THE EMPLOYMENT TRIBUNAL

SITTING AT: **SOUTHAMPTON**

BEFORE: **EMPLOYMENT JUDGE EMERTON (sitting alone)**

BETWEEN:

Dr R Werner

Claimant

AND

University of Southampton

Respondent

ON: **10 July 2019**

APPEARANCES:

For the Claimant: **In person**
For the Respondent: **Mr E Capewell (Counsel)**

JUDGMENT under rule 20 having been sent to the parties on 11 July 2019 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Summary of Decision

1. The respondent is a well-known Russell Group University. The claimant was Professor of International Banking from 2004 until 2018, when he resigned. The claim involves a claim for constructive unfair dismissal and numerous allegations of a course of multi-headed discrimination over a period of some eight years, and the claim form claimed over £4 million in compensation.

2. The respondent failed to present a response, and failed to attend the rule 21 remedy hearing on 5 June 2019. The tribunal issued a judgment in the claimant's favour, awarding £3,449,328.54 (including interest) in respect of the

claimant's claims for wrongful dismissal, unfair dismissal, failure to pay holiday pay, direct religion or belief discrimination, direct race discrimination, indirect religion or belief discrimination, indirect race discrimination, harassment related to religion or belief, harassment related to race and victimisation.

3. The respondent applied under rule 20(1) for an extension of time to present a response. Having heard the parties' submissions and considered the evidence, at the hearing on 10 July 2019 the tribunal decided to allow the application for an extension of time to present a response, setting aside the rule 21 judgment. The tribunal accepted the draft response as the respondent's response to the claim.

4. In exercising its discretion, the tribunal followed Mummery J's guidance in *Kwik Save Stores Ltd v Swain [1997] ICR 49.* Having considered the explanation for the delay, the balance of prejudice and the merits of the claim and the draft response, the tribunal concluded that the interests of justice required that discretion be exercised in the respondent's favour.

Background to the hearing of 10 July 2019

The claim, and background to the rule 21 remedy hearing

5. On 16 November 2018 the claimant presented a claim against the respondent, alleging unfair constructive dismissal, race discrimination, religion or belief discrimination, also asserting that he was owed holiday pay, arrears of pay and "other payments". The effective date of termination was 31 July 2018. ACAS early conciliation commenced on 5 August 2018 and a certificate was issued on 5 September 2018. On the face of it, a claim arising out of an act or omission on or after 17 July 2018 would appear to be in time.

6. The claim form explained that the claimant was "*Chair (Professor) in Int'l Banking at Southampton Business School*", and that he had been employed by the respondent since 1 April 2004 until his resignation (with immediate effect) on 31 July 2018. He claimed total compensation of £4,375,000.00. Within the claim form itself, and an attached 15-page document, he set out a lengthy and largely narrative account of his claim, setting out various workplace problems dating back to 2008, making a large number of factual allegations against named individuals. The claims were lacking in clarity and focus, in respect of how he sought to plead his case under the relevant legislation falling within the Employment Tribunal's jurisdiction. He did, however, refer (for example) to a repeated refusal to deal with grievances, to "bullying, harassment, victimization and vindictive behaviour", to a failure to promote him, to refusals of sabbatical leave, being prevented from taking annual leave, and unwarranted investigations into him. He felt that he had no choice but to tender his resignation to the Vice Chancellor on 31 July 2018. He complains that the respondent has failed to disclose material under subject access requests and other disclosures, to write an appropriate reference, to redirect email and give access to emails. He also asked to be given Professor Emeritus status. The claim form does not indicate how the discrimination claims are pleaded.

7. On 21 November 2018, in view of the lack of clarity in the claim form, the claimant was directed to provide further and better particulars on his race, and religion or belief, discrimination claims.

8. The claimant provided a further 8 pages of particulars. This was also somewhat opaque, and did not set out the specific heads of the discrimination claims which the claimant wished to pursue, but did explain in general terms that he believed that his treatment was, in part, because of his race (as a German, and "*proud to be from Germany*"), his religion as a Christian, and his belief that concentrated banking was "a cancer on society", and (although it was not clear if this formed part of his belief) concerning "related problems in the banking system and the economy".

9. The claim was accepted, and was served on the respondent on 5 December 2018, giving the usual 28 days (to 2 January 2019) to present a response. On the same day, the parties were notified that a case management preliminary hearing (by telephone) was listed for 12:00 noon on Wednesday 5 June 2019. At this point, therefore, the respondent was aware of the existence of a high-value claim, and both parties were aware that the next significant event would occur on 5 June 2019, on which date both parties would expect the tribunal to identify the issues, manage the case, issue orders and list a further preliminary hearing and (if the parties were sufficiently ready) to consider listing a final hearing.

10. On 13 December 2018 the respondent requested an extension of time to present a response, to 25 January 2019. The respondent was granted the extension of time sought.

11. On 24 January 2019 the respondent requested a further extension of time to present a response, to 1 February 2019. The respondent was, again, granted the extension of time sought.

12. The respondent did not present a response. A summary of the relevant events is set out in the tribunal's findings of fact, below.

13. On 8 February 2019 a member of the tribunal staff telephoned the respondent's legal office, because the deadline had passed and nothing had been received. Nothing further was sent by the respondent.

14. On 14 February 2019, on the instructions of an Employment Judge, two letters were sent to the parties. The first informed the respondent that as it had not presented a response, a judgment might be issued under rule 21, and (echoing the wording of rule 21(3)) the respondent was reminded that it would be "*entitled to receive notice of any hearing but you may only participate in any hearing to the extent permitted by the Employment Judge who hears the case*". The second was a "*Notice of remedy hearing following non-presentation of response*", informing both parties that there would be a one-day remedy hearing commencing at 10:00 on Wednesday 5 June 2019 at the Southampton

Employment Tribunal. That was, of course, the same date that the telephone preliminary hearing had previously been listed to manage the case.

15. Nothing further was received from the respondent until a few days after the hearing of 5 June 2019.

The rule 21 remedy hearing of 5 June 2019 and the tribunal's judgment

16. The claimant having arrived rather late, and having handed in a very large number of documents, the case was called on at 10:15am. The claimant had chosen not to engage a lawyer, and represented himself. The respondent did not attend. The hearing concluded at 12:26pm.

17. It is not necessary to summarise all the matters discussed at the remedy hearing. However, it should be noted that the claimant provided two witness statements, a very detailed schedule of loss (prepared by a solicitor) and a rather surprising five lever-arch files of documentary evidence, albeit the judge made it clear to the claimant that he would not be reading these files unless taken to a relevant remedy document by the claimant. The judge also expressed surprise at the hearing that, given the nature of the claim and the sums claimed, the respondent had not presented a response, nor attended the remedy hearing. The claimant wished to proceed with the hearing. The judge considered the clear record of the legally-represented respondent being notified of the hearing, noted that the hearing was already starting late, that the respondent's offices were close to the tribunal, and that scope of a rule 21 remedy hearing in any event constrained the role which a respondent could play in the hearing. There was no explanation for the failure to attend, albeit there was no requirement for the respondent to attend such a hearing. Having confirmed the paper record and that no recent messages had been received from the respondent at Southampton Employment Tribunal or at the regional offices in Bristol, the judge took the view that no further enquiries were necessary or appropriate. The tribunal also took into account the over-riding objective to deal with cases fairly and justly. In all the circumstances, the tribunal decided that it was in the interests of justice to proceed in the respondent's absence under rule 47 (working on the assumption that rule 47 would still be applicable in respect of a rule 21 remedy hearing). The hearing proceeded.

