Neutral Citation Number: [2022] EAT 185

Case No: EA-2021-000405-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 December 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR H ELHALABI **Appellant**

- v –

AVIS BUDGET UK LIMITED **Respondent**

- -
- -

Mr H Elhalabi the **Appellant** in person
David Campion (instructed by **Avis Budget UK Ltd**) for the **Respondent**

APPEALS FROM REGISTRAR'S ORDERS

Hearing date: 8 November 2022

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – time for appealing

This decision considers a number of particular points, which arose on the particular agreed facts of this case, about time for appealing from decisions of employment tribunals, and time for appealing from the EAT's Registrar to the judge, in respect of decisions of the Registrar on that issue.

At the end of a full merits hearing the employment tribunal gave an oral decision dismissing the claimant's claims. In subsequent timely emails both parties requested the employment tribunal to provide written reasons. Prior to receipt of the written reasons the claimant sent his notice of appeal to the EAT. He explained to the EAT that he had not provided it with the tribunal's written reasons because they had been requested, but not yet received. He attached copies of the relevant emails.

Subsequently the employment tribunal sent the parties the written reasons, but the claimant did not at that point send a copy to the EAT. After being told that a copy was required in order for the appeal to be properly instituted, he provided it, but at that point it was more than 42 days from when the written reasons had been sent.

The matter was referred to the Registrar, who decided that the appeal had not been properly instituted in time, and declined to extend time. (The first order) The claimant notified the EAT that he wished to appeal the first order, but did so only after the time limit for doing so had expired. In due course the Registrar made a second order, refusing to extend time in that regard.

Held: The so-called **Abdelghafar** approach applies to the power to extend time for a proposed appeal from the EAT Registrar's interim orders relating to whether an appeal from a decision of the employment tribunal has been properly instituted in time and/or whether time in respect of such an

appeal should be extended.

In this case the claimant's explanation for why he had not notified his wish to appeal the first order in time sooner than he did, was that this happened because he did not receive the EAT's letter attaching the first order, and the email from the EAT attaching it had gone into his junk or spam folder. That factual account was not, ultimately, challenged by the respondent. However, that was not a good excuse. The claimant could and should have made sure that he looked for any email from the EAT, including in his spam folder, with sufficient care and frequency, so that, if the decision went against him, he would still, if he wished, be able to notify his appeal within the time allowed.

However, in view of the fact that when the claimant first sent in his notice of appeal, he also provided an explanation of why the written reasons were not attached, supported by copies of emails showing that there had been timely requests to the employment tribunal to provide written reasons, and taking account of the EAT's powers under rule 39(2) and (3), the EAT should have treated the substantive appeal as properly instituted. Alternatively, there was a good excuse, or exceptional circumstances, supporting an extension of time in respect of the institution of the original appeal, if required.

In view of the conclusion that, on these particular facts, the original substantive appeal should have been treated as instituted in time, there were also exceptional circumstances justifying an extension of time in respect of the late appeal against the second Registrar's order.

Both appeals against Registrar's orders therefore succeeded.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I will refer to the parties as they were in the employment tribunal, as claimant and respondent.

2. Following his dismissal by the respondent the claimant presented a claim to the employment tribunal complaining of unfair dismissal and race discrimination and seeking notice pay. There was a full merits hearing on 2 – 8 February 2021. The claimant was a litigant in person. The respondent was represented by Mr Campion of counsel. The tribunal dismissed all the complaints. The claimant seeks to appeal against that decision of the employment tribunal. That is the substantive appeal.

3. In a decision sealed on 17 February 2022 Ms A Kerr, on behalf of the EAT's Registrar, decided that the substantive appeal had not been properly instituted in time and declined to extend time. I will call that the first Registrar's order. The claimant subsequently emailed the EAT seeking to appeal the first Registrar's order to an EAT judge. But in a further decision sealed on 19 April 2022 the Registrar determined that *that* appeal was out of time, and declined to extend time. I will call that the second Registrar's order. The claimant applied to appeal the second Registrar's order to a judge. That application was in time.

4. If the Registrar's decision in the second order stands, then the first order will also stand. The position will then remain that time has not been extended in respect of the late substantive appeal against the employment tribunal's decision, which will in that case remain dismissed. In order for his substantive appeal to proceed, the claimant needs to succeed in his appeals against both the second Registrar's order, and then the first Registrar's order. If he does, then the substantive appeal from the employment tribunal will be treated as properly instituted after all, and it will proceed to the next stage of consideration by the EAT.

5. The matter was listed for a hearing which came before me on 8 November 2022. In discussion

at the start it was ultimately agreed that I should treat the hearing as relating to the appeals against both the first and second Registrar's orders, and hear argument on both sides in relation to both those appeals in one go. The respondent's skeleton argument for this hearing had included an application for costs, but at the start of the hearing Mr Campion indicated that this was not pursued. After a break he also indicated that, on consideration, the respondent no longer wished to cross-examine the claimant in relation to his factual case on certain relevant issues. It was content that I should proceed on the basis that his account in that regard was factually undisputed.

