Neutral Citation Number: [2024] EAT 96

Case Nos: EA-2021-001150-LA
EA-2022-000132-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 June 2024

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

THORNEY GOLF CENTRE LIMITED

Appellant

- and –

ANDREW REED (1)
ROLAND REED (2)

Respondents

- -
- -

Neil Morgan (director) for the **Appellant**
Patrick Tomison (instructed by Thompson Solicitors) for the **Respondents**

Hearing date: 23 April 2024

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

Late Submission of Response, Application for Extension of Time

At a hearing the employment tribunal refused an application by the respondent for an extension of time in respect of its late response. The appeal in respect of that decision was allowed.

The late submission of a response, and an application to extend time for it, will inevitably cause some delay, because of the need for that application to be adjudicated on paper or at a hearing. But when deciding whether to extend time for a late response, the starting point, in relation to delay, should be a consideration of the extent of the delay in putting in the response itself and/or (if done later) in applying for an extension. The more serious the delay which has necessitated the application the more important it is for the respondent to provide a full and satisfactory explanation for it. **Kwik-Save Stores Limited v Swain** [1997] ICR 49 (EAT) discussed.

If the late response was not accompanied (or preceded) by a request for an extension of time, the tribunal should also consider the delay in making the application, and why *that* was not done sooner, including, where the failure to accompany the response with an application for extension has been raised by the administration, how promptly thereafter the request, and associated explanation for the original delay, were put forward.

Once the late response, and application for extension, with an explanation for the original delay, have been provided, and the claimant has had the seven days allowed by rule to register any opposition to the application, the next step should be for a judge to decide that application on paper or, if the judge directs, at a hearing. In many cases, where this proceeds smoothly, the further time delay inevitably involved in reaching that point, and what has occurred between the time of the application and the

time of the decision on it, will not be significant to that decision. But it will not necessarily be irrelevant in every case. There could, for example, be a case where it is said that additional delay has been caused by the unreasonable conduct of a party, or that there has been some specific further development which should have a bearing on the balance of prejudice.

The present tribunal erred by failing to consider, and weigh in the balance, the extent of the prejudice caused by the original lateness of the response, as at the point when the application to extend time was made. This should have been the starting point when considering the factor of delay.

The tribunal also erred by confining its consideration of the prejudice to the respondent of being denied an extension of time, to the impact of that on its ability to advance its case on the issue of whether the claims were in time, and not weighing in the balance also the prejudice to it of not being entitled, except so far as permitted, to advance its case contesting the substantive merits of the claims.

The appeal in respect of the tribunal's decision taken at a subsequent hearing, at which the claimants' complaints were substantively decided, and remedy awarded, and at which the respondent's participation was limited, consequential upon the decision not to admit its late response, was consequentially also allowed.

Observed: decisions under rule 19 – 21 must be taken by an Employment Judge alone.

HIS HONOUR JUDGE AUERBACH:

Introduction and History of the Litigation

1. I shall refer to the parties as they were in the employment tribunal as claimants and respondent. The respondent appeals against two decisions of the tribunal arising out of the same matter. In view of the issues raised by these appeals, I need first to set out the relevant history of the litigation in some detail, though it is not necessary to record every single communication or development.

2. The claimants, who are brothers, were both employed for some years by the respondent as part of the green-keeping team. In early 2017 there was a change of ownership of the respondent and a new Head Greenkeeper was appointed. In the course of May 2017 both claimants began periods of absence for the given reason, broadly stated, of work-related stress.

3. In May 2018 solicitors for both claimants began a tribunal claim for wages by way of SSP in respect of their absence from work up to December 2017. The respondent was represented by a director, Mr Morgan, together with his colleague Ms Abbott. It defended the claim essentially on the basis that the claimants had not been genuinely sick at all, but were malingerers. At a preliminary hearing in November 2018 a judge identified that the dispute appeared to fall outside of the jurisdiction of the tribunal and should be raised with HMRC. Following further correspondence the claims were withdrawn. The respondent then applied for costs. That application was dismissed at a hearing in November 2019 which the respondent did not attend, and at which the tribunal awarded the claimants their counsel’s fee costs of the hearing. The respondent then appealed that decision.

4. Reverting to 2018, following the hearing in November 2018, the claimants and their solicitor wrote emails in December indicating that it was considered that they remained employed and stating that each of them intended returning to work on given dates in February 2019. The respondent replied on 21 January 2019 stating that the claimants had not been employed since 2 June 2017. It relied upon a letter of 30 May 2017 inviting the claimants to meetings on 2 June to discuss their grievances and absences, and a letter of 2 June 2017 indicating that, having failed to attend such meetings, the

claimants were treated as having left their employments with effect from that date.

5. Following this, the claimants' solicitors presented a fresh tribunal claim, for unfair dismissal, discrimination arising from disability, holiday pay and notice money. They claimed to have been dismissed by the letter of 21 January 2019. The new claim was stamped by the tribunal as having been presented on 18 April. The notice of claim dated 12 June required a response to be entered by 10 July 2019. On 26 June Mr Morgan emailed the claimants' solicitors. Like a number of the emails sent by Mr Morgan, the content was in places foul-mouthed and abusive. He stated that they could not start new tribunal claims when they had not paid the costs of the previous claim, and that the new claims were out of time as the claimants had "fucked off" in May 2017. Further on he wrote: "We are not spending our time and effort addressing your invented bullshit."

6. On 8 August 2019 the tribunal received from the respondent a completed response form, dated 7 August, with attached letters from a number of individuals giving accounts that were critical of the claimants' conduct during their employment. That response was rejected by the tribunal by a letter of 1 September 2019 because it was out of time and it was not accompanied by an application for an extension of time. By an email of 3 September 2019 the respondent, as well as raising other matters, then applied for an extension of time and reconsideration of the rejection of the response.

7. The tribunal had, upon issuing the new claim, also listed a case-management preliminary hearing for 20 January 2020. On 25 December 2019 the respondent applied for an order striking out the claim on paper on the basis that it was out of time, alternatively because the respondent's costs in the first claim had not been paid. Alternatively it applied for the 20 January 2020 hearing to be replaced with a strike-out hearing on a later date. It sent follow-up emails in early January 2020.

8. On 17 January 2020 the tribunal wrote to the parties informing them that the 20 January 2020 hearing had been postponed because of the number of cases in the list. On 6 March the case-management hearing was relisted for 9 April 2020. The respondent then applied again for a strike-

out on paper, alternatively for the hearing to be relisted to consider its strike-out application, on the basis that its directors were unable to attend on 9 April because of annual leave.

9. The case-management hearing went ahead on 9 April 2020 before EJ Ord. The claimants were represented by counsel. There was no attendance for the respondent. The tribunal noted that the claimants' costs that had been ordered at the November 2019 hearing in the 2018 claim had not been paid. Directions were given for the claimants to provide schedules of loss in respect of the 2019 claim by 21 May 2020 and for the matter then to be referred to EJ Ord together with the 2018-claim file for further directions. The minute of hearing was sent to the parties on 23 May 2020.

10. That same day, 23 May 2020, the respondent applied to set aside that order. It referred to its previous strike-out applications and the fact that it was appealing the November 2019 costs decision in the first claim. It renewed its application for the current claim to be struck out on paper, or alternatively at a hearing. Alternatively it applied for the current claim to be stayed pending determination of its costs appeal, and payment to it of its costs incurred in defending the first claim.