18. The judge also explained to the claimant that the general practice when no response had been presented would usually be to permit a respondent to make submissions as to remedy at the remedy hearing, and perhaps to call evidence as to remedy, and to cross-examine the claimant. He pointed out to the claimant that many of the matters set out in the schedule of loss were extremely contentious, which he would certainly expect a respondent to wish to challenge, especially in view of the extraordinarily large sums of money claimed.

19. There having not yet been a rule 21 liability judgment (no doubt because of the lack of clarity over heads of claim), and the hearing just being listed for remedy,

the judge explained procedures, then confirmed the heads of claim relied upon, and that the tribunal wished to be satisfied that claimant was making factual assertions capable of supporting such claims. There being no response to the claim, and having identified the matters relied upon by the claimant, the judge confirmed that the judgment would reflect a liability finding pursuant to rule 21, on those matters which were subsequently set out at paragraph 1 of the judgment (namely wrongful dismissal, unfair dismissal, failure to pay holiday pay, direct religion or belief discrimination, direct race discrimination, indirect religion or belief discrimination, indirect race discrimination, harassment related to religion or belief, harassment related to race and victimisation.)

20. In respect of remedy, there having in fact been no challenge to any of the claimant's evidence or assertions (extreme and rather surprising though some of them were), the tribunal would proceed from the starting point that it would accept the claimant's assertions of fact if he was able to provide a reasonable evidential basis for finding the facts in his favour. The tribunal would also examine whether there was an apparently logical basis for calculating the proposed remedy based on those findings of fact.

21. The claimant gave brief sworn oral evidence, adopting his two witness statements as his evidence-in-chief, together with the contents of his original claim form, the further particulars and the (lengthy) schedule of loss. The judge confirmed that there was an evidential basis for most of the sums claimed, including assertions in the schedule of loss, and went through the schedule of loss in some detail. The sums awarded, and the basis of the calculations, are as reflected in the remedy judgment.

22. It should be noted that parts of the schedule of loss were rather infelicitously constructed, and the calculation of compensation (including the approach to grossing-up and to interest) were mathematically flawed. For that reason, findings of fact in respect of losses and heads of compensation were made at the hearing, and the calculation of the final sums due (including the "grossing-up" element) were reserved to the extent that the final mathematical calculation would be set out in the judgment, which was signed later in the afternoon. There would be no need for written reasons to be provided automatically, as the calculations in question would be set out in the judgment and would sufficiently explain those limited matters which could not be completed during the hearing.

23. It should also be noted that the claimant made an application for costs/preparation time at this hearing. The judge declined to make such an order, without determining the merits of the argument. He pointed out that the claimant had not given advance notice of such an application to the respondent. He also pointed out that the claimant appeared to have spent a disproportionate amount of time preparing documents, many of which were unfocussed, unintelligible or entirely unnecessary, when what was really needed was clarity (and brevity) in the claim. If the costs application was renewed, it would need to show with greater clarity how the costs/preparation time arose from any unreasonable conduct by the respondent, or set out any

other arguments relating to the liability for, and amount of, any costs which were sought.

24. The tribunal also declined to award aggravated damages, to recommend the award of an Emeritus Professorship, or compensation of £280,000 relating to the claimant's "support staff costs". There did not appear to be any proper evidential basis for such awards.

25. The press attended the hearing, and the case was reported a few days later. It also became apparent that the reporter in question contacted the respondent prior to the respondent receiving the tribunal's judgment, which no doubt triggered the respondent's initial reaction to the judgment..

26. The tribunal's judgment, awarding the claimant compensation of £3,449,328.54, was signed on 5 June 2019 and sent to the parties on 12 June 2019.

Events after the 5 June 2019 hearing, and the respondent's applications

27. On 11 June 2019, Ms Halliday (General Counsel and University Secretary), emailed a letter to the tribunal, indicating that she was aware that a judgment had been given, and making the factual assertion that she had dialled in to the telephone preliminary hearing on 5 June, unaware that it had been converted to a remedy hearing. The respondent would apply for reconsideration/extension of time to file a response.

28. There was also other correspondence, which need not be referred to here. Of more relevance to subsequent developments, and having received the tribunal's judgment, on 14 June 2019 the respondent made three applications:

    a. An application pursuant to rule 20 for an extension of time to present a response (on the basis that, if successful, this would have the effect of the rule 21 judgment being set aside);

    b. Further or alternatively, an application for reconsideration of the judgment under rule 71; and

    c. An application for a stay on execution of the remedy judgment pursuant to rule 29 and/or rule 65.

29. Detailed submissions were set out in writing. The respondent's applications were accompanied by a detailed draft ET3 response form, seeking to resist the claims in their entirety. The respondent's submissions stated an intention to provide a detailed witness statement and supporting exhibits at the beginning of the week commencing 17 June 2018.

30. The contents of the draft ET3 may be broadly summarised as follows:

a. The respondent noted that the claimant had resigned with effect from 31 July 2018, and summarized what it understood to be the heads of claim, including a number of matters which did not amount to a specific claim within the jurisdiction of the Employment Tribunal, which should be struck out. It was suggested that, "*the claimant's claims are in significant part inadequately pleaded, and the respondent does not fully understand the case it has to meet*". [The tribunal shares this view of the claim, which fairly characterises the particulars supplied by the claimant].

b. In respect of the unfair constructive dismissal claim, it was pointed out that the claimant had not stated what contractual term had been breached by the respondent, nor identified what matters amounted cumulatively to fundamental breach. The respondent denied repudiatory breach of contract, suggesting that the real reason for resignation was that the claimant had been subject to legitimate disciplinary investigations. The respondent would rely on conduct/some other substantial reason, and relies on contributory conduct and the fact that the claimant would have been dismissed in any event.

c. The discrimination/harassment claims were resisted, and various significant gaps in the claim were pointed out. Many of the claims were well out of time, and it was denied that the philosophical belief relied upon was capable of falling within the meaning of section 10 of the Equality Act 2010. It was argued that there was no pleaded basis for any free-standing holiday pay claim or breach of contract.

d. The respondent then set out a summary of the evidential background relied upon, including the period leading up to the claimant's resignation, resisting the factual allegations made by the claimant and his claims. The respondent also challenged the remedy claimed.

31. On 18 June 2019, the claimant emailed some requests for information, and on 19 June the claimant copied the tribunal on an emailed request for the witness statement and exhibit, which had not yet been received.

32. On 21 June 2019, the claimant emailed a request for an extension of time of seven days to present the grounds for resisting the respondent's applications.

33. On 21 June 2019, Employment Judge Emerton signed a case management order, dealing with the matters raised by each party. The tribunal considered that the matters raised in the respondent's applications under rules 20 and 71 raised arguable issues, which could only be justly determined at a hearing. Similarly, the claimant had indicated a wish to contest the application and it was just and equitable to extend the time for him to reply, to enable him to receive the evidence promised by the respondent, and to take legal advice. This was reflected in orders contained within the same document, which also listed a hearing. In view of the fact that the forthcoming hearing would deal with the point as to whether the existing judgment should be set aside (or revoked), the tribunal considered that it was in the interests of justice to accede to the

respondent's application to stay the remedy judgment pursuant to rule 29 and/or rule 65. The claimant had had the opportunity to comment on that application and had not done so, and that matter would not be affected by the contents of any further evidence which the respondent may serve on the claimant. The tribunal in any event considered that it was self-evidently not appropriate to seek to enforce the judgment on or immediately after the deadline of 26 June 2019, when a hearing had been listed for only a few days later.

