least arguably and at its highest, the case which the Respondent advanced before the Tribunal was that there had been a fundamental failure by the Claimant to deliver the services for which she had been hired, namely those of a nanny. In addition, were the Tribunal, on consideration, to find that case made out, that might raise further doctrinal issues as to whether, in *those* circumstances the Respondent

was legally entitled to the remedy claimed by her and/or whether the Tribunal would have jurisdiction to grant her that remedy.

49. It also seems to me certainly at least arguable that the Respondent was seeking the remedy of repayment from the Claimant of the sums that the Respondent had incurred on her plane fares and accommodation, notwithstanding passages in the Respondent's documents to the effect that she was not litigating for the money but for other reasons.

50. Accordingly, in my judgement, whether the doctrinal premise underpinning ground 2 is right is not only something that I do not have to decide, given that I am allowing this appeal on ground 1. It is also something better left to the Tribunal to consider, depending on what it decides in relation to the Respondent's underlying claim on remission, and, if necessary, with the benefit or opportunity for more detailed submissions from both sides on the law.

51. A further matter arises in relation to the disposal of this appeal. As I have indicated, the Tribunal's Judgment was both that the Respondent's claim succeeded and that the sum indicated was to be paid to her by the Claimant, but also that the Claimant's claim was dismissed. The Claimant appeals against the whole of that Judgment.

52. In particular, Ms Egan argues that, whilst the Judgment was framed in terms that dismissed the Claimant's claim, in reality, as the Reasons make clear, the Respondent's claim succeeded, because it was not defended, and the Claimant's claim, in principle, was upheld, because the Respondent agreed that the amount claimed by the Claimant should be set off against the award made in favour of the Respondent. I agree with that submission, as such, and therefore, given in

particular my decision in relation to the part of the Judgment concerned with the Respondent's claim, that the Judgment *dismissing* the Claimant's claim cannot stand.

53. Ms Egan invites me to substitute a Judgment *upholding* the Claimant's claim, so leaving only the Respondent's claim to be further considered by the Tribunal on remission. I am mindful in this regard that, as I have already mentioned, the Respondent's proposed cross appeal was considered not arguable by me when I gave it initial consideration on paper, and the Respondent did not thereafter seek a Rule 3(10) Hearing in that regard.

54. However, I have had the further opportunity not only to consider the materials before me today, but to spend a little time discussing this aspect of the matter with Ms Egan this morning, who also had the opportunity to take instructions from the Claimant, who has attended this hearing today. It appears to me – or at any rate the Claimant cannot say for sure that this is wrong – that at the hearing before the ET the Respondent only conceded the Claimant's claim on the basis that it was understood *at that point* that the Judge intended to give Judgment for the Respondent on *her* claim, and that the concession was made on the basis specifically that there *would* be an award in favour of the Respondent, against which the amount claimed by the Claimant would be set off. That indeed is reflected in the very terms in which the Judgment was expressed.

55. Whilst I therefore allow this appeal, not only in respect of the decision upholding the Respondent's claim and making an award in respect of it, but also in respect of the decision dismissing the Claimant's claim, I am not persuaded that I should myself substitute a decision *upholding* the Claimant's claim. This curious combination of features in this case means that both the Respondent's claim and the Claimant's claim must return to the Tribunal for further consideration.

56. Accordingly, the whole of the Judgment as it relates to both the Respondent's claim and the Claimant's claim is quashed. However, no decision is substituted by me in respect of either. Both matters are remitted to the ET for it first to decide under Rule 21(2) whether a determination can properly be made of the Respondent's claim without a hearing. Although it seems to me doubtful that it could, it will be for the Tribunal to decide. Secondly, unless it has disposed of the Respondent's claim entirely without a hearing, the Tribunal will need to decide to what extent the Claimant should be permitted to participate in any hearing in relation to the Respondent's claim. Thirdly, the Tribunal will need to rehear the Claimant's claim and, to the extent that it has not been disposed of without a hearing, the Respondent's claim.

57. Having heard further submissions from Ms Egan, she submits, and I agree, that there is no reason for me to direct either that this matter on remission should be considered and/or heard by Employment Judge Wright, if available, nor that it would not be appropriate for Employment Judge Wright to consider or hear this matter. Therefore, I make no direction of either sort and the matter may on remission be considered or heard by the same or by a different Tribunal.