11. A letter from the tribunal of 18 August 2020 indicated that that email was treated by the judge as an application for reconsideration of the order made on 9 April 2020. That would be listed for a one-day hearing at which, if the reconsideration succeeded, the tribunal would also consider the respondent's strike-out application. A separate notice listed that hearing for 27 November 2020.

12. On 27 November 2020, after some delay, as Mr Morgan did not attend in person, having assumed that the hearing would be conducted by CVP, the hearing went ahead at 2pm by CVP before EJ Ord. The claimants were represented by counsel, Mr Morgan appearing for the respondent. Mr Morgan, in substance, submitted that the claim should be struck out for the same two reasons he had previously advanced in writing. The judge reviewed the history of the litigation. The narrative recorded that during the course of the hearing Mr Morgan became heated and at one point made a remark which caused the judge to ask whether he was being accused of bias. Mr Morgan so

confirmed. The judge recorded that matters thereafter deteriorated further on account of Mr Morgan's conduct. He terminated the hearing, recused himself, and referred the matter to the REJ.

13. On 2 January 2021 the tribunal sent notice of a full merits hearing of the claim to take place on 10 February 2021. The respondent replied protesting that its strike-out application should be heard first. On 13 January 2021 REJ Foxwell wrote to the respondent. Among other things he apologised that the notice sent on 2 January was erroneous, as the hearing on 10 February was not to be a final hearing, but a relisting of the matters that were to be considered at the hearing on 27 November 2020, had EJ Ord not recused himself. The net result of further correspondence was that the 10 February 2021 hearing date was also postponed to 10 March 2021.

14. At the hearing on 10 March 2021 the claimants' counsel drew the attention of the judge, EJ Manley, to the respondent's application on 3 September 2019 for an extension of time for the late response. The judge noted that this issue appeared to have been overlooked, and stated that it needed to be determined before other matters. She listed a further hearing to consider (a) whether the response should be accepted out of time; (b) if the late response was not accepted, what claims should succeed and what compensation should be awarded; (c) if it was accepted, whether to strike out the claims as out of time. She agreed to the respondent's request that the hearing be before a three-person tribunal. Directions were given for filing and service of documents and skeleton arguments. The respondent was also permitted to file and serve a witness statement explaining the late response.

15. The respondent filed and served witness statements of Mr Morgan and Ms Abbott on 26 May 2021, together with various documents. I note that these did not address why the response had been filed late, but instead addressed why the respondent maintained the claimants' employment had ended in 2017, so that their present claims were out of time, and should be struck out.

16. The next hearing was initially listed for one day on 2 June 2021. In the run-up the respondent applied for a postponement on the basis of late or partial compliance by the claimants with the March

2021 orders. Alternatively it requested a 2pm start because of Covid vaccination appointments in the morning. The judge decided to postpone, to avoid the risk of the hearing going part-heard. It was relisted for 9 September 2021.

17. The hearing on 9 September 2021 was at Watford (by CVP) before EJ Manley, Mr Bhatti and Mr Hancock. Mr Tomison of counsel appeared for the claimants, Mr Morgan for the respondent. An oral decision was given. The respondent's application for an extension of time in respect of its late response was refused. The tribunal recorded that, following this decision being given, Mr Morgan became abusive and was excluded from the CVP room.

18. The tribunal went on to list the matter for a further hearing on 9 and 10 December 2021 before the same three-person panel, to consider whether the claims were out of time, if so whether to extend time, whether to enter any judgments in favour of the claimants, and, if so, what remedy to award. The claimants were directed to provide statements about the ending of their employment, any paid work they had done since May 2017 and their efforts to find work, and the respondent thereafter to provide any additional evidence about the ending of the claimants' employment (in addition to the 26 May 2021 statements and documents). A written judgment and reasons and a case management minute were all sent to the parties on 21 September 2021.

19. The respondent subsequently applied for EJ Manley to be recused, but this was refused.

20. The hearing in December 2021 took place before the same three-person panel at Watford (as a hybrid hearing). Mr Tomison appeared for the claimants. Mr Morgan attended and was permitted to make representations, but not to cross-examine the claimants. The tribunal found that both claimants were dismissed on 21 January 2019. Accordingly their claims were in time. It found that they were both unfairly dismissed, dismissed without notice and owed holiday pay in respect of periods of sickness absence. It found that Andrew Reed was a disabled person and was discriminated against because of absence which arose from his disability; Roland Reed was not a disabled person,

so his disability discrimination claim failed. Awards were made to both claimants by way of basic awards, notice pay and holiday pay, and to Andrew Reed, £10,000 for injury to feelings. The total award to Andrew Reed was £15,890.66 and to Roland Reed was £8,877.38.

21. Meantime the rule 3(10) hearing in respect of the respondent's appeal from the November 2019 costs decision in the first claim took place in July 2021. Certain grounds of appeal were directed to proceed to a full hearing. At a hearing in May 2023 that appeal was dismissed.

The Present Proceedings in the EAT

22. The first appeal by the respondent before me is against the decision, arising from the 9 September 2021 hearing, to refuse the extension of time for the late response. The second appeal is from the substantive decisions arising from the hearing on 9 and 10 December 2021.

23. Both appeals were considered at a rule 3(10) hearing before HHJ Wayne Beard. His order permitted the first appeal to proceed in respect of ground 3 only. The rule 3(10) application in respect of the second appeal was allowed, and the respondent was directed to lodge amended grounds. By a subsequent order Judge Beard gave the respondent permission to amend the grounds of appeal in the second appeal in the form lodged with the EAT on 28 April 2023.

24. In their Answer to the second appeal the claimants invited the EAT to give further directions in respect of allegations raised in the amended grounds regarding the conduct of the December 2021 hearing. Pursuant to further orders made by HHJ Katherine Tucker the respondent tabled a witness statement of Mr Morgan in that regard dated 20 November 2023. Comments were then received from the employment judge and from one of the two lay members, Mrs Hancock.

25. At the hearing of these appeals Mr Morgan appeared for the respondent and Mr Tomison for the claimants. I had bundles of documents before me from both parties, to which some additions were made during the course of the hearing before me, bundles of authorities and skeleton arguments from them both. I heard extensive oral submissions over the course of a day. On the morning

following the hearing before me Mr Morgan sent in an email with further submissions and attachments. He did not have permission to do so, but his email was copied to Mr Tomison, no objection or comment upon it on behalf of the claimants has been received, and I have considered it.

26. Mr Morgan accepted that, in respect of the first appeal, only ground 3 had been permitted to proceed; but he submitted that points that had been raised in grounds 1 and 2 were pertinent to it. In relation to the second appeal Mr Tomison accepted that the net effect of HHJ Wayne Beard's orders was that all of the 28 April 2023 amended grounds had been permitted to proceed.

The Legal Framework

27. The following particular rules of the **Employment Tribunals Rules of Procedure 2013** are relevant to the issues and arguments raised by these appeals (I have omitted irrelevant sub-rules).