34. The tribunal therefore ordered a stay of execution on the judgment of 5 June 2019, sent to the parties on 12 June 2019, for the reasons set out above and set out in the respondent's application of 14 June 2019, under its powers under rules 29 and 65.

35. A hearing was listed for 10 July 2019, being the first day that Employment Judge Emerton was due to be back in office after an absence. Both parties were able to accommodate that date and did not ask for postponement.

36. The parties were notified that the purpose of the hearing would be as follows:

    a. To hear the respondent's applications under rule 20 and/or rule 71, and to set aside, confirm, vary or revoke the judgment of 5 June 2019, sent to the parties 12 June 2019.

    b. Depending upon the outcome, to consider lifting the stay of execution on the judgment.

    c. To consider how any costs/preparation time order application might be dealt with.

    d. If the judgment is set aside or revoked, to clarify the issues in the case, to make further case management orders, and to list a further preliminary hearing and or final hearing as applicable.

    e. To consider judicial mediation.

37. The tribunal set out orders with which the parties would be required to comply. These provided for a logical sequence of actions designed to ensure that both parties would be ready for the hearing. They provided a timetable for the respondent providing supporting evidence for its applications, for the service of the respondent's witness statements, for the claimant's reply, for the claimant's witness statement (if any) and supporting documents, and for agreeing a bundle for the hearing. The parties were reminded that they could expect that the one-day hearing would be strictly timetabled by the judge, in accordance with rule 45. They were advised that they could provide additional skeleton arguments before the start of the hearing, accompanied by copies of any cases relied upon.

Conduct of the hearing of 10 July 2019

38. The parties were represented as set out above. The hearing commenced shortly after 10:00am. Having completed introductions and confirmed the documents received from each party, the Judge confirmed that the scope of the hearing would be as set out in the case management order.

39. Mr Capewell confirmed that he was bringing his case primarily on the basis of an application pursuant to rule 20, and as that would have the effect of setting aside the judgement if his application was successful, he did not believe it would be necessary to considered matters separately of under rule 71 ("reconsideration"). He made it clear, however, that the same arguments would be used in respect of why it would be in the interests of justice to revoke the judgement of 5 June 2019.

40. The issues which were identified to be determined are set out below.

41. The question of the claimant's costs was raised and was resolved informally between the parties (see below).

42. The tribunal was provided with more extensive documentation than had been directed in the tribunal's orders, but the tribunal was content to receive the documents it was presented with. These included two bundles: the first bundle included a large number of documents relating to the claim and response and associated correspondence (207 pages). The second bundle (77 pages) included various background documents. The respondent also provided two witness statements: the original (and longer) witness statement signed by Ms Barbara Halliday on behalf the respondent on 21 June 2019, and a shorter version dated 26 June. The tribunal was content to permit the respondent to rely upon the longer version. The claimant also provided a witness statement. These had cross-references to the bundle. The parties raised various issues as to the inclusion of specified documents in the bundle, all of which were successfully resolved. The claimant, for example, wish to provide updated versions of documents he had provided to the respondent and which had originally been included in the bundle.

43. Mr Capewell provided a skeleton argument. The claimant relied upon his written submissions, which were included within the bundle. Both parties provided copies of case law.

44. As indicated above, the tribunal had noted that the claimant had made an application for costs/preparation time, in view of the time spent preparing for the rule 21 hearing and dealing with the consequences of the respondent's failure to present a response until after the 10 June 2019 hearing. These matters were resolved between the parties, and Mr Capewell confirmed to the tribunal that the respondent would be paying an agreed sum to the claimant in the near future. The tribunal agreed to record that fact, but no judicial decision was necessary on the point.

45. The judge timetabled the case, including further reading time and confirmed that the respondent wished call one witness and the claimant wished to give oral evidence. The tribunal restricted cross-examination to a maximum of 15 minutes each, which should be more than enough to deal with the very limited evidential issues in the case, noting that there did not appear to be any relevant primary evidence in the claimant's own witness statement. Mr Capewell confirmed that he would have no questions for the claimant. The tribunal confirmed that it would read the parties written submissions; oral submissions would be restricted to 15 minutes per party.

46. The tribunal adjourned for the judge to complete his reading of the documents. The respondent then called Ms Barbara Halliday. She adopted her witness statement and was cross-examined at in some detail by the claimant. The claimant was then sworn in and adopted his witness statement. There were no questions for him.

47. The tribunal then heard oral submissions from each party.

48. The tribunal adjourned just before 1300 and the parties were called back in at 1438 to hear the tribunal's ruling.

49. The tribunal allowed the respondent's application for extension of time to present a response and set aside the judgement of 5 June 2019 under rule 20 (4). The judge gave full oral reasons to the parties, albeit he confirmed that further detail could be expected to be included in the written reasons, should they be requested.

50. After the public hearing completed (oral judgment having been delivered) the tribunal reconvened as a preliminary hearing (in private) for case management. The details need not be set out here, save to note that a significant part of the tribunal's efforts needed to be focussed in seeking to establish exactly what claims the claimant was attempting to bring, such that detailed orders were needed. It was not yet possible to list a final hearing, as it was unclear what matters such a hearing would need to deal with.

51. The tribunal had explained in some detail as to the arrangements for providing a judgment and reasons, and indeed the case management order of 21 June 2019 set out a standard explanation as to the on-line publication of judgment and reasons. The judge also reminded the claimant that he might wish to consider carefully whether he wished to ask for reasons, in light of the fact that any reasons would necessarily set out, in a public document, the weaknesses in his claims, which he might prefer not to be available for reading by the press, the general public, his employers or his students. However, it was recognised that if he was seeking to appeal the judgment, he would probably need to ask for reasons.

52. In the event, the judgment was sent to the parties the following day, on 11 July 2019. On 17 July 2019 the claimant emailed the tribunal to request written reasons.

The issues

53. The tribunal had identified that the purpose of the hearing was to (1) hear the respondent's applications under rule 20 and/or rule 71, and to set aside, confirm, vary or revoke the judgment of 5 June 2019, sent to the parties 12 June 2019; (2) Depending upon the outcome, to consider lifting the stay of execution on the judgment; and (3) to consider how any costs/preparation time order application might be dealt with. It was common ground that purpose (1) would involve a judicial exercise of discretion subject to the overriding objective to deal with cases fairly and justly, and that the principal guidance was to be found in *Kwik Save Stores Ltd v Swain*.

54. It was agreed at the start of the hearing that the respondent's main application was under rule 20, with the same arguments (in effect) being raised in the alternative under rule 71, as a reconsideration application, if it was necessary to consider the latter provision. In the event, the application to present a response having been allowed, this had the effect of setting aside the judgment. In those circumstances, there was no need to consider the reconsideration application (which would in any event have had the same practical effect, as the tribunal would unquestionably have revoked the judgment), as there was then no judgment to reconsider. Similarly, there was no need to deal with the stay, as the stayed judgment had been set aside. As indicated above, the costs/preparation time application was dealt with between the parties without the tribunal needing to make any ruling.

55. In respect of the live issue to be determined, rule 20 provides as follows:

> **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.