6. I had the benefit of written skeleton arguments and a bundle, which was supplemented during the course of the hearing, and was referred to various authorities. I heard extensive oral argument. It was not possible for me, in the time remaining, to give an oral decision, and so I reserved my decision.

7. I note at the outset that, although these are described as appeals from Registrar's orders, in the established way I am not confined to reviewing the decision that the Registrar took on each occasion on paper based on the material available at that time. Rather, I have come to my decisions independently and afresh, based on the material and information available, and the written and oral arguments that were presented, to me.

Chronology

8. The relevant chronology of the litigation in the employment tribunal and EAT is this.

9. On the last day of the hearing in the employment tribunal, 8 February 2021, the tribunal gave an oral judgment and reasons dismissing the claimant's claims.

10. On 15 February 2021 the respondent emailed the tribunal requesting written reasons, copying in the claimant.

11. On 19 February 2021 the claimant emailed the tribunal, copying in the respondent: **"I am still**

awaiting the decision in writing for my case which was concluded on the 8th of February. I need the decision in writing so that I can submit my appeal. Can I please have the decision in writing?" On 1 March he emailed the tribunal again, copying in the respondent, to the same effect.

12. Later on 1 March 2021, at about 15.11, the claimant emailed a notice of appeal to the EAT, using the London EAT email address. The attachments included a statement which read in part:

> **"I was not able to provide a copy of the ET decision in writing because to this date, I have not received the decision in writing for the conclusion of my ET case no 3321111 on the 8th of Feb 2021.**
>
> **I was told by the judge on the 8th that I should receive the decision in writing within 7 – 14 days, I have emailed the tribunal more than once asking for it but I have never received a response, the respondent has also requested a copy of the reasons in writing, but they haven't received it as well."**

13. The claimant attached copies of the emails to which he referred.

14. The tribunal's written judgment dismissing the claims, which had been signed by the judge on 8 February 2021, was sent to the parties on 1 March 2021. It contained a standard note at the foot to the effect that, oral reasons having been given, written reasons would not be provided unless requested at the hearing or in writing within 14 days of the sending of the written judgment.

15. The tribunal's written reasons were sent to the parties on 7 March 2021.

16. On 9 March 2021 the EAT's administration emailed the claimant as follows:

> **"Your explanation for not providing the decision has been noted however you must provide the decision you're appealing for your appeal to be properly lodged. Also you have not attached the grounds of claim stated in the ET1 form section 8.2. Please send us these documents for your appeal to be properly instituted."**

17. That email shows as having been sent by a member of the EAT's administration on behalf of London EAT, and gives both their EAT email address and the London EAT email address.

18. That same day the claimant replied as follows:

> **"Apologies for missing those important details, I have not been able to get legal help and so doing this on my own, I am appealing the below decision:**
>
> **1: On the 8th of February 2021 the reading employment tribunal judge has decided to dismiss all my claims, my unfair dismissal claim, and my discrimination claim/less favourable treatment claim, and I would like to appeal his decision.**
>
> **I have also attached my statement/claim grounds which is what is referred to in section 8.2 of my ET1.**
>
> **Please let me know if you require further information and thank you for your patience."**

19. On 10 April 2021 another member of the EAT's administration emailed the claimant, from the London EAT address, providing him with a link to the web page where the employment tribunal judgment could be found, and asking him to provide a copy. In a later statement in support of his application to the EAT for an extension of time, the claimant stated that that email for some reason went to his junk folder and he did not see it on the 10th.

20. On 12 April 2021 the claimant emailed the EAT at 8.13 am: **"I just wanted to check if there was any update on my case appeal? Thank you and I look forward to your reply."**

21. The claimant's later statement states that the administration then telephoned him and **"kindly explained what's required from myself and asked me to check my junk folder, which I did and found his email, he didn't ask for the written reasons and only asked for the judgment."**

22. The claimant then emailed the EAT that same day (12 April): **"Thank you for your call today, please see attached the reasons from Tribunal with the dismissal of claim which I have downloaded using the link you sent me."** What the claimant attached to that email was in fact a copy of the tribunal's written judgment, not the written reasons.

23. On 20 April 2021 the EAT emailed the claimant

> **"Thank you.**
>
> **You have provided the Judgment but not the written reasons of the Judgment.**

> **Please see Note on the Judgment. If you have requested the written reasons from the Watford ET please provide a copy of the letter/email you sent to the Employment Tribunal to confirm this.**
>
> **If you have not requested the written reasons, please see paragraph 3.4 of the attached EAT PD and provide a written explanation for not providing the written reasons."**

24. The claimant replied, by an email timed as received at 16.53:

> **"Apologies for the confusion, I used the link you provided me in your last email and I could only see the judgment on there but not the reasons.**
>
> **As discussed over the phone, the reasons were sent out to me after I submitted my appeal and they are attached."**

25. A copy of the written reasons was indeed attached to that email.

26. On 23 April 2021 the EAT wrote stating that the last day for submitting a properly instituted appeal was 19 April 2021 (that is, 42 days from the sending of the written reasons) and that the appeal was deemed properly instituted when a copy of the written reasons was received on 20 April 2021 at 16.53. Accordingly, the appeal was considered to have been properly instituted two days out of time. The claimant was asked if he wished to apply for an extension of time.