> **"Overriding objective**
>
> **2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—**
>
> **(a) ensuring that the parties are on an equal footing;**
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> **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;**
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> **(c) avoiding unnecessary formality and seeking flexibility in the proceedings;**
>
> **(d) avoiding delay, so far as compatible with proper consideration of the issues; and**
>
> **(e) saving expense.**
>
> **A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.**
>
> **Rejection: substantive defects**
>
> **12.—(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—**
>
> **(a) one which the Tribunal has no jurisdiction to consider;**
> **… …**
>
> **(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c) or (d) of paragraph (1).**
> **… …**

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

Sending claim form to respondents

15.— Unless the claim is rejected, the Tribunal shall send a copy of the claim form, together with a prescribed response form, to each respondent with a notice which includes information on—

(a) whether any part of the claim has been rejected; and

(b) how to submit a response to the claim, the time limit for doing so and what will happen if a response is not received by the Tribunal within that time limit.
… …

Response

16.— (1) The response must be on a prescribed form and presented to the Tribunal in accordance with any practice direction. Subject to any direction given under rule 15(2) (sending claim form to respondents), it must be presented within 28 days of the date that the copy of the claim form was sent by the Tribunal.
… …

Rejection: form presented late

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

… …

Reconsideration of rejection

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

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

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

… …

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) The Tribunal may determine the application without a hearing.

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

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

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

(2) The Tribunal shall decide whether on the available material (which may include further information which the parties are required by the Tribunal to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Tribunal shall issue a judgment accordingly. Otherwise, a hearing shall be fixed. Where the Tribunal has directed that a preliminary issue requires to be determined at a hearing, a judgment may be issued by the Tribunal under this rule after that issue has been determined without a further hearing.

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

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

> **(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.**
>
> **(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.**

28. Of the authorities cited to me, the following are most pertinent in terms of general principles.

29. In **Kwik Save Stores Limited v Swain** [1997] ICR 49 the EAT (Mummery J presiding) gave guidance on the approach to the extension of time for a late response (the rules then in force being materially the same as the current rules). At 53G – 54E the EAT said this:

> **"We agree with the regional chairman that time limits are laid down as a matter of law, not by the tribunals themselves, and that "they are there for good reason because of the nature of industrial tribunal hearings." This is an important factor in the exercise of the discretion to grant an extension of time under rule 15(1) of the Industrial Tribunals Rules of Procedure 1993 . As Sir Thomas Bingham M.R. said in *Costellow v. Somerset County Council* [1993] 1 W.L.R. 256, 263:**
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>> **"The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious despatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met."**
>
> **Those observations, made in the context of ordinary civil litigation, apply with even greater force in the case of the procedure in industrial tribunals, which were established to provide a quick, cheap and effective means of resolving employment disputes. Failure to comply with the rules causes inconvenience, results in delay and increases costs. It is also indicative of an unacceptable attitude on the part of the defaulter not only to the rights conferred and asserted, but also to the industrial tribunal system itself. This case is a striking illustration of the detrimental consequences of disregarding time limits. If the employers had observed the time limits, the hearing of the cases on the merits would probably have taken place by now. Here we are, nearly six months after the presentation of the originating applications, deliberating on an appeal on the issue of extension of time, with leading counsel appearing for the employers, with two of the applicants represented by separate counsel and the third by his trade union representative.**
>
> **This delay and this additional expense would not have occurred if the employers had complied with the time limits or had made an application for and obtained a modest extension of time before the time limit for filing notices of appearance had expired. The delay, the expense and the inconvenience are all the fault of the employers. We repeat what this appeal tribunal said in *Charlton v. Charlton Thermosystems (Romsey) Ltd.* [1995] I.C.R. 56, 61A:**
>
>> **"The appeal tribunal cannot emphasise too strongly the importance of respondents complying with the time limits for entering an appearance in order to avoid later expense and delay in the hearing of applications by the industrial tribunal and appeals from it."**

30. At 54H – 55H, under the heading: "The Discretionary Factors" the EAT said this:

> **"The explanation for the delay which has necessitated the application for an extension is always an important factor in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default. In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.**
>
> **In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. The process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice. An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer if the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour in granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgment that often renders the exercise of a discretion more difficult than the process of finding facts in dispute and applying to them a rule of law not tempered by discretion.**
>
> **It is well established that another factor to be taken into account in deciding whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham M.R. in Costellow v. Somerset County Council [1993] 1 W.L.R. 256, 263:**
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>> **"a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate."**
>
> **Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a notice of appearance, the industrial tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. This does not mean that a party has *a right* to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case."**

31. In **Limoine v Sharma** [2020] ICR 389 (EAT) I gave guidance in relation to the provisions of rule 21. I noted at [24] – [28] that where a response has not been presented, or not accepted out of

time, judgment for the claimant should not just automatically follow. The judge needs to be satisfied, either on paper, or at a hearing, that there is the basis, in material presented by the claimant, for a finding that the complaint in question is made good. I drew attention also to the Presidential Guidance on this subject, issued pursuant to rule 7, which should be taken into account.

32. At [32] – [40] I also gave guidance on the approach to be taken to whether, or to what extent, to permit a respondent to participate in hearings under rule 21(3). After discussing the position where such a hearing is only a remedy hearing, I continued:

> **38. However, where the hearing is concerned with liability, very different considerations are likely to apply. The fact that there has been no written response at all is likely in most cases to be highly significant to the practical implications of a request to participate. Further, the fact that such a party *can* still potentially be permitted to participate under Rule 21(3) should plainly not be treated as a ready substitute for the obligation to put in a timely response, or apply for, and obtain, an extension of time to do so, under Rule 20. The Rule 21(3) power cannot be lightly invoked in order to subvert or circumvent the essential framework of Rules which support the obvious importance of defences to claims being properly set out in a timely pleading, so that the party bringing a claim knows clearly what elements of it are contested and on what basis, and there is then fair and orderly preparation, and in due course trial, of the contested aspects.**
>
> **39. If there is a Rule 21(3) application to participate in a Liability Hearing in an undefended case, the Tribunal will therefore need to give particularly close and careful consideration to the balance of prejudice and the practical implications of allowing such participation in one form or another, if at all, in that hearing. Certainly, it should not be assumed that the respondent to an undefended claim who simply turns up to a Liability Hearing of that claim will easily be able to persuade the Judge to allow it to participate, even in a limited way.**
>
> **40. However, beyond those basic points, I do not think I need to give more particular guidance. What is essential is that, where there is an application or request for permission to participate, it be given substantive consideration by the Judge and granted or refused judicially, having regard to the particular circumstances of the given case."**

Grounds of Appeal and Matters Raised in Arguments

33. I have considered all of the detailed arguments raised before me. The following are in summary what appear to me to be the principal points advanced in ground 3 of the first appeal, against the tribunal's September 2021 decision to refuse the extension of time in respect of the late response.

34. First, it is said that the late response had in fact long since been *de facto* accepted without a

hearing, by virtue of the conduct of the tribunal and the parties, including at the hearings in 2020 at which the issue was not raised, and the content of EJ Foxwell's 13 January 2021 letter. EJ Manley had then, at the March 2021 hearing, wrongly revived the issue of the response being out of time.

35. Further, the tribunal should in any event still have addressed first, as the logical starting point, the issue, raised by the respondent's repeated strike-out application, of whether there were even valid claims over which it had jurisdiction. In fact the 2019 claim should never have been accepted. EJ Manley had therefore wrongly treated the issue of the late response as the first order of business.