56. It is not in dispute that the respondent had made an application which complied with rule 20(1).

The parties' submissions

57. Both parties presented written and oral submissions. What appears below is intended as a broad overview of the parties' arguments rather than a comprehensive summary of all the matters raised.

58. Mr Capewell, for the respondent, addressed the tribunal first. He confirmed that he relied upon his 12-page skeleton argument, which may be summarised as follows. It commenced with an introduction, inviting the tribunal to exercise its discretion to grant an extension of time to submit its response (a draft of which had been submitted), with the consequence of setting aside the judgement of 5 June 2019. His case, in essence, was that whilst the respondent was seeking a lengthy extension of time, conceding that the evidence shows that the respondent was undoubtedly responsible for serious and highly regrettable procedural defaults, the interests of justice did not require that the claimant be entitled to keep the benefit of his "colossal windfall". He argued that these were "*substantial, complex, and ostensibly high-value claims which could only fairly and justly be determined on their merits with the benefit of evidence and submissions from both sides*". He argued that beyond some limited delay, there was little real prejudice to the claimant in allowing the application, and that such prejudice as does exist can adequately be compensated in an order for costs. He argued that,

> "*by contrast, the prejudice to the respondent in having to meet an enormous monetary award which the claimant has obtained simply because of its procedural default, is very considerable indeed*. *The respondent has a strongly arguable defence to the claims which it should be permitted to advance*."

59. The submissions went on to set out the factual background to the hearing, including correspondence between the parties and the tribunal. Mr Capewell then set out the relevant law contained within rules 2, 20 and 21 of the 2013 Rules of Procedure and referred to *Kwik Save Stores Ltd v Swain*, which sets out the test to be applied in such cases. He also referred to the case of *Office Equipment Systems Ltd v Hughes [2018] EWCA Civ 1842*, and other case law. Mr Capewell argued that the proper exercise of discretion under the test identified in *Kwik Save Stores* should lead the tribunal to conclude that in this case that even though the explanation for the delay may not be a good one, it was satisfactory, full and honest. The balance of prejudice suggested that the application should succeed. In respect of the merits, the claimant's case was unclear but appeared to be lacking in merit, whereas the respondent had presented a cogent defence to the allegations.

60. In oral submissions Mr Capewell reiterated the test under rule 20, and the binding precedent of *Kwik Save Stores*. He further addressed the tribunal on the three factors identified by Mummery J in that case. He referred the tribunal to the respondent's witness statement in respect of the explanation for the default, which he characterised as not being "an excuse", but a series of errors for which the respondent felt significant regret and offered apologies. These

serious errors and procedural defaults should not, however, lead to the respondent being prevented from putting forward its case, as it had a complete defence to the claim. Whilst appreciating the claimant's difficulties as a litigant in person, the respondent suggested that there would be significant problems in proving the claim. In respect of the race and religion or belief discrimination, and the constructive dismissal, as well as the financial claims, there were very serious flaws in the case presented by the claimant thus far. He reiterated the respondent's case that the only prejudice to the claimant by allowing the respondent's application was a short delay, and any additional costs would be met by voluntary payment to the claimant. But the respondent (a public bog body delivering education) would be financially severely prejudiced if it was denied the opportunity of presenting its case.

61. The claimant relied upon his lengthy written submissions (set out in the bundle at page 107A onwards), together with some supporting documentation in which the claimant had analysed exchanges of correspondence and a chronological series of events which he sought to rely upon. This was somewhat convoluted, and the claimant was encouraged to clarify the main thrust of his resistance to the application in his oral submissions. The written submissions had been presented by email on 1 July 2019, and updated by the claimant the day before the hearing. He confirmed that he opposed the application under rule 20(4) (and indeed under rule 71) and relied upon a detailed chronology which he set out. He suggested that this showed that the respondent was well aware of the fact of the claim but had conspicuously failed to provide any sensible explanation for its failure to present a response or to attend the remedy hearing. He argued, in essence, that the respondent was well able to respond to the claim, and their conduct and their negligence was quote simply "inexcusable".

62. The claimant also relied on the case of ***Kwik Save Stores*** and referred to the legal test. He suggested that in respect of the first limb of that test, the respondent's default could not sensibly be categorised as a genuine misunderstanding, or an accidental or understandable oversight. He argued, in respect of the merits of the claim that "*the employment judge found no difficulty in assessing the claimant's claim*". [Employment Judge Emerton would wish to dissociate himself from these remarks, as he had in fact had considerable difficulty in ascertaining what claims the claimant had been seeking to bring, albeit by exhaustive enquiries had sufficiently established the basis the claims to be able to deal with a rule 21 remedy hearing]. The claimant argued that his claim was clear and coherent, and categorised the respondent's case as being based on mere assertion. It was irrelevant that the respondent was a public body, and the claimant argued that the overriding objective was frustrated, not furthered, by the respondent's application. The application, if successful would lead to delay, and cost to all parties, including the tribunal. There had already been extensions of time granted to the respondent, and the claimant (unlike the respondent) had been fully engaged with the claim. He pointed out that he himself had wished to delay the hearing of the case by three months, and this had been refused. It was unfair to permit the respondent a delay, when he had not been granted one. To accede to the application would undermine case

management. He argued that the respondent's application included *"documented negligence, contradictions, omissions, and potentially wrong and/or misleading statements of fact*". In conclusion, he submitted that the respondent had failed to show it that it has a defence which enjoys reasonable prospects of success, and had failed to explain its serious procedural default and had a "blasé attitude". He would seek his costs in responding to the application.

63. In his oral submissions, the claimant summarised many of his written submissions and supporting documentation, and reiterated his argument that the respondent's explanation for the delay was questionable, that the balance prejudice should lead to the application being refused, taking into account the overriding objective. The claimant had not received a "massive windfall," and the tribunal should be avoiding delay. He doubted the accuracy of the assertions made in the ET3. At this point, the judge asked the claimant to explain why it should conclude that assertions made in the response were not capable of belief, but that assertions made in the claim form should all be accepted as fact. The claimant was unable to deal satisfactorily with that issue, but made the point that there should be finality in litigation. He suggested that he had already suffered prejudice, and that he would lose a large award which had been legitimately awarded to him. He suggested that the if the respondent's application succeeded, the case would take much longer than it would have done. [*The judge invited the claimant to address the tribunal on the point that this hearing was only just over a month after the original hearing, which had been listed on the same date as the first preliminary hearing for case management, and therefore on one analysis it might be seen as a delay of only about a month in respect of the impact it might have on the progress of the claim*]. The claimant explained that he had complied with all orders and the respondent had not. The response was now 133 days late and this was inequality between the parties. The respondent had had reminders which it had ignored, whilst the claimant had done all that was required of him. The respondent was seriously negligence and in serious default, and Ms Halliday had provided conflicting evidence. He questioned the integrity of the employment tribunal process, if this led to a lack of finality in litigation.

64. The tribunal permitted Mr Capewell a short reply. He raised two points on the respondent's behalf: Firstly, he accepted that there was a public interest in the finality of litigation, but also in disposing of cases justly. Secondly, he suggested that the merits of the case in defence were relevant, and although this was not a "mini-trial", it was a matter to take into account. At this stage claimant made another point, suggesting that in *Kwik Save Stores* there was a short delay, and that this was a very lengthy delay which needed a satisfactory explanation, and this might be decisive. Mr Capewell responded to this additional point, accepting that the delay in this case was longer than that in *Kwik Save Stores*, whilst noting that processes were probably much quicker in 1995, whereas the function of a case management preliminary hearing had developed in the ensuing years.