27. On 26 April 2021 the claimant sent the EAT a document applying for an extension of time, but expressing his surprise. He set out his account of the history. This included that when he received the written reasons from the tribunal on 8 March **"I wasn't sure if I still needed to send them to the EAT or not as the practice direction is not very clear on what to do in situations like these, my answer came the following day"** in the EAT email that said that **"my explanation for not providing the written reasons have been noted"** but he still needed to provide other documents, which he then provided that same day. **"So at that point I thought that the written reasons are no longer needed since I have already submitted my appeal."** His conversation with the administration on 12 April **"reinforced my belief that the written reasons are no longer needed."** He had provided the written reasons straight away when he was specifically asked for them on 20 April. He asked why they had

not been requested until then, when it was a day over the 42-day time limit.

28. On 11 May 2021 the respondent sent the EAT a submission opposing the claimant's application for a number of reasons. The claimant sent in his final submission on 24 May 2021.

29. The claimant emailed the EAT on 27 July, 6 September and 22 November 2021 and 14 February 2022 asking for any update. It appears that in replies in September he was given a time estimate of 8 weeks, and in November 4 – 18 weeks, for the Registrar's decision to be completed.

30. The Registrar decided that the appeal was instituted out of time and she declined to extend time. Because I am considering matters afresh, and with respect, I do not need to set out her reasoning.

31. The Registrar's decision was sent to the parties on 17 February 2022 by both email and first class post. The email was sent from the EAT email address of a member of the EAT's administration.

32. On 29 March 2022 the claimant emailed the EAT asking for any update on his case. In further exchanges the administration informed him that a copy of the Registrar's decision was sent by email and first class post on 17 February 2022, and attached a copy. The claimant stated that he wished to appeal, reiterated that he had received nothing by post, stated that he had found the 17 February email in his spam, and described it as having been sent **"through a personal email and not the EAT."**

33. By her decision sealed on 19 April 2022 the Registrar refused the claimant an extension of time to appeal against the February order.

34. I should also note that the claimant availed himself of the HMCTS complaints procedure in relation to what he regarded as the failings of the EAT's administration; and he had received a reply to his complaint which indicated that he would have the opportunity to raise his issues at this hearing. I explained to him that complaints about the administration as such, were not a matter for me; and I would therefore not comment on how HMCTS had responded to his complaint. What I would

consider was what was or was not the relevance or implications of the communications between him and the administration (or absence or timing thereof), in law, to the issues that I had to decide.

The Law

35. Rules 3(1) and (2) of the **Employment Appeal Tribunal Rules 1993** (as amended) identify the documents which must be served in order to institute an appeal. Where the appeal is from a judgment of the employment tribunal, by rule 3(1)(c), these include: **"a copy of the written record of the judgment of the employment tribunal which is subject to appeal and the written reasons for the judgment, or an explanation as to why written reasons are not included"**.

36. Rule 3(3) begins:

> **"The period within which an appeal to the Appeal Tribunal may be instituted is –**
>
> **in the case of an appeal from a judgment of the employment tribunal – (i) where the written reasons for the judgment subject to the appeal –**
> **(aa) were requested orally at the hearing before the employment tribunal or in writing within 14 days of the date on which the written record of the judgment was sent to the parties; or**
> **(bb) were reserved and given in writing by the employment tribunal**
> **42 days from the date on which the written reasons were sent to the parties;**
> **(ii) [relates to national security proceedings]; or**
> **(iii) where the written reasons of the judgment subject to appeal –**
> **(aa) were not requested orally at the hearing before the employment tribunal or in writing within 14 days of the date on which the written record of the judgment was sent to the parties; and**
> **(bb) were not reserved and given in writing by the employment tribunal**
> **42 days from the date on which the written record of the judgment was sent to the parties;"**

37. Rule 20 requires every interim application to the EAT to be considered first by the Registrar and enables such applications to be disposed of by the Registrar. Rule 21(1) provides that where such an application is disposed of by the Registrar an aggrieved party may appeal to a judge who may then determine that appeal. Rule 21(2) provides that notice of appeal under rule 21(1) may be given within five days of the decision appealed from.

38. Rule 37 includes provisions that the time prescribed by the rules for doing any act may be

extended whether it has already expired or not; that where an act is to be done on or before a particular day it shall be done by 4pm that day; and that when the last day falls on a day when the EAT office is closed, it may be done on the next day on which it is open. It also provides at (3) that an application for **"an extension of the time prescribed for the doing of an act, including the institution of an appeal under rule 3, shall be heard and determined as an interim application under rule 20."**

39. Rule 39(1) provides that failure to comply with a requirement of the rules does not invalidate any proceedings unless the EAT otherwise directs. However, that sub-rule does not apply to the rules relating to the institution of an appeal, or override the need for the EAT positively to exercise its rule 37 discretion in favour of a party whose proposed appeal has been found to have been instituted out of time: **J v K** [2017] UKEAT 0661/16 at [43].