36. Next, the delay in submitting the response was not significant. Once alerted to the matter, the respondent had also applied promptly for an extension of time. The application should have been considered by reference to the position when it was made, on 3 September 2019. The delay at that point had not caused any prejudice to the claimants at all, in particular because the first case-management hearing was not listed to take place until January 2020. It was wrong to take account of later developments up to the hearing in September 2021. In any event the tribunal had erred in laying responsibility for later delays in the progress of the litigation entirely at the respondent's door.

37. Next, it was wrong to say that no good reason had been put forward for the lateness of the response. The respondent had explained that this was due to a number of factors. Mr Morgan referred to a statement that he had put in to the EAT which gave a detailed account of why there was a delay and to internal emails relating to the preparation of the response, provided to the EAT. Mr Morgan also explained that he had calculated that the response was sixteen days late on the basis that time ran only from when the respondent actually received the notice of claim, which was 24 June 2019.

38. Next, refusal of the extension of time was, in all the circumstances, disproportionate and draconian. It was unfair to the respondent having regard in particular to the fact that the tribunal itself in its decision stated that it considered the defence raised by the late response to be arguable. The respondent was denied the opportunity to have a fair trial of that defence. The tribunal had erred by

focussing solely on the prejudice to the claimants of allowing the late response, without properly considering the prejudice to the respondent of not allowing it, and balancing the two.

39. Finally, it was also wrong, in the directions given at the September 2021 hearing, to permit the claimants to adduce further evidence about the termination of their employments for the further hearing listed for December 2021. The respondent had filed its evidence back in May 2021, and the claimants had not filed any evidence at all prior to the September 2021 hearing.

40. The following are in summary what appear to me to be the principal points advanced in the second appeal, challenging the decision arising from the December 2021 hearing.

41. First, the tribunal erred in its approach to various matters related to the late and piecemeal filing of witness statements and medical evidence by the claimants, and in rejecting the respondent's submissions in this regard. I will set out the main issues raised in this respect later in my decision.

42. Secondly, and relatedly, the claimants did not have any "validly or legitimately-served evidence" to support their claims or resist the respondent's longstanding strike-out application.

43. Next, Mr Morgan was, at that hearing, unfairly prevented from cross-examining the claimants. When he protested about this his microphone was muted.

44. Next, the respondent's strike-out application was relegated to a brief discussion at the end of the hearing during which the judge constantly interrupted and harangued Mr Morgan.

45. Next, the tribunal's finding that the claimants did not receive the letter of 30 May 2017, nor the letter of 2 June 2017, was contrary to their own statements. Hence that finding was perverse, as was the consequential finding that their employments had only ended on 21 January 2019.

46. Finally, having regard to all the foregoing, the claims should have been struck out because of the claimants' non-compliance with orders or because the respondent could not have a fair hearing.

47. Mr Morgan acknowledged that the content of a number of his emails in the course of the litigation had been intemperate and abusive and used inappropriate language. He apologised for this conduct but maintained that it was borne of years of experience and frustration at the injustices of the system towards small businesses such as the respondent, and the difficulties of getting responses to his communications and proper consideration of his points. He also urged upon me that this should not be treated as a trump card for the claimants, overriding the need for a fair consideration of the merits of his substantive criticisms of the tribunal's decisions raised by the grounds before me.

48. A point which had been raised in a ground not permitted by HHJ Wayne Beard to proceed, but which Mr Morgan addressed in some detail, was that the respondent did not accept that the claim had in fact been filed on 18 April 2019. It was his case that the date stamp had been faked so as to make the claim appear to be in time on the basis of the claimed dismissals date. The notice of claim was stamped as posted on 21 June 2019 and was received on 24 June. The truth, he maintained, was that the claim had in fact been received shortly before that notice was sent on 21 June. The date on the notice of claim issued by the tribunal, of 12 June 2019, was itself deliberately backdated.

49. Alternatively, if the 18 April 2019 date of issue of the claim was genuine, then the period of time taken by the tribunal to issue it, as well as other delays by both the tribunal and the claimants, pointed up the unfair double standard of the tribunal penalising the respondent for what he said was its short and innocuous delay in filing the response.

50. I will consider in more detail, the relevant reasoning of the tribunal, and the arguments, including the position of Mr Tomison in relation to these matters, in the next section of my decision.

Discussion and conclusions

Initial Acceptance of the Claim

51. As I have noted, Mr Morgan contended that the tribunal should never have accepted the 2019

claim in the first place. That was, he said, for two reasons.

52. First, this second claim was an abuse of process, because the claimants had not paid the respondent's costs in respect of the first claim. However, as the tribunal noted at [18] the respondent did not obtain a costs order in the first claim. The fact that the respondent was appealing the costs decision in the first claim did not mean that the tribunal was bound to stay the second claim pending the outcome of that appeal, still less not to accept it, or to strike it out.

53. The second plank of this argument is the respondent's contention that the second claim was out of time. However, the tribunal did not err in holding, at [37], that it did not follow that it was wrong for it to have been initially accepted. The claimants claimed to have been dismissed on 21 January 2019. It was not an error not to reject the claim for lack of jurisdiction under rule 12. That rule should only be used where lack of jurisdiction is plain and obvious on the face of the claim form, for example because it raises a legal complaint of a type which is not with the tribunal's jurisdiction at all. (See: **Clarke v The Restaurant Group (UK) Limited** [2021] UKEAT/2020/1107, 30 July 2021.) The respondent's case was that their employments had ended in 2017 and so the claims were out of time. It needed to put in a response advancing that case as part of its defence.

De Facto Extension of Time for the Response?

54. The respondent contended that, by the time of the March 2021 hearing, the late response had been effectively accepted without a hearing under rule 19(3). Following its application for an extension on 3 September 2019 the issue had not been raised at the hearings in April or November 2020 or otherwise. Mr Morgan also relied upon REJ Foxwell's statement in his letter of 13 January 2021 that "I am the Regional Employment Judge for the South-East Regions *where these claims are presently proceeding*." The parties and the tribunal had effectively proceeded for many months on the basis that this was no longer a live issue until it was suddenly revived at the March 2021 hearing.

55. As to that, the starting point is that on 1 September 2019 the tribunal correctly rejected the

response because it was received after the date given in the notice of claim, no extension of time had been granted, and the late response was not accompanied, or preceded, by an application for extension of time. Rejection under rule 18 was, in those circumstances, not only correct, but mandatory. That decision stood unless or until a judge decided to reconsider it and/or to extend time retroactively.

56. As the tribunal noted at [25] there was no written decision to that effect. Overlooking, or failing to deal with, an application is not the same as a judge considering and deciding it. As for the 13 January 2021 letter from REJ Foxwell, the phrase on which Mr Morgan relies was merely by way of explanation that he was writing as he was the REJ for the relevant region in this case.

57. It was therefore not wrong for REJ Manley, when it was raised at the March 2021 hearing, to identify that the application needed to be determined. This was not, as the ground contends, a reflection of prejudice, but the only correct approach. Indeed, I note that the judge also allowed the respondent a further opportunity to put in a statement explaining why the response was late (additional to the reasons given in the 3 September 2019 letter), before the matter came to be decided.

Order of Business

58. The respondent contends that the tribunal should, in any event, have decided first whether the claims should be struck out, as being out of time, and was wrong to treat the question of extension of time for the response as the first order of business.