The evidence and findings of fact

65. The background to the hearing is set out above, and need not be rehearsed. The tribunal heard oral evidence from the claimant, which was either largely irrelevant, opinion or dealt with matters which were not in dispute. No further comment is needed on the claimant's oral evidence.

66. The key oral evidence was that of Ms Barbara Halliday, on behalf of the respondent. It was apparent that giving oral evidence was (unsurprisingly) an embarrassing and painful experience for her, as an experienced solicitor employed by the University to head up its legal functions. The tribunal has no wish unnecessarily to increase that embarrassment, but the matters which caused the embarrassment were central to the issues to be determined, and could not be avoided. That was recognised by the tribunal, as it was doubtless recognised by Ms Halliday herself. Ms Halliday's position was no doubt made more uncomfortable by the claimant's lines of cross-examination and the tone of his questioning, seeking to emphasize her (admitted) negligence and to challenge the integrity or honesty of her answers to his questions.

67. Much of Ms Halliday's evidence related to documented exchanges, and correspondence which had been ignored (or at least unactioned) by Ms Halliday and her team. She was seeking to apologise, and admit the failures, rather than to try to excuse her or her office's defaults.

68. Despite the claimant's submissions to the contrary, the tribunal found Ms Halliday's oral evidence to be truthful and straightforward, with frank answers to questions in cross-examination and from the judge. There were, needless to say, various instances where documents had been received, and where, if properly read on receipt, the respondent would have gained a better understanding of what was going on. Repeatedly pointing out instances of that, does not add weight to the claimant's case. The whole point is that the respondent had clearly rather "lost the plot" (as the tribunal would describe it) over a period of months in 2019. The claimant establishing that the respondent had failed to react to another document, does not fundamentally change the underlying position. Ms Halliday and her team had plainly been overwhelmed, for whatever reason, and admitted that they had not done that which, objectively, they should have done. The respondent's legal team had plainly conducted itself in a way that fell far below the standards which one would expect from legal professionals, and indeed it discloses a catalogue of failures. However, the tribunal is content to find that Ms Halliday was a witness of truth, who gave honest evidence.

69. Adding a further complication to the mix, with the potential for further confusion, was the fact that the rule 21 remedy hearing was listed for the same day as the original telephone preliminary hearing for case management, which had clearly been put in the respondent's legal office diary when originally notified. The diary was evidently never updated when the respondent was notified of the rule 21 remedy hearing. It did not help that in correspondence to the parties dated 17 April 2019, the tribunal had, erroneously and regrettably, made reference to

the existence of the preliminary hearing, even though it had by this date been cancelled, and replaced by a remedy hearing in person. Similarly, the claimant's own correspondence was not always straightforward, and had he achieved greater brevity and focus, this might more easily have put the respondent on notice as to the true state of affairs. Had that been the case, a quick enquiry to the tribunal would have resolved the matter. It is unfortunate that in April 2019 the claimant sent correspondence asking for an order for disclosure of documents, although this was hardly relevant to a rule 21 remedy hearing, and strictly speaking the respondent was not a party to proceedings, and would not normally be ordered to comply with case management orders. On the face of it, anyone receiving such correspondence (without reading the detail of the whole chain of correspondence) can be expected to assume that it would relate to a contested case which was awaiting a case management hearing. The tribunal considers that it is tolerably clear that the claimant's request for disclosure having been referred to a judge (not Employment Judge Emerton) for a decision, that judge assumed that the correspondence must be in relation to matters which would be discussed at a preliminary hearing, leading that judge erroneously directing that the parties be advised (in the tribunal's letter of 17 April 2019) that "*Such an order would usually be made at the Telephone Case Management Preliminary Hearing which is due to take place on the 5 June 2019*."

70. It is not necessary or appropriate to set out detailed findings of fact as to every development in the case, and every error or default by the respondent. In all the circumstances, and having found Ms Halliday to be a witness of truth, the tribunal makes the following findings of fact, on a balance of probabilities (which should be read in light of the tribunal's summary of the background to the hearing, set out at paragraphs 7-41, above):

    a. The claimant was employed by the respondent from April 2004 until 31 July 2018, when he resigned with immediate effect from his post of Professor of International Banking.

    b. The respondent is a Russell Group University. Its legal office, which is located not far from the Southampton Employment Tribunal, includes five solicitors (some part-time). It deals with a wide range of legal and governance business, as well as dealing with the respondent's overseas interests. Employment disputes form part of the office's business. It is headed by Ms Barbara Halliday, an experienced practicing solicitor, who set up the legal function in 2003. Ms Halliday currently has the job title of "General Counsel and University Secretary". Ms Halliday shared responsibility for employment law matters with Mrs DH (who did not give evidence at the hearing). At the relevant time DH had significant domestic matters to deal with and needed extra time off. There was a plan to train up a chartered legal executive to deal with employment law matters, but at the relevant time this had not yet happened. During DH's earlier maternity leave, employment work had been out-sourced. Unfortunately, the budget for this had been exhausted by late 2018. An experienced employment lawyer (and ex-employee of the University), Ms MS, had previously

provided locum cover, but had not been available to help out on this occasion.

c. The legal office was very busy at the end of 2018, especially as regarding employment-related matters, and in the first half of 2019. The tribunal accepts that the level of staffing was, at the time, insufficient to deal with its case-load, and that the office did not at the time have the budget to out-source any more employment work (although the office would often directly instruct counsel). The tribunal would observe that although the respondent was the author of its own misfortune, on any objective view the situation at the time that the claimant's claim was being dealt was a very precarious one in the office.

d. Ms Halliday had taken on the role of General Counsel in February 2019, to deal with more strategic matters, with a view to handing over the day-to-day running of the legal office to a new Director of Legal Service, who was not due to commence until 1 July 2019.

e. The claimant's ET1 claim form, containing the initial particulars of claim, and further particulars ordered by the tribunal, was received by the respondent on 5 December 2018, and a file was opened. The claim was a complex and rather unclear claim based on constructive dismissal, various types of discrimination spanning many years, and various financial claims. It claimed compensation of well over £4,000,000. The notice of claim was followed (on 11 December 2016) by notice of a preliminary hearing for case management, to take place at 12:00 noon on Wednesday 5 June 2019. Both mailings were read by the respondent's legal team. Ms Halliday's PA was on sick leave, and a diary note of the preliminary hearing was made by the temporary secretary who was covering. The temporary secretary left early, and was not replaced before the PA returned to work on 18 February, putting extra pressure on the already busy legal team, which consequently did not, at the beginning of February 2019, have adequate administrative support.

f. The tribunal accepts that the usual procedure would be for Ms Halliday's PA not only to diarise the telephone preliminary hearing, but to log the due dates for work to be completed, so that there was a central record and reminders to ensure that dates are not missed. The tribunal accepts that in the PA's absence, the usual records were not completed.

g. The respondent clearly intended to resist the claim, but as the office was short-staffed, the end of term was approaching and a large quantity of work would be needed to analyse the claim and prepare a response, a decision was made to request an extension of time. Ms Halliday decided to keep the solicitor work in-house, but to seek specialist counsel's assistance in drafting the response; in December 2018 contact was made with two specialist sets of barristers' chambers, and an initial decision was made to instruct Mr Edward Capewell of 11 Kings Bench Walk (who was

subsequently briefly to represent the respondent on 10 July 2019, and did so very professionally).