40. Rule 39(2) contains a power to dispense with a step required by the rules, or to direct that a step be taken in a manner other than that prescribed by the rules, where that "**would lead to the more expeditious or economical disposal of any proceedings or would otherwise be desirable in the interests of justice"**. Rule 39(3) provides that such powers **"extend to authorising the institution of an appeal notwithstanding that the period prescribed in rule 3(2) may not have commenced."**

41. The **Practice Direction (Employment Appeal Tribunal Procedure) 2018** includes provision at paragraph 3.1 that a notice of appeal from a judgment of the employment tribunal must be accompanied by a copy of the tribunal's written reasons or, if not, a written explanation for the omission of them. Paragraph 3.4 provides as follows:

> **"Where written reasons of the Employment Tribunal are not attached to the Notice of Appeal, either (as set out in the written explanation) because a request for written reasons has been refused by the Employment Tribunal or for some other reason, an Appellant must, when presenting the Notice of Appeal, apply in writing to the EAT to exercise its discretion to hear the appeal without written reasons or to exercise its power to request written reasons from the Employment Tribunal, setting out the full grounds of that application."**

42. Paragraph 4.3 contains provisions regarding the time for instituting an appeal and reflects the corresponding provisions of the rules. Paragraph 4.6 concerns applications for extension of time for appealing, which must be made as interim applications to the Registrar, and appeals to the judge from such decisions of the Registrar. It states that such an appeal must be notified within 5 working days of when the Registrar's decision was sent to the parties, and gives an example of how that works. Paragraph 5 concerns interim applications generally. It includes provision at paragraph 5.3 that an appeal from a Registrar's decision on such an application must be notified within 5 days of the date on which the Registrar's decision was sent.

43. There is a body of authority giving guidance on the exercise of the rule 37(1) power to extend time for the institution of an appeal. Points set out in **United Arab Emirates v Abdelghafar** [1995] ICR 65 and a number of other authorities were confirmed as valid and applicable by the Court of Appeal in **Green v Mears Limited** [2019] ICR 771. Points emerging from this body of authority include, in summary, the following.

44. Observance of time limits is important to certainty and finality in litigation. There is no automatic right to an extension. The EAT takes a strict approach to the exercise of the power to extend time for properly instituting an appeal, having regard to the fact that the matter will already have been the subject of a first instance decision, and the interests of finality in litigation. The 42-day time limit for appealing is a generous one. In principle litigants in person are not entitled to any greater indulgence than those who are professionally represented. In principle the same approach applies in cases where the notice of appeal has only been presented after the time limit has expired, and in those in which one or more of the required documents has been provided late. It is the responsibility of the party concerned to ensure that they take the necessary steps. It is not the duty of the EAT or its staff, either before or after the time limit expires, to alert a party to defects in compliance, or to do so within a particular time scale. See **Fincham v Alpha Grove Community**

Trust, UKEATPA/0993/18 at [23].

45. In every case the EAT will need to consider whether there has been a full, honest and acceptable explanation for the delay in instituting the appeal or presenting the required document as part of it. Error, oversight, or carelessness are not ordinarily acceptable excuses. Nor are ignorance of the time limit or what documents are required to properly institute an appeal. These matters are clearly explained in materials to which parties are signposted when judgments are sent out, and which are readily available on the internet. A delay even of seconds may be fatal. The fact that the other party may not be prejudiced by a very short delay is not a sufficient reason by itself to extend time. The potential merits of the proposed grounds of appeal will not usually be relevant, although they can be, for example where they are patently very weak. In some cases there may be some compelling truly exceptional reason to extend time, despite the lack of an acceptable excuse.

46. Some further points of law to which the particular facts of this case give rise will be considered as they arise in the course of the next part of my decision.

Discussion and Conclusions

47. As I have noted, there was extensive written and oral argument. I do not need to summarise separately all the points made on each side. I will refer to some of the particular points relied upon on both sides, which I regarded as most significant, in the discussion which follows.

48. The place to start is with the question of whether the appeal against the second Registrar's order was submitted out of time. That related to the first Registrar's order. Rule 21(1) provides for notice of appeal to be given within five days "of the decision". The Practice Direction at 4.6 refers to five working days from the date when the decision was sent and paragraph 5.3 to five days from then. Nothing turns in this case on the difference between five days and five working days, but I consider, in view of paragraph 4.6, that if an appeal from a Registrar's order relating to time for

appealing from the employment tribunal is notified within five working days, it should be treated as having been notified in time. In light of the provisions of the Practice Direction, that time period also runs from the date when the decision was sent, and not any earlier date.

49. In this case the decision was sent on 17 February 2022. Accordingly an appeal needed to be notified by 4pm on 24 February 2022. The appellant emailed the EAT notifying that he was appealing from it on 29 March 2022. As that email was received after 4pm it was deemed received on the next day, but nothing turns on that. The appeal was in any event more than a month out of time.

50. So I must consider whether to extend time in respect of that appeal under rule 37(1).

51. The authorities I have discussed earlier all concerned the exercise of the power to extend time in respect of the institution of a late appeal from the employment tribunal. What should be the approach where the appeal is from a decision of the Registrar relating to whether an appeal from the employment tribunal has been presented in time and, if not, whether time should be extended? I am not aware of any previous authority specifically relating to that, and Mr Campion had not found any.