59. Mr Morgan was plainly very aggrieved that he had raised his strike-out application repeatedly, that this application took some time to be identified by the tribunal, and that it was not then considered and decided first. However, in accordance with the rules of procedure, the issue as to whether this claim was out of time – whether considered as a a strike-out (no reasonable prospect of success) issue or determined substantively – was not appropriate for consideration at the stage of acceptance of the claim, nor prior to the determination of the issue relating to the late response, which itself raised the point of dispute. The tribunal did not err in approaching these matters in the order that it did.

Date of Presentation of the Claim; Date of Receipt of Notice of Claim

60. Although not strictly within the scope of the live grounds, I have considered Mr Morgan's contention that the tribunal was wrong to proceed on the basis that the claim was presented on 18 April 2019. That Mr Morgan challenged this was identified in the September 2021 decision at [22]. At [37] the tribunal noted that the claim forms were "date stamped by the tribunal on 18 April 2019". I take with this, Mr Morgan's point about the notice of claim only have been received at the respondent's office on 24 June 2019. At [38] – [39] the tribunal said this:

> **"The tribunal regrets that there was a delay of around 6 weeks before the claims were sent to the respondent but can only assume this was because of the high workload at the tribunal office. In any event, that is no prejudice to the respondent which still had 28 days from the date it was sent to it to respond. The respondent was told of that date, which was 10 July 2019.**
>
> **The tribunal takes into account that the respondent felt able to write a long e-mail to the claimants' solicitor well within the time, which time could have been better spent filling in the response by the due date. When the response was sent on 8 August 2019, it raises the very same issues about whether the claims have been presented in time, if, as the respondent alleges, the claimants' employments ended in June 2017."**

61. Mr Morgan had engaged in extensive correspondence with the claimants' solicitors about this matter and he was not satisfied that the evidence showed that the claim form truly had been presented on the date stamped by the tribunal. He told me that he remains convinced that there was a deliberate falsification of the date by the tribunal's administration, and that evidence provided to him by the respondent's solicitors, such as an email receipt from the tribunal, had been doctored.

62. However, notwithstanding his abiding conviction, the tribunal was entitled not to accept this conspiracy theory, and to accept that the claim *was* presented when date-stamped, and to infer that, however unusually slow Mr Morgan considered it to be, the delay in sending out the notice of claim on this occasion was, more prosaically, simply a reflection of the high workload at the tribunal office. Nor did the tribunal err in not concluding that, because the respondent did not receive it until 24 June, the notice of claim must therefore also have been fraudulently backdated to 12 June.

63. Mr Morgan says that even the period from 18 April to 12 June 2019 was appreciably more

than the "around 6 weeks" reckoned by the tribunal. As noted, he also calculates that the response was only 16 days late, reckoning the 28-day period from when the notice of claim was received. As to this, the tribunal identified (at [1]) the date of receipt by it of the claim *and* the date of the notice of claim, as well as the date by which the notice indicated that the response was required. As it correctly noted at [38], time for the response only ran from the date of sending. But, I add, it did indeed, as rule 16(1) expressly states, run from the date of *sending*, not the date of *receipt* (see: **Bone v Fabcon Projects Limited** [2006] ICR 421 (EAT). In a case where the tribunal accepts that, through no fault on the part of the respondent, there has been a serious delay in that notice being received, that should be taken into account when deciding whether to extend time. (Cf. on a similar point **Rana v LB Ealing** [2018] EWCA Civ 2074; [2019] ICR 789. I note also that the problem, in some cases, of a wrong address being initially used, has been the subject of a rule change in April 2024.)

64. In this case the tribunal did not specifically address in its decision the respondent's point that it had not received the notice of claim until 24 May 2019. However it noted that it was able to send the email of 26 June 2019 commenting in substance on the claim, which was two weeks prior to 10 July 2019, and that there had been no application for an extension of time for the response prior to, or when, it was submitted late. I therefore do not think that the tribunal erred by failing to treat the late receipt of the notice of claim as a significant factor in the respondent's favour in this case.

65. Finally, on this aspect, it does not follow that, because the administration took some weeks to process and issue the claim, therefore the tribunal in the September 2021 decision wrongly applied a double standard. The timescale for provision of a response is stipulated by rule, and compliance with that rule is important for the reasons discussed in **Kwik-Save**. However, the approach to be taken to events occurring in the litigation after the making of the extension-of-time application, but prior to its adjudication, is a different matter, to which I will come.

The Explanation for the Response Being Late

66. The tribunal noted that the email of 3 September 2019 began with a criticism of the tribunal

itself for accepting the claim form, and continued with a "strongly worded commentary on the tribunal system" the language of which was "abusive and highly disrespectful". The tribunal continued:

> "**14. There then appears to be an explanation of the delay as follows: "to be further specific, we could not respond to claim forms any faster because:**
>
> > **1. 'When we received them it was our peak season, and our peak workload of the year. Contrary to you dilatory-public-sector-gohome-at-2-on-Fridays-23days-a-year-off-sick-8-days-paid-holidayhuge-pension-parasitical-fuckers; we actually have to work for a living. In practical terms, this means 14+ hour days and 7 days a week. Consequently, we could not attend to them any sooner.'**
>
> **15. The e-mail then goes onto criticise the claimants' lawyer using similar language, stating that the respondent had been waiting for a reply to an email they had sent to that lawyer on 26 June 2019.**
>
> **16. The e-mail of 3 September includes an application to strike-out the claims because they are "time-barred" and "because costs of previous failed claims have not been paid". It is also an application to file the response "a couple of weeks late (only)".**
>
> **17. The e-mail sent to the claimants' solicitor on 26 June 2019, which was copied to the tribunal, has similar vitriolic criticisms and expletives. The part which might be relevant to the application to present the response out of time reads as follows (paragraph 3): "What you have written is a highly prejudiced, far left-field, fantasy, fairy story. We are not spending our time and effort addressing your invented bullshit"."**

67. The tribunal noted that there was no further communication from the respondent until the response itself was received. In oral submissions Mr Morgan referred to the witness statements from himself and Ms Abbott from May 2019, which the tribunal read. Further on, at [23], the tribunal said:

> "**When prompted again to address the issue of the response being presented out of time, Mr Morgan went on to say that the respondent was very busy at the time that the response was due. He said that it was a private business; it was a leisure park and it was the summer period and they were overwhelmed with business, working 7 days a week. He also said that, at some point, he was away for 2½ weeks on a business trip to the United States."**

68. In the discussion of its conclusions, at [39], the tribunal indicated that it took into account that the respondent felt able to write a long email to the claimant's solicitor "well within the time, which could have been better spent filling in the response by the due date" and that the response, when it came, raised the very same issues as that email. A little further on the tribunal said this:

> "**41. The tribunal considered what Mr Morgan has said, both in the application of 3 September 2019 and in his oral submissions today.**

> **42. We have tried to look beyond the vitriolic attacks on the claimants, their lawyers and the tribunal system and ascertain what there might be to suggest a reason for the response to have been presented late. The closest we can come is that it was the peak season and the respondent was busy. The tribunal does not accept that that is a good reason, particularly in light of the fact that the respondent found time to write the earlier email to the claimants' solicitors. That email made it clear that the respondent had decided not to respond (quote above at paragraph 17). In Mr Morgan's words, the respondent would not "spend our time and effort".**
>
> **43. There really is no reason given for non-compliance, Mr Morgan, concentrated instead on asking for a strike-out of the claims which, on his case, have been improperly accepted. The tribunal considered the application as it was made at the time in September 2019. We have formed the view, that had we been considering it then, we would not have accepted the reason provided. The respondent did not apply for an extension of time and did not provide a satisfactory explanation for the late presentation of the response."**

69. Particularly having regard to the fact, and content, of the 26 June 2019 email, and the fact that the notice of claim specifically identified the due date for the response, the tribunal was fully entitled to take the view that it did, of the explanation that the response was not put in sooner than it was, because of the pressures of dealing with other business. I also agree with Mr Tomison's submission to me that the tribunal cannot be criticised for not finding compelling, the explanation that the respondent was expecting and awaiting a reply to its 26 June email to the claimants' solicitors, given, not least, the abusive content of that email, including the parting shot that it contained.