h. The respondent did not, in reality, provide a very satisfactory explanation as to why the brief to Mr Capewell was never confirmed in January 2019. The tribunal would make the observation that had a brief been prepared for Mr Capewell, he would doubtless have ensured that proper grounds of response had been prepared and presented, even if the complexity and lack of clarity in the claim would doubtless have needed some responses to be subject to subsequent confirmation.

i. The tribunal accepts that the original intention was that counsel would prepare a response, with the brief prepared by DH in January 2019. In fact DH was off work in January 2019, and Ms Halliday herself made enquiries in response to the allegations, and prepared a first draft of the grounds of resistance, and draft instructions for counsel. A substantial amount of preliminary work was carried out by Ms Halliday, clearly with the sole intention of gathering material which would be used to prepare the ET3 response so that the claimant could be resisted. She had therefore taken on responsibility for moving matters forwards.

j. What in fact happened was a combination of events which plainly contributed to Ms Halliday taking her eye off the ball, failing to ensure that a response was presented, and failing to spot what was going on to retrieve the situation in the ensuing months. This included notification on 10 January 2019 that the Higher Education Assurance team of UK Visa and Immigration (UKVI) would be conducting a risk-based compliance visit – a very import matter for the University, which involved significant work for the legal team and for Ms Halliday. This, and other significant work-pressures and deadlines at this period of time, considerably distracted Ms Halliday, but she continued to work on the response/instructions to counsel in late January 2019.

k. In any event, at the respondent's request the tribunal agreed to extend the time to present a response to 25 January 2019, and then to 1 February 2019. The application for the second extension of time refers to the complexity and volume of work needed, and to the involvement of counsel.

l. The respondent failed to present a response. Ms Halliday admits that she simply missed the deadline. She apologised to the tribunal and to the claimant for this; clearly she should have ensured that matters were progressed, but they were not.

m. Matters might have been put back on track, because a member of the tribunal staff telephoned the respondent's legal office on 8 February 2019, and explained that the file would be referred to a judge because the response was overdue.

n. Ms Halliday, who was working on another urgent (but unrelated) matter which had arisen, was informed of the call. She then worked on the grounds of resistance (and application for extension of time to present a response). It is fair to comment that had they been presented immediately, it would be uncontroversial for a judge to agree, on the papers, to extend time and accept the response. But Ms Halliday failed to present the response or to make an application under rule 20. The tribunal accepts her explanation that she believed that she had done so, and that when she subsequently went back over the documentation and computer records it appears that she had failed to save the work, and there was no record of a despatch of any response. However, the tribunal would also observe that there appears to have been considerable confusion in Ms Halliday's mind, probably as a result of her having to juggle more urgent tasks than she had the capacity to deal with at once. The tribunal has described this as "losing the plot": usual administrative practices appear to have broken down by this point, and that, unfortunately, remained the position for some months.

o. On 14 February 2019 the respondent emailed two letters to the parties, both of which were received by the respondent's legal office. These (in the standard format) informed the respondent that as no response had been presented, the claimant was entitled to a rule 21 judgment, and replaced the telephone PH on 5 June 2019 with a one-day remedy hearing in person, on the same day. Either they were not read – or if they were read, the contents were not acted upon. DH received copies, and spoke to Ms Halliday. Ms Halliday did not open the email (which was copied to her) – there appears to have been miscommunication between DH and Ms Halliday. At this point, Ms Halliday was distracted by the UKVI audit and other urgent matters, and did not review the paperwork relating to the case. Had she done so, she would immediately have realised that the respondent was in serious default, and would have understood the true situation.

p. Various correspondence about the claim was exchanged, none of which prompted any written response from the respondent, and appears to have been largely ignored, pending the preliminary hearing that was in the respondent's diary. See the tribunal's comments above. The tribunal does accept Ms Halliday's evidence that she was shown the tribunal's letter dated 17 April 2019 which had referred, confusingly, to matters being dealt with at the telephone case management preliminary hearing on 5 June 2019. The tribunal accepts that this would clearly have to some extent allayed any fears that the respondent had missed something import, albeit had other correspondence been properly read then clearly Ms Halliday would have appreciated the true situation.

q. The rule 21 remedy hearing took place at Southampton Employment Tribunal before Employment Judge Emerton, on the morning of Wednesday 5 June 2019. The respondent was not represented. A

representative of the press attended. A remedy judgment was issued, in the sum of £3,449,328.54.

r. Meanwhile, in accordance with the original notice of preliminary hearing, since cancelled by the notice of remedy hearing, Ms Halliday prepared for the preliminary hearing which was in the diary, and telephoned the specified number at 12:00 noon on 5 June 2019. She held on for 15 minutes, but nobody joined the call and she then rang off. She did not immediately telephone the tribunal office to enquire what was happening.

s. Having been alerted by the press on Friday 7 June 2019 that a judgment had been issued, Ms Halliday spoke to Employment Tribunal staff, who confirmed that the hearing had indeed taken place before Employment Judge Emerton on the Wednesday, and that a judgment for a large sum had been issued in the claimant's favour. On Tuesday 11 June 2019, although the judgment had not yet been received, the respondent wrote to the tribunal to explain that an application would be made for an extension of time to present a response.

t. The respondent received the tribunal's judgment on 12 June 2019, and on 14 June 2019 the respondent presented the applications for an extension of time to present a response (with the draft response), in the alternative for reconsideration, and for a stay of judgment pending a decision on the applications. On 21 June 2019 the respondent submitted Ms Halliday's witness statement, which crossed in the post with Employment Judge Emerton's case management order. The order stayed the judgment, listed a one-day hearing for 10 July 2019 to hear the rule 20/reconsideration applications, and made case management orders to ensure that the parties were ready for the hearing.

u. The tribunal notes that since the events in question, additional staff have been recruited to assist the respondent's legal team. It is unfortunate that over the period on question, the respondent appears to have assigned insufficient resources to the legal office, and Ms Halliday appears to have been overwhelmed by the volume of work and missed things which she should not have missed. She expressed sorrow, and apologised for what she herself described as a "catalogue of errors", and told Employment Judge Emerton that it made her "feel sick" when she looked back at what had gone wrong.

The tribunal's conclusions

71. The tribunal agreed with Mr Capewell that the primary issue to be determined was the application under rule 20, and that the reconsideration application was secondary. In the event, as the first application was successful, resulting in the judgment being set aside, there was then no judgment to reconsider.

72. The law is set out above. The key issue is whether, applying general case management powers and the over-riding objective to deal with cases fairly and

justly, time should be extended to present a response under rule 20. The tribunal has followed the approach set out by Mummery J in *Kwik Save Stores Ltd v Swain [1997] ICR 49* (admittedly pre-dating the including in the Rules of Procedure of the over-riding objective), recently helpfully relied upon and re-stated by HHJ Eady in the EAT, and endorsed by Bean LJ in the Court of Appeal in *Office Equipment Systems Ltd v Hughes [2018] EWCA Civ 1842*

73. The tribunal would observe that, in essence, whatever the significance of the respondent's defaults, this was a very high-value claim against a publicly-funded educational institution, which had always intended to resist the claim (which had been stated in the ET1 to be worth in excess of £4 million). Although the claimant asserts that it is irrelevant that the respondent is publicly funded, the tribunal considers that it is one factor to weigh in the balance, even though the tribunal's decision would have been identical, had the respondent been a commercial enterprise. The respondent's budget is intended for the education of students, and the compensation awarded equates, for example, to the tuition fees of some 380 UK undergraduate students, and is doubtless money which would need to be taken from a budget that the respondent needs for more obviously educational purposes.