52. There is, however, authority that the same strict approach is taken to applications to extend time for seeking a rule 3(10) hearing following notification that grounds of appeal are considered not to be reasonably arguable under rule 3(7). In **Echendu v William Morrison Supermarkets plc** [2008] UKEAT 1675/07, which was such a case, Underhill J (as he then was) said this:

> **"20. I should note for completeness one potential distinction between the facts of the present case and those of most of the reported authorities in this field, namely that the delay was not in the instituting of the actual appeal but in proceedings subsequent to the institution of the appeal. I cannot regard that as requiring a different approach. Compliance with the time limits required under rule 3 remains of real importance. They are not concerned merely with administrative or preparatory matters such as lodging bundles or skeletons but with the substantive question of whether the appeal should be allowed to proceed at all. I note in passing, although this particular point was not argued, that the so-called Abdelghafar approach was applied by Sir Peter Gibson sitting in the Court of Appeal in the case of Morrison v Hillcrest Care Ltd [2005] EWCA Civ 1378 when refusing permission to appeal in a case involving a missing of the deadline under rule 3(10)**

> **21. I would also add that, as Mr Martin pointed out, the limits provided for rule 3 are far from onerous, and a party wishing to make an application under rule 3(10) has no less than 28 days to do so, and if he is seeking an oral hearing all that is required is a very short letter so stating."**

53. Mr Campion submitted that that reasoning applied with at least equal, if not greater, force to the extension of time in respect of a proposed appeal from a Registrar's order which itself related to time for appealing from the employment tribunal. I broadly agree. What Underhill J said at paragraph 20 of **Echendu** about requests for rule 3(10) hearings applies equally (if not more strongly) to appeals from Registrar's orders relating to time for instituting a substantive appeal. Such appeals are not concerned with decisions concerning the case management of the appeal, but with whether a proposed appeal should be permitted to proceed at all. The rationales and considerations behind the general points of guidance in the **Abdelghafar** line of authorities logically apply in that context.

54. The time limit for appealing a decision of the employment tribunal to the EAT is 42 days, that for seeking a rule 3(10) hearing is 28 days, but that for appealing against a Registrar's interim order of this type is 5 working days. Underhill J's point, at [21], about the length of the time limit, therefore does not carry across with the same automatic force. It might also be argued that, while a party who wants to challenge a routine case management order made by the Registrar could and should be able to raise this very promptly, a different approach might sometimes be appropriate where a substantive issue of this sort is at stake.

55. However, I do not think that the particular length of this time limit is a reason in principle not generally to apply the **Abdelghafar** approach in this context. That is for the following reasons. First, all that the party needs to do is notify the EAT that they are appealing from the Registrar's order. There is no requirement beyond that as to form or content. Formal grounds are not required. Secondly, in the nature of things the party will already have given some thought to the matter, as they will already have set out their case and their arguments once for the purposes of the Registrar's

consideration of the matter. So, when they read the Registrar's decision they should be able promptly to come to a view as to whether they want to take the matter further.

56. So, I must decide, next, applying the **Abdelghafar** approach, whether the claimant's explanation for being late amounts in this case to a sufficient or good excuse. As I have noted, the respondent, ultimately, did not challenge his assertion that he never received the hard copy of the first decision that was posted to him. But that does not resolve the matter, because a copy was emailed to him as well. The respondent also does not contest his factual assertion that that particular email went into his junk or spam folder, and that it was only after the EAT, in reply to his email of 29 March 2022 informed him about it, that he looked in his spam folder and found it there.

57. The claimant argues that this should be regarded as an acceptable or good excuse. He relies in particular on the fact that the 17 February 2022 email was sent from the individual EAT address of a member of the administration rather than the London EAT address (which, in earlier written submissions he said he had made a VIP address, though in oral submissions he stopped short of saying that); and on the fact that he was periodically chasing the EAT for an update following the completion of submissions on the extension of time application, having last chased just three days before the decision was actually sent. He also told me that around 20 – 30 emails went into his spam folder every day, that if the name is unusual and not recognised, he ignores it, and that he cannot see an email's subject line on his 'phone. His submission was that he could not have reasonably be expected to monitor his spam folder for any communication from the EAT in relation to this matter.

58. I do not agree. The EAT properly used the postal and email addresses that it had for him, and it was his responsibility to ensure that any communication from the EAT sent to either of those addresses promptly came to his attention, so that, if the decision was against him, and he wanted to appeal, he did not miss the deadline for doing so. The rules and Practice Direction make clear that he would have a maximum of five working days to do that. At a time of exceptional workload and

challenges, it was some months before the Registrar's decision was produced, but he had no reason to suppose it might not come when it in fact did. The onus was, and remained, on him, to keep a lookout for it, and to check with sufficient frequency, so that, when the decision did come, he did not miss the further deadline, if it was against him, and he wished to appeal further.

59. The fact that the email went to his spam folder also does not provide a good excuse. Even if he saved the London EAT email address to his VIP folder he should not have considered it safe to assume that this was the only address used by members of the EAT's administration. In fact he had already received at least one email from the EAT which was not from that address. Nor should he have regarded it as safe to assume that no EAT email, even one from the London EAT address, would have been diverted to spam. Spam filters are notoriously capricious. Further, there had already been one example of an email from London EAT which *had* gone into his junk folder (that of 10 April 2021) and he had been advised on that occasion to check that folder, and duly then found it.