70. Mr Morgan also told the EAT that, following receipt of the notice of claim, attempts had been made to speak to the tribunal to get to the bottom of when the claim had been received (as they did not believe the 18 April 2019 date stamp) and an explanation of why it had been accepted when (on their case) it was out of time. He also referred to some personal circumstances that were distracting him at the time. But, even if, as he told me (which Mr Tomison did not accept), these points, and his more detailed account of the internal process of preparing the response, were orally advanced by him before the tribunal, in light particularly of the fact that he had been able to write the 26 June email, I do not consider that the tribunal erred by not treating them as a good explanation.

The Impact of the Response and Application to Extend Time Being Late

71. I turn to the respondent's criticisms of the tribunal's approach to the question of the impact of

the delay occasioned by the late response and application. At [20] the tribunal said this.

> **"As can be seen from the summary above, there were considerable delays in this matter coming to a hearing. The respondent did not attend the CPH in April 2020 and the hearing in November 2020 could not proceed. It appears to the tribunal that the application to reconsider the rejection and accept the response out of time might well have been overlooked by the parties and the Employment Tribunal. However, it clearly came to light on 10 March 2021 when the claimants' counsel referred me to it. Given that the position was quite clear that there had been a response which had been rejected and an application made to accept it out of time, I decided that issue would need to be determined before anything else in these claims.**

72. In its conclusions, at [44] – [46], the tribunal said this;

> **"44. We considered the question of prejudice. The respondent has raised the issue of whether the claims were made in time and that is a jurisdictional issue which must be determined by the tribunal before the claims proceed. However, the tribunal can consider that issue with the benefit of evidence from the claimants and from Mr Morgan and Ms Abbott. When we consider the prejudice to the claimant, the tribunal have formed the view that it is significant, given the long delays there have been and the respondent's insistence on pursuing matters other than the one in hand. Mr Morgan's belligerent attitude has made the proceedings very difficult.**
>
> **45. The tribunal then considered whether the fact that this matter seems to have been overlooked by the parties and possibly by the tribunal, would affect our judgment on the issue. But this does not improve matters for the respondent. The respondent has not properly engaged with this process. It is true that a considerable number of e-mails have been sent both to the claimants' lawyers and to the tribunal, but they contain a high level of abuse and that makes it difficult to understand what is being requested. The two hearings in 2020 did not proceed properly. On the first occasion, nobody appeared for the respondent and on the second occasion, it was brought to an end because of the behaviour of Mr Morgan.**
>
> **46. No good reasons have been given for late presentation of the response. There was no suggestion of ill-health or of a failure to understand the rules. Indeed, Mr Morgan was at pains to remind the tribunal on a number of occasions, of the rules that he believes assist his case. Given that the respondent can take part in hearings to the extent permitted by the Judge, and its evidence on the time limitation point will be taken into account, the tribunal have decided that the response will not be accepted out of time. It is not in the interests of justice to accept the late response."**

73. The respondent contends that the tribunal erred in principle by considering how events had unfolded in the litigation after the date on which the response was presented. Its focus should have been, solely, on the impact of the delay up to the date when the response was received, on 8 August 2019 and/or the application made, on 3 September 2019. Given that the first case-management hearing was not due to take place until January 2020, that delay caused no prejudice at all.

74. Alternatively, the tribunal erred by laying the blame for subsequent delays entirely at the door of the respondent. Careful consideration of the chronology showed that this was a false narrative. Mr Morgan in particular made the point that the January 2020 hearing was postponed by the tribunal itself, because of lack of resource. As to the April 2020 hearing he referred to the fact that the respondent had informed the tribunal that it could not make the date because of annual leave.

75. Mr Tomison submitted that a tribunal will not necessarily or automatically err by taking into account how matters have unfolded following the submission of a late response and application for extension of time. As discussed in **Kwik-Save** late compliance and the need to adjudicate such an application is liable inherently lead to an element of delay in the proceedings. Mr Tomison accepted that if there is a delay which is the fault of the tribunal itself, that should be recognised. But he submitted that in this case the tribunal specifically considered whether the respondent could be properly blamed for the delay, at [45], and reached a permissible conclusion.

76. I will consider first the point of principle. In **Kwik-Save** it was observed that the entering of a late response and an application to extend time is liable inherently to cause some delay. But this was said specifically in the context of a discussion of why compliance with the time limit in the first place is important. When deciding whether to extend time, the starting point, in relation to delay, should be a consideration of the extent of the delay in putting in the response itself and/or (if done later) in applying for an extension: it is *that* delay which was the focus of the EAT's remarks at 54H to 55B, where it indicated that the more serious the delay *which has necessitated the application* the more important it is for the respondent to provide a full and satisfactory explanation for it.

77. In a case where the response has been submitted late, the tribunal should therefore start by considering *that* delay – both as to its impact and as to the explanation put forward for it. If it was not accompanied (or preceded) by a request for an extension of time, the tribunal should also consider that delay, and why *that* was not done sooner, including, where the failure to accompany the response with an application for extension has been raised by the administration, how promptly thereafter the

request, and associated explanation for the original delay, were put forward.

78. Once the late response, and application for extension, with an explanation for the original delay, have been provided, and the claimant has had the seven days allowed by rule 20(2) to notify any objection to the application, the next step should be for a judge to decide that application on paper or, if so directed, at a hearing. In many cases, where this proceeds smoothly, the further time period taken to reach that point will not be significant to the tribunal's decision. But it will not necessarily be irrelevant in every case. There could, for example, be a case where it is said that additional delay has been caused by the unreasonable conduct of a party, or that there has been some specific further development in that period which should have a bearing on the balance of prejudice.

79. In the present case the tribunal did not proceed, following the application, to consider and determine it as the next order of business. Other matters were addressed, and two hearings took place, before, at a third hearing, the respondent's counsel raised the matter. Mr Tomison submitted that, at [45], the tribunal properly considered the implications of the application having been "overlooked by the parties and possibly by the tribunal", and its conclusions could not be challenged.

80. However, what the tribunal does not appear to have done, in relation to its consideration of delay, is to start by considering, and weighing in to the balance, the delay *up to 3 September 2019*, and the respondent's contention that it did not have a significant impact *at that point*, given the date of the first case-management hearing, before then considering what might be the further implications of the application having been overlooked until March 2021.

81. In addition, as to those further implications, the tribunal referred at [44] to the abusive content of the respondent's emails making it difficult to understand what is being requested. But, while the opening section of the 3 September 2019 email was indeed staggeringly abusive, as the tribunal identified, the email did then include express applications for a reconsideration of the refusal of the response and an extension of time, and advanced reasons for the lateness of the response. True it was

that the respondent had not itself chased this aspect thereafter. But nor did the claimants' solicitors raise the fact that the response had been rejected, as out of time, and an application for an extension made, prior to it being brought to the tribunal's attention by counsel at the hearing in March 2021.