74. The claimant objected to the sum awarded in compensation being referred to as a "windfall", but if the respondent is right that it has a good defence to the claims, that might not be an unfair characterisation. It is also a claim which makes repeated, and serious, allegations of unlawful discrimination against a number of senior members of the University, all of which are resisted. At the rule 21 remedy hearing the tribunal needed to deal with what appeared, on the face of it, to be some extraordinary factual allegations. The fact that the tribunal felt constrained to accept the factual assertions in a rule 21 remedy judgment (when those assertions were *capable* of being correct) did not mean that they were all logical, or would stand much realistic chance of succeeding at a contested hearing. For example, the claimant was awarded significant compensation (with interest) arising from his assertion that in over 14 years of employment, he had never once been permitted to take even a day's annual leave, and that at least part of the reason for that decision by the University of Southampton was because the claimant is German, is a Christian, and because of his philosophical beliefs regarding the banking industry. That allegation is really quite bizarre. It is entirely unsurprising that the respondent should wish to call evidence to show that the facts were otherwise, and to suggest that the compensation is a "windfall". Indeed, the tribunal found that the contents of the claim, despite the Regional Employment Judge's direction to provide clarity as to the discrimination claims, were unclear, not properly particularised, lacking in realism, and showed a surprising lack of intellectual focus. The claimant, in his submissions, appeared to believe that if he asserted something to be true (without providing any coherent analysis to support his conclusions), it must be so; whereas if the respondent made any factual assertions they were "mere assertions" which must be disbelieved as an attempt to mislead. To put it charitably, the claimant's assessment of his own arguments appeared at times to be lacking in self-awareness. That is not to say that there might well be some good arguments underpinning at least part of his claim, and he is of course a

litigant in person, but without substantial clarification, there are many assertions where it is patently obvious that one would expect the respondent to wish to be able to call evidence to contradict.

75. There is force in Mr Capewell's underlying argument that notwithstanding serious procedural default by the respondent, justice does not require that the claimant should be permitted to keep his £3.5 million "windfall". He points out this was obtained without a full hearing on the merits of his claim, and under the adversarial system of justice a respondent with an arguable defence should be permitted to have its case heard. The tribunal considers that this is certainly a cogent starting point, but has taken into account matters in the round.

76. Both parties addressed the tribunal on delay, and the tribunal accepts that there is weight in Mr Capewell's argument that the position in 1995, when the *Kwik Save* case was heard at first instance, was probably that cases would be listed fairly quickly, with little case management, and that a short delay might be seen as more significant. There is no doubt that a complex multi-headed discrimination case like this claimant's, would today require considerable, and lengthy, case management. When the claimant is a litigant in person (such as this claimant), who has not been able to present an adequately particularised claim, then there will be all the greater need for case management. It was notable that on 10 July 2019, it was not possible to list a final hearing, because detailed case management orders needed to be complied with, and the case brought back to at least one further preliminary hearing, before there could be sufficient clarity as to the basis of the claim, and the legal and evidential disputes.

77. The claimant has asserted that the respondent was responsible for a delay of 133 days. On the face of it, that would be correct: it has certainly taken a very long time for the respondent to grip the situation and present a response. The (extended) time limit set out by the tribunal for presenting a response was 1 February 2019. The late application for a further extension of time, with the draft response, was presented on 14 June 2019, exactly 19 weeks (133 days) later. However, the tribunal considers that in practical terms, the effect of the delay was much shorter. As was customary at the time, the claim was listed shortly after receipt (and before any response was received) for a telephone preliminary hearing some six months later – it was listed for 5 June 2019. At that preliminary hearing, had it gone ahead, it would have been necessary to try to clarify the issues and to make further case management orders and list at least one further preliminary hearing, before the final hearing could be listed. As it is, after the hearing in public on 10 July 2019, Employment Judge Emerton then converted the hearing to a case management preliminary hearing in private, and dealt with the same matters as would have been dealt with had the preliminary hearing gone ahead as originally listed on 5 June 2019. In practical terms, therefore, the delay in the case progressing towards its final hearing has in fact been exactly five weeks (35 days), in a case where the claimant has chosen to bring a claim with allegations of discrimination dating back more than eight years before the claim was presented.

78. The tribunal also recognises that the claimant, even if he did not clarify his case, put in his claim in the correct paperwork, correctly presented after ACAS early conciliation, and provided further particulars when directed to do so. Notwithstanding the lack of clarity in his claim, he did what he was supposed to have done. The respondent did not do what it was supposed to do. The practical result has been the short delay referred to above (as well as the disappointment of the judgment issued in his favour being challenged, albeit the judge had warned the claimant as to the likelihood of this at the 5 June 2019 hearing). It is also notable that the claimant has necessarily been put to extra effort in needing to prepare not only for a rule 21 remedy hearing (albeit, had the claim been contested, he would still ultimately have needed to do this work), but also to prepare his response to the respondent's application (albeit he could have conceded the point, had he chosen to do so). He has had to attend two hearings in person, rather than the one telephone preliminary hearing which would otherwise have been listed. However, the tribunal has not needed to deal with costs/preparation time issues, as the parties reached a voluntary settlement without the need for the tribunal to hear a further application. The extra cost faced by the claimant has therefore been addressed by a separate financial agreement.

79. In deciding the application taking into account the parties' submissions and the facts (see above), and the matters referred to in the immediately preceding paragraphs, the tribunal has looked at arguments in the round. Adopting the *Kwik Save Stores* approach, however, it is helpful to structure the analysis below in the way suggested by Mummery J in looking at the "discretionary factors" (and followed by HHJ Eady in *Office Equipment Systems Ltd* and further considered, albeit in a more limited scope, by Bean LJ in the Court of Appeal).

80. The first areas is the "**explanation for the delay**". The events have been set out in some detail above, and it is unquestionably the case that the respondent's legal office was under particular pressure and short of staff at the time. That is not, in itself, the explanation, albeit important background. The explanation is, as the tribunal has characterised it, that the legal office "lost the plot". Ms Halliday has, to her credit, not sought to blame others or make excuses, but has squarely accepted responsibility and apologised for what she herself described as a "catalogue of errors" and told the judge that it "made her feel sick" when she looked back at what had gone wrong.

81. As Mr Capewell righty identified, the delay is one of a number of factors, and need not be determinative. Comment is made above that the practical effect of the delay is not as significant as it may at first appear. Using Mummery J's formulation (paragraphs 55A and 55B of *Kwik Save Stores*), the tribunal has taken a view as to the nature of the explanation. It largely agrees with Mr Capewell that Ms Halliday's explanation is "satisfactory, full and honest". It is not "satisfactory" in the sense that it is "justified", but as Mr Capewell argued, Mummer J's formulation does not require that it is a "good explanation" or a "complete excuse". It is "satisfactory" in the sense that the tribunal accepts that the reason, and the only reason, is that only reason the respondent failed to

present a response earlier was a "catalogue of errors", or "losing the plot". There was no bad faith, and quite plainly the respondent wanted to defend the claim and took the preliminary steps to do so – the default was not to send off a response, and to take their proverbial eyes off the ball in the ensuing weeks, when had Ms Halliday carried out her responsibilities properly she should have spotted the error and tried to rectify it earlier. This could legitimately be described as negligence. The tribunal certainly accepted that it was both full and honest (despite the claimant's arguments that it was not).