60. Whatever the volume of daily emails going into his junk folder, and however they may first appear to him when he looks at the folder contents on his phone, before opening a given email, there is no good reason why he could not have managed his emails, and, one way or another, taken the necessary steps to ensure that if an email from the EAT did go into spam, he picked it up promptly. He clearly would have, had he had checked with sufficient care. I note also that the sender had sent him a previous email, and he had referred to them by name in one of his submissions, the subject line was the case name and EAT and ET case numbers, and as soon as it was suggested to him that he look in his spam for it, he found it. Whether or not he had to open it to verify it, and whatever device he used, there was no good reason why he could not have taken the steps necessary to ensure that he spotted it promptly when it was first received.

61. However, even where there is no good excuse for being out of time, the possibility remains of there being, in the circumstances of the particular case, some exceptional reason to extend time.

See: **Green v Mears** at [19]. In **Abdelghafar** at paragraph 8(3) the EAT said: **"The merits of the appeal may be relevant, but are usually of little weight. It is not appropriate on an application for leave to extend time for the Tribunal to be asked to investigate in detail the strength of the appeal. Otherwise there is a danger that an application for leave will be turned into a mini-hearing of the substantive appeal."** However, in this case, an issue arises, which is not about the merits of the underlying proposed substantive appeal from the employment tribunal, but about whether that proposed appeal should have been treated by the EAT as instituted in time, in which case the claimant would not have found himself needing to appeal from the first Registrar's order at all. If so, that might amount to an exceptional reason to extend time in respect of that late appeal.

62. I therefore turn to consider that issue.

63. The claimant's primary case is that his original substantive appeal was, in fact and law, properly instituted in time, so that no extension of time for that original appeal was required. On the date when he sent the EAT his notice of appeal and accompanying documents the time limit for instituting his appeal (however determined) had not yet expired. When he sent in copies of the missing judgment and grounds of claim the time limit had not yet expired. The written reasons were not provided, but that was because, when he sent his notice of appeal, they had been timely requested but not yet received. He had complied with the requirement in that situation to explain why they were missing. He had done everything required to institute his appeal properly, and he had done it in time.

64. The claimant also made the point that he had diligently chased the tribunal for the written reasons precisely because he was intending to appeal. But he had received no response, or assurance as to when they would be forthcoming. The tribunal's rules did not require them to be produced within any particular timescale. He could not be sure when they would appear, or even that they ever would. In those circumstances he felt he had to institute his appeal without waiting any longer, so as to ensure that there was no risk of his losing his right of appeal.

65. If he was wrong about that, he in any event had a good reason for not having provided a copy of the written reasons to the EAT (even after they were in fact received by him) sooner than he did. The message he took from the administration's email of 9 March was that, having, when he sent in his notice of appeal, provided an explanation for why he did not have the reasons, there was nothing more he was required to do in that particular regard. The communications of 10 and 12 April reinforced his understanding that the only further documents which the EAT needed him to provide to ensure that his appeal was properly instituted were the judgment and the grounds of claim. It was only on 20 April that the EAT also, for the first time, asked him for the written reasons.

66. Mr Campion's principal points were as follows. First, however anxious the claimant was, that the tribunal had yet to provide the written reasons, and about when they would come, he did not need to institute his appeal until he got the reasons. Because there had been a timely request for written reasons (in fact two requests), whenever the reasons were produced, he would have until 42 days after that to institute his appeal. This was not a case where the 42 days was calculated from the earlier date on which the written judgment was sent. The rules on this point are clear.

67. Secondly, appealing before the written reasons were to hand was not only not necessary, it was in law premature. In a case where there had been a timely request for them, the appeal had to be instituted *after* the written reasons were sent. Were it otherwise, a party could make a timely request for written reasons and then circumvent the requirement to furnish them by immediately instituting their appeal and attaching an explanation that they had been requested but not yet been received.

68. Thirdly, the claimant plainly knew that the written reasons were needed. He had written to the employment tribunal that he needed them to appeal; and he knew that the starting point is that they should be included with the notice of appeal, or their absence explained. It was surely obvious that sight of the reasons was needed in order to properly consider the grounds of appeal. It should

therefore have been obvious to the claimant without being asked, that, once he received the reasons, he needed to send them in to the EAT, and to do so within 42 days.

69. Fourthly, it is well-established that the onus is on a party seeking to appeal to comply with all the relevant requirements and to do so at the right time. There is no obligation on the EAT's administration to draw failures of compliance to their attention, or to do so within any particular timescale. Nor could or would the EAT's administration provide a party with advice.

70. A further point raised by the respondent's solicitors in submissions to the Registrar, though not highlighted by Mr Campion in submissions to me, contends that, even if it was open to the claimant to institute his appeal when he did, without reasons, upon providing an explanation for their absence, he was also required by the Practice Direction in such a case to request the EAT to determine his appeal without reasons, or for it to ask the employment tribunal to provide them. I note that the claimant's position on that point in the earlier submissions, had been that he had effectively done that.