82. The tribunal was entitled to take the view that the absence of any attendee for the respondent at the March 2020 hearing (for which dates to avoid had been requested and which had not been postponed) slowed progress, and entitled to lay the postponement of the November 2020 hearing at the door of the respondent, given its findings as to Mr Morgan's conduct during the course of it. But it was also the case that at neither of these hearings was the fact that the response had been filed late raised by the claimants' representatives, or otherwise identified or considered by the tribunal.

83. Mr Tomison correctly submitted that, so long as the tribunal takes all relevant factors into account, the weight to be attached to them is a matter for it. However, for these reasons I consider that the tribunal made a principled error by failing specifically to consider what prejudice, if any, had been caused by the original delay up to the point when the late response was submitted, and the extension application made; and by it, without distinction, taking the approach that the respondent was responsible for the whole period of delay up to the point of adjudication.

84. The respondent also contends that the tribunal erred, in reaching its overall conclusion, by failing properly to consider and weigh the prejudice to it of refusing the application, by focussing solely upon the issue of whether the claim was out of time, and by failing to take into account the tribunal's own finding that the defence was arguable (the second factor identified in **Kall-Kwik**).

85. As to this, the tribunal's focus does appear to have been specifically on the issue of when the claimants were dismissed, and hence whether their claims were presented in time. At [40] it said that the defence may be arguable "at least as far as the question of when employment ended is concerned", adding only that it "does contain some criticisms" alleging that they were "work shy" and that their claims were "false". The tribunal's remarks at [44] and [46] concerned specifically the time point, in

relation to which it said that the respondent's evidence could be taken into account. Correspondingly, it directed the claimants to put in witness statements about the ending of their employment (as well mitigation) and permitted the respondent to put in any additional evidence about *that* issue.

86. Picking up, here, another of the strands of the appeal, it was not wrong, as such, to permit the claimants to put in evidence on the date-of-dismissals point. The tribunal appears in March 2021 to have envisaged that, if the late response was accepted, then this point would be considered in the first instance as a strike-out point (that is, the claims would be struck out if it was considered that there was no reasonable prospect of them being found to be in time). In keeping with that approach, at that hearing it directed skeletons and bundles on the point, but not witness statements. However, at the September 2021 hearing the tribunal envisaged that the issue would be determined in substance at the December 2021 hearing, and so a direction for witness evidence relating to it was appropriate.

87. However, the tribunal did not require the claimants to produce evidence on any other topic, which itself reflected that it had only considered the prejudice of not extending time for the response, with respect to the date of dismissals/time point. It did not consider the prejudice to the respondent of not being able to defend the claims on their merits, if they were in time. In particular, both claimants were claiming that they were dismissed because of sickness absence arising in consequence of disability, whereas the respondent's case was that neither of them were genuinely sick (nor, by implication, disabled) at all. The disability discrimination complaints were also a very significant part of the claims, with each claimant seeking, if successful, £15,000 in respect of injury to feelings.

88. Mr Tomison submitted that the tribunal had taken into account that, if it did not extend time, the respondent would require permission to participate in the next hearing to any extent at all. As to that, it is correct that the tribunal noted that the respondent would be able to take part in the next hearing "to the extent permitted". But it did not purport, as part of that decision itself, to grant such permission beyond stating that the respondent's evidence on the claim-in-time point would be "taken into account" and that it would "be able to comment on any possible compensation".

89. What the tribunal did not do is address the implications for the respondent of not being able, except so far as permitted, to participate in the hearing, whether by way of live witness evidence or as its own representative, in order to contest the *merits* of the claims, including the disability discrimination claims, if they were found to be in time. The tribunal therefore made the further principled error of failing to identify, and weigh in the balance, those further implications for the respondent, of the extension of time being refused.

90. The errors I have identified were only partially offset by the tribunal's indication and directions, at the same time, as to the extent to which the respondent would nevertheless be permitted to participate, to a degree, in the next hearing.

91. For these reasons I conclude that the appeal against the first decision must be upheld, and that the appeal against the second decision must, consequentially, also be upheld. However, I will, for good order, also now consider the appeal from the second decision on its freestanding grounds.

Issues relating to the Claimants' Evidence for the December 2021 Hearing and the Tribunal's Factual Findings and Conclusions

92. Mr Morgan raised a number of issues about the claimants' evidence for the December 2021 hearing. In summary, his points were (a) the witness statements were originally tabled late, on 12 November 2021, the tribunal having directed this to be done by 29 October 2021; (b) revised statements were then tabled on 3 and 6 December shortly before the hearing; (c) only during the hearing were signed statements provided; (d) those signed statements were again different and had not actually been signed by the claimants but by their brother (who attended the hearing); (e) GP notes were only provided shortly before the hearing, and fit notes during it; (f) the claimants' case was that they had not received the May/June 2017 letters; but the first version of the statement of Andrew Reed said that they had not been well enough to come to the 2 June meetings; (g) the medical records revealed that the GP had been told in 2017 that they planned to set up their own business, and

other issues, such as about the willingness of the GP to issue fit notes in the terms requested.

93. Mr Morgan submitted that, having regard to all the foregoing, the tribunal should not have relied on the evidence in the final statements, or the (on his case purported) witness evidence of the claimants at all, or should have struck out the claims for non-compliance with orders or on the basis that the respondent, being restricted in its participation, would not get a fair hearing. Alternatively, the claimants' own evidence contradicted their case about when their employments ended, so that the tribunal's decision on this point, and whether the claims were in time, was perverse.

94. As to this aspect, the following passages in the tribunal's decision are pertinent:

> **"8. There were some preliminary matters to deal with. The first was that the claimants' witness statements had been sent to the respondent on 12 November 2021 whereas the order had been to send those statements by 29 October 2021. Employment Judge Manley informed Mr Morgan that as the response had not been accepted, the respondent could only take part in the proceedings to the extent permitted by the Judge. Mr Morgan made it clear that he did not believe a fair trial could proceed because of the late service of the witness statements. He also made reference to some differences between the statements which he had received initially and those which were then before the tribunal. He was also concerned that the ones he had seen were not signed.**
>
> **9. The claimant's representative offered to send signed statements which were then forwarded to the tribunal and to Mr Morgan. The tribunal discussed matters and determined that the hearing could go ahead. Although it was unfortunate that the witness statements had been sent late and there were some minor alterations for the final versions, it was still the tribunal's view that Mr Morgan had plenty of opportunity to read them and comment on them before we decided the case. Mr Morgan pointed out, on a number of occasions, that we had not accepted the response which was, he said, only about two weeks late (although as the 9 September judgment makes clear, it was 4 weeks late). In any event, it seemed to the tribunal that the delay, whilst not ideal, did not get in the way of the hearing proceeding to deal with the matters to be addressed, particularly in view of the delays which had already occurred.**
>
> **10. The next preliminary matter was that the claimants sought to rely on some documents which were being presented late and were not included in the bundle. The first group of these were medical records. Some records had been sent with respect to Mr Roland Reed on 8 December and those with respect to Mr Andrew Reed were sent on the morning of the hearing. These were relatively lengthy documents but could be read fairly quickly because we only needed to read those parts which were relevant to any question about whether the claimants had a disability and references to their position at work.**
>
> **11. The second group of documents was recorded delivery receipts which were relevant as the claimants said that their sick notes had been sent to the respondent by recorded delivery. Mr Tomison, for the claimants, apologised for the delay in these documents being sent through, but pointed out that they were clearly relevant to the**