82. As Mr Capewell points out, in *Kwik Save* the EAT endorsed the tribunal's view that there was "no valid explanation at all" for the delays "other than negligence/and/or incompetence at a level which I would expect the senior management of the employers to be thoroughly ashamed of", but the EAT was nevertheless prepared to conclude that an extension of time should be granted.

83. In this case, the explanation certainly does not prevent the respondent's application from succeeding, and the tribunal is content to find that the explanation (in the sense accepted by the EAT in *Kwik Save*) was satisfactory, full and honest. This militates in favour of exercising discretion in the respondent's favour.

84. The second area is the question of **prejudice**. The tribunal was keen to establish with greater clarity, during oral submissions, what prejudice the claimant had suffered, beyond matters which could be addressed by the respondent's agreement to pay a sum in settlement of costs. Other than the fact that there had been some delay and that the claimant had been entitled to a default judgment in his favour, having followed the tribunal's correct procedures, he did not point to any material prejudice. Mr Capewell submitted, and the tribunal accepts, that being deprived of what he described as a "massive windfall" is not really prejudice, because the claimant will still have the opportunity to call evidence and prove his case in the usual way, as he would have expected, when he presented his claim in the first place.

85. Mr Capewell submitted that the prejudice to the respondent, if the application was refused, would be that the respondent would have to meet a judgment of around £3.5 million, which has been summarily determined with no oral evidence, when the respondent wishes to be able to call evidence to challenge all the claims. The tribunal agrees that that is a potentially significant prejudice, quite apart from the international and national reputational damage of a finding based numerous allegations of unlawful discrimination by University employees, when the University wishes to be able to defend the claims and show that they are not well founded. As Mummery J pointed out in Kwik Save Stores at paragraph 55G, "I*f no extension of time is granted… the result may be that an applicant wins a case and obtains remedies to which he would not have been entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed*." The tribunal considers that that is a significant point in this case.

86. The tribunal concludes that the balance of prejudice points firmly in favour of allowing the application.

87. The third area identified by Mummery J was the **merits factor**. As Mummery J pointed out in *Kwik Save Stores*, (paragraph 56A), an initial view of the merits could be an important factor in determining the application. In this case, the tribunal has read the claim and the response, and it is immediately apparent that the defence has merit in it. Quite apart from the general lack of particularisation, clarity and logic in the claim form and further particulars, Mr Capewell identified some specific weaknesses in the claim, even though the claimant seeks to deny that there are any such flaws. It should also be noted that the rule 21 judgment was based on the heads of claim in the schedule of loss presented by the claimant at the rule 21 remedy hearing, and the tribunal's analysis at the time was not required to go further than accepting the claimant's case that there was on the face of it some pleaded basis capable of supporting such claims.

88. In respect of the financial claims (holiday pay, wages and breach of contract), the respondent argues that these are effectively un-pleaded, with no proper legal or evidential basis set out in the claim form. The tribunal, without making any finding as to the need (or otherwise) to apply for amendment, agrees that the respondent's arguments have some force. Comment has already been made above as to the astonishing assertion that the claimant had never, in over 14 years, been permitted to take even a day's annual leave.

89. In respect of time limits, the tribunal accepts that there is an arguable case that the claimant would not be able to show continuing acts back to 2010, or if the final alleged acts were not discriminatory, might not be able to establish a just and equitable extension of time, albeit it is difficulty to form an informed view at this stage in proceedings.

90. In respect of race discrimination, the tribunal agrees with the respondent's argument that the claims rest on pure assertion, without sufficient facts being pleaded to make out a *prima facie* case. The claims are also not properly particularised. The respondent also has a tenable argument (in respect of part of the religion or belief discrimination claim) that opinions on the banking system do not fall within the definition of philosophical belief for the purposes of section 10 of the Equality Act 2010 (see *Nicholson v Grainger Plc [2010] ICR 360*). The claimant dismisses such arguments as "risible", but that is not a fair characterisation. Overall, even if the claimant was able to discharge the initial burden of proof, the tribunal accepts that the respondent has set out clear non-discriminatory explanations for the matters complained of. There is nothing inherently implausible in these explanations, albeit they would need to be tested in oral evidence.

91. The indirect discrimination claims, relied upon by the claimant, currently make logical sense at all, albeit (with further particularisation) it is possible that the claimant might be able to set out a coherent claim.

92. The constructive dismissal claim (where the burden of proof is upon the claimant to establish that there was a repudiatory breach of contract by the respondent) is similarly challenged, relying on many of the same facts as the discrimination claims. For example, what appears to be the main trigger for the resignation was a disciplinary investigation into the claimant: the respondent has put forward an explanation as to why the investigation was appropriate and non-discriminatory. It also asserts that the claimant affirmed the contract in respect of any earlier breaches (which are also denied).

93. The claimant's case is unclear, and significant weaknesses have been identified in many parts of it. The respondent's arguments are all ones which are clear and have potential merit, and which fairness suggests should be heard by the tribunal before a final judgment is issued.

94. The tribunal considered the above matters in light of rule 2 (the over-riding objective to deal with matters fairly and justly). The parties were not on an equal footing if the respondent. albeit as a result of its own default, was not permitted to enter its arguable defence to the numerous and very high-value claims, which were unclear and had still not been adequately particularised. Allowing the claim to proceed in the usual way, with further case management on 10 July 2019, would restore that balance. This was a proportionate response to the complexity of the case, saved what could be unfair expense to the respondent University, whilst noting that the extra expense and effort which the claimant had suffered would be voluntarily met by the respondent paying him a sum of money. There had been delay, albeit the practical effect of that had been to hold the case back by no more than five weeks, and if the application was allowed the judge was keen to move matters on, the same day, to avoid any further delay make as much progress in case management as could be achieved. The previous delay had been the respondent's fault, but a proper consideration of the issues in dispute militated towards accepting that delay and now permitting the issues to be examined in the usual way.

95. Overall, applying the overriding objective to deal with cases fairly and justly, in light of the *Kwik Save Stores* guidance, the tribunal considers that justice requires that the respondent should have the opportunity to present its arguable defence in this case, against a claim which is at present unclear and unparticularised. The respondent was plainly in serious default, leading to the need for Ms Halliday to give an abject apology and admit to serious failings within her office, and to be cross-examined on that. That evidence having been given, and the respondent having reached a financial settlement with the claimant in respect of his costs, the litigation should now resume in the usual way, and was case managed to that end after the end of the public hearing on 10 July 2019. The progress of the case had been effectively delayed by five weeks, and should now proceed.

96. The rules of procedure expressly permitted a late application for an extension of time to present a response, and the respondent sought to rely upon that provision, making an application very shortly after receipt of the tribunal's rule

21 judgment. It was a matter of judicial discretion to decide whether to accede to that application, and the material factors weighed in favour of allowing it.

97. It is in the interests of justice to allow the respondent's application for an extension of time to present a response, and to accept the draft response. That is the tribunal's decision. In consequence, the rule 21 judgment of 5 June 2019 is set aside

_____

Employment Judge Emerton

_____

Date: 30 August 2019

REASONS SENT TO THE PARTIES ON

9 September 2019

FOR THE TRIBUNAL OFFICE