71. Finally, Mr Campion made some submissions to the effect that the proposed substantive grounds of appeal were palpably weak, and that, in line with authority, this was one of those cases where that should weigh against the grant of any extension for the original substantive appeal.

72. I turn to my conclusions on these matters.

73. First, the respondent is right that in this case the initial time limit did not expire 42 days from the date when the written judgment was sent. It expired 42 days from when the reasons were sent. Because there was a timely request for written reasons (one would have been enough) in this case rule 3(3)(a)(i) applied, not rule 3(3)(a)(iii). The rules, and the Practice Direction, are clear on this.

74. Was it also premature to institute the appeal *before* the written reasons had been provided? That depends on whether the end of the 42-day period is merely the latest date to institute the appeal,

or whether the requirement is for the appeal to be instituted during the course of that period. The opening words of rule 3(3) – **"the period within which"** – are arguably supportive of the latter reading, if perhaps also arguably not wholly unambiguous. That said, paragraph 4.1 of the Practice Direction opens with the words **"the time within which"**, which is perhaps a little less clear.

75. However, rule 39(3) indicates that the tribunal may exercise its rule 39(2) power to authorise the institution of an appeal notwithstanding that **"the period prescribed in rule 3(2) may not have commenced."** At first sight the reference to rule 3(2) – which concerns the documents required in a national security case – is puzzling. But the clear explanation is that, in the rules as originally framed, rule 3(2) concerned time for appealing. The current rule 3(2) was added by amendment in 2001, and rule 3(2) then became rule 3(3). However, plainly the drafter overlooked to make a consequential amendment to the cross-reference within rule 39(2). I note also, in this regard, that the original version of rule 3(2) itself (now rule 3(3)) used the opening words: **"[t]he period within which".**

76. It does therefore appear to me, reading the opening words of rule 3(2) with the words of rule 39(3), that the drafter did envisage a window during the course of which the appeal should be instituted, and which, in a case such as the present, opens when the tribunal sends the written reasons.

77. However, in my judgment, while this conclusion emerges to the legal mind from a careful consideration of the rules as a whole, the possibility that the time provisions might operate by creating a window rather than a long-stop is not an obvious one, and does not leap out starkly from a reading of rule 3, or the Practice Direction; and rule 39 also appears at the very end of the rules, a long way from rule 3. Further, in a case where it might be said that the appeal has been technically instituted prematurely, but otherwise compliantly, rule 39(3) does enable the rule 39(2) power to be exercised, effectively to cause rule 3(2) to be treated in that case as merely applying a longstop.

78. If there has been a timely request for written reasons, but these have yet to be received at a

time when it is approaching 42 days from when the written judgment was sent, it is also not hard to understand why a prospective appellant might feel that they should take all the steps that they can to institute their appeal before that date passes, in order to minimise the risk of being caught out.

79. Further, it is fair to assume that, in most cases, this point will not make any actual difference. That is because, in most cases, even where the appeal has been instituted before the timely-requested reasons were received, they will be sent in to the EAT by the appellant within 42 days of the date of receipt. This, combined with the fact that, when there is a timely request, the party concerned will always have until 42 days from the date of receipt of the reasons to institute the appeal, perhaps also explains why the Practice Direction does not expressly cater for the particular scenario that arose in the present case. Further, the paradigm case (though there could be others) with which paragraph 3.4 of the Practice Direction is implicitly concerned is, it seems to me, one in which no reasons have been provided because there was no, or no timely, request for them; and so in such cases written reasons will not be provided unless the EAT is persuaded to exercise its power to request them.

80. It occurs to me that it might be argued that, even in a case where there is a timely request for written reasons, the party concerned presents their appeal by providing everything else required before the reasons arrive, explains to the EAT that the reasons have not been included, because they have been requested but not yet received, and then sends them to the EAT within 42 days of receiving them, the proper course would be for them to start again, by resending everything they sent earlier. But I do not think that technocratic argument is right; and even if it is, it is hard to envisage a clearer case for the exercise of the rule 39(2) power, in order to further **"the more expeditious or economical disposal of any proceedings"** and/or **"the interests of justice."**

81. It is my understanding, and experience, as a resident EAT judge, that, in cases where an appeal is otherwise properly instituted ahead of receipt of written reasons, and there is a clear explanation, supported by evidence, that a timely request for these has been made, the usual practice of the EAT

is indeed to treat the appeal as properly instituted at that point; but also to take the approach that a copy of the written reasons, once received, needs to be provided to the EAT, before consideration is given to the next appropriate step. In light of the foregoing that appears to me to be, in principle, the right approach, in such clear cases, so as to further the expeditious and economical disposal of such appeals, and in accordance with the interests of justice to both parties and the overriding objective.

82. I turn then to consider, in light of the foregoing, what happened in this case. I note again that the respondent indicated that it was content for me to proceed on the basis of the claimant's account of the factual circumstances, in relation to matters of potential dispute, being unchallenged.

83. In this case, even had time to appeal been running from the date when the written judgment was sent, there were still some weeks to go on the date when the claimant submitted the notice of appeal. But I accept his account that he was already anxious that the written reasons had not yet been received, and about when they would, and about missing the deadline. In his statement accompanying the notice of appeal he referred to having been told by the judge on the 8th (that is, the last day of the hearing when the oral decision was given) that "I should receive the decision in writing within 7 – 14 days." Professionals who litigate in the employment tribunals know that the extraordinary volume of cases that they have for some time been dealing with, the limits on available resources, and additional pressures that matters such as the pandemic have created, would mean that a tribunal would be doing extraordinarily well to promulgate written reasons within that timescale.

84. I suspect therefore that what the claimant is recalling was a conversation in which the judge was referring to the possible timescale for issuing the written judgment (which the judge signed off that day) by the administration. However, I accept that the claimant did not have that familiarity, and, one way or another, formed the expectation that written reasons would or should be produced to a very short timescale. The impression that that was what he expected is reinforced by the content of his emails to the tribunal of 19 February and 1 March. While it might be said that, even on that

footing, he showed particular impatience by not allowing time for a response to his 1 March chaser before putting in his notice of appeal later the same day, I accept that, given his subjective expectations, he *was* anxious, and he was trying to play safe.

85. I have considered these aspects because, even when an explanation has been provided for the failure to provide the written reasons, the explanation must still, obviously, be one which is both genuine and satisfactory. But in all the facts and circumstances of this particular case, I conclude that it was. In light of the foregoing, I also conclude that, once the claimant had also furnished the other missing documents when he did, his appeal should at that point have been treated as instituted in time, exercising the power referred to in rule 39(2) and (3).

86. If I am right in my conclusions so far, then the claimant did not need an extension of time for his substantive appeal, and how matters subsequently unfolded does not need to be further considered. But in case I am said to be wrong, I have considered them.

87. While the claimant, in the course of argument, at times indicated his gratitude to the EAT's administration for the assistance they had given him, it is also entirely clear that he seeks to rely on his communications with them, and what he considers was their mishandling of the matter at points.

88. On that aspect, I start by reiterating two important points. First, complaints about the administration are considered by HMCTS, not judiciary. Secondly, it is not the responsibility of the administration to point out defects or errors in compliance to a litigant within any particular timescale, whether before or after a deadline has expired, or at all.

89. That said, I accept that the claimant's reading of the EAT's email of 9 March 2021 left him with the impression that, having provided an explanation for the absence of the written reasons, there was nothing more he needed to do, in that respect, *in order to ensure that his appeal was properly instituted*, and that he was not told otherwise in the communications of 10 and 12 March. As I have

said, I think that was, in fact, the right approach; but in any event, it is fair to take this into account.

90. Finally, I do not accept that it should count against the claimant that he did not, when he submitted the appeal, ask the EAT to decide it without written reasons, or to request them from the employment tribunal. That provision appears in the Practice Direction, not the rules, and so I do not think that non-compliance with it should ordinarily be treated as a substantive defect in relation to institution of an appeal that has otherwise been properly instituted. Nor is it apposite to a situation in which there has been a timely request for written reasons, but these are awaited. All that is needed in such a case, is for them to be furnished to the EAT as soon as possible once received.

91. To be clear, this does not mean that a party who has not requested written reasons in time or at all, or who has requested them out of time and been refused, need do nothing. Such a party will need to explain to the EAT whether they are asking it to consider their proposed appeal without the aid of reasons, or to request them from the tribunal, or both, and why, despite their failure to comply with the employment tribunal's rules, that would be the right thing to do. Each request is, of course, considered on its individual merits, and circumstances, and the decision whether or not to grant it is a judicial one. But it should not be assumed that such requests are granted as a matter of routine.

92. Returning to the present case, I conclude, in light of the foregoing discussion and findings, that in this particular case, the original appeal from the employment tribunal's decision was, or should have been treated as, properly instituted in time, in exercise of the rule 39(2) and (3) power; or, alternatively, if I am wrong about that, this is a case where the claimant had an acceptable excuse for not instituting it in time, or the circumstances mean that time should, exceptionally, be extended.

93. Had the original substantive appeal been treated as instituted in time, as I conclude it should have been, the first Registrar's order would not have been made as it was, and the claimant would not have found himself in the position of having to seek an extension of time to appeal from it at all.

Justice requires that he be put back in that position. That being so, I conclude also that there are exceptional circumstances in this case, such that, although the claimant does not have a good excuse for appealing from the first Registrar's order out of time, time for him to do so should also be extended. In light of the foregoing conclusions, there should then, for the first Registrar's order, be substituted a decision treating the original substantive appeal as instituted in time.

Outcome

94. For all the foregoing reasons, I therefore allow the appeal from the second Registrar's order and substitute a decision extending time for the appeal against the first Registrar's order to the date when that appeal was in fact made. I then allow the appeal from the first Registrar's order, and substitute a decision that the original substantive appeal was instituted in time.

95. The outcome of these appeals from Registrar's orders has not turned on a consideration, or determination, of the merits or potential merits of the underlying substantive grounds of appeal. This is not a case where they were obviously determinative of what I had to decide. This substantive appeal will therefore now proceed to the next stage, which is consideration by a judge of the notice of appeal on paper, by reference to rule 3(7) and related provisions.