> **issues to be determined. Mr Morgan was permitted to comment and he said did not believe the documents should be admitted. He accepted that they were relevant but that they should have been sent in plenty of time before the hearing. Time was allowed for everyone to look at these documents. The tribunal determined that, as they were relevant documents, they should be considered and if further time was needed to look at any parts of them, we could do allow time. It should be noted that Mr Morgan, when he made his representations later in the day, and the next day, had clearly been able to read the medical records with some care as he asked us to consider sections of them with respect to the question of whether the claimants thought they were still in employment or were going to return to employment.**
>
> **12. We did have the witness statements and saw signed copies. Although Mr Morgan was concerned that he had seen a different version, it was confirmed to him that the ones the tribunal would take as evidence at this hearing were those which had been signed. Mr Morgan did not accept that the signatures were those of the claimants."**

95. At various points in the decision the tribunal also referred to submissions having been made by Mr Morgan, both orally and in writing, about the claimants' statements, both as to their content and timing, and about aspects of the medical evidence. It also referred at [60] to a further contention that the claimants' brother had coached their evidence during the hearing, which it rejected in terms.

96. In the course of its fact-finding the tribunal considered the evidence in relation to the respondent's letters of 30 May and 2 June 2017, including Mr Morgan's submission as to the significance of Andrew Reed's original statement that they were not "able to attend the hearing because we were suffering from work-related stress" and his final statement that "as stated previously, we were not aware of any meeting on 2 June 2017." The tribunal considered this to be a "relatively minor difference" [24] and, taking account of the oral evidence, and the fact that the claimants continued to send in Med 3s after this date, accepted that they did not receive the first letter. Having regard to various features of the evidence, it also accepted that they had not received the second letter.

97. The tribunal went on to review the evidence as to the correspondence at the end of 2018 leading up to the email of 21 January 2019, leading to its conclusion that the date of the dismissals was when the respondent unambiguously stated in that email that the employments had come to an end. That in turn led on to its conclusions that the claims were in time, and that, because the respondent had not shown a fair reason, or followed a fair process, the dismissals were unfair.

98. The tribunal set out a detailed review of the medical and witness evidence relating to each claimant's health, and its reasoning as to why it found that Andrew Reed was disabled at the relevant time but Roland Reed was not. It went on to find that Andrew Reed had been dismissed because he was on sick leave and had sent in sick notes, which was something arising in consequence of disability. It awarded him £10,000 by way of compensation for injury to feelings as well as making basic awards, and awards of holiday pay and notice money to both claimants.

99. Mr Morgan also complained that he had not been permitted to cross-examine the claimants and that he had been muted and/or harangued by the judge. In its decision the tribunal said this:

> **"15. Mr Morgan wanted to ask questions of the witnesses. This was not allowed because that was not considered to be in the interests of justice. The tribunal accepted that both claimants had mental health issues and Mr Morgan's behaviour in these proceedings has sometimes been belligerent and offensive. The tribunal was well aware of the disputes on the evidence. Mr Morgan was told that he could make representations at the end of the hearing and address the tribunal on anything which he wishes to take issue with in the statements. The respondent's case and the differing claimants' case is, in any event, clear. Of course, there is a disagreement between them which is to be determined by the tribunal but the tribunal did not feel there were any proper questions which could be asked of these witnesses by Mr Morgan."**

100. In response to the invitation to comment made at HHJ Katherine Tucker's direction, the judge stated that her recollection was that Mr Morgan was muted in the first hearing after judgment was given "and he was abusive and offensive, referring to me as a 'mad, corrupt, bitch'". She continued:

> **"During the 9 and 10 December 2021 hearing, where Mr Morgan could only take part as far as the employment judge allowed, he was reminded several times not to be disrespectful to the claimants. I do not accept that I interrupted and harangued Mr Morgan but, as the judgments show, it is likely that I spoke firmly to him."**

101. The lay tribunal member, Mrs Hancock, observed in her comments:

> **"It is clear in my mind that it was a challenging case for EJ Manley to manage but at no time do I feel that she, or the panel in its decision-making, displayed anything but fairness and equal treatment to the parties."**

102. Mr Tomison submitted that the foregoing passages showed that the tribunal had considered, and dealt fairly with, all of Mr Morgan's procedural issues relating to the claimants' witness and

medical evidence and their oral evidence. Having considered the substantive evidence as a whole, and Mr Morgan's submissions about it, it had also made permissible findings of fact that the claimants had not received the 2017 letters and that they were dismissed on 21 January 2019. These findings of fact were not perverse. It had then properly found, in light of the facts, that the dismissals were unfair and that Andrew Reed was disabled, and his discrimination claim was well-founded.

103. Mr Tomison submitted that the tribunal had also fairly and properly exercised its rule 21(3) discretion in not permitting Mr Morgan to cross-examine the claimants for the reasons that it gave. The statements from the judge and lay member fully answered the other criticisms of the conduct of the hearing, in light also of the account of the hearing given in the decision.

104. My conclusions in relation to these aspects of the second appeal are as follows.

105. First, *on the basis of the evidence which it in fact had*, I cannot say that the tribunal's conclusion that the claimants did not receive the 2017 letters, that their employments did not end until they got the 21 January 2019 letter, and that Andrew Reed was disabled, were, *as such*, perverse. The tribunal was not *bound* to treat the passage in the first version of Andrew Reed's statement, or the features of the medical evidence, relied upon by the respondent, as necessarily determinative of these points in its favour. Notwithstanding Mr Morgan's incredulity at the tribunal's factual findings, the high threshold for a perversity challenge to them, is not, *as such*, surpassed.

106. As to the various procedural criticisms relating to the timing and presentation of the claimants' witness statements, oral evidence and medical evidence, Mr Tomison is right to say that these were all specifically considered. However, the conclusion at [9] that Mr Morgan had had "plenty of opportunity to read and comment on" the late and revised statements "before we decided the case" appears to have been reached without consideration that the September direction had envisaged that, following service of the claimants' statements by 29 October, the respondent would be entitled to serve further witness evidence of its own by 26 November. While the tribunal recorded that it took

steps, for example, to allow time for the late medical evidence to be considered, on which Mr Morgan then made detailed submissions, the need to deal with this aspect on the hoof appears to have arisen from the prior failure to give any directions in September for such evidence to be disclosed in advance.

107. As to the refusal to permit Mr Morgan to cross-examine, the claimants' solicitors had emailed the tribunal on 6 December noting their case that they were disabled, asking that questioning of them be adapted and that they not be subjected to any hostile or aggressive questioning. The tribunal had a duty to witnesses who were, or at least might be, vulnerable. It was, in all the circumstances, also fully entitled to be concerned that Mr Morgan could not be trusted to cross-examine appropriately. As against this, whether the claimants were disabled, or mentally unwell, to the extent that they claimed, or at all, was plainly something that the respondent strongly contested. There are ways in which the need to address both aspects raised by such a scenario – which is perhaps more regularly encountered in the criminal and family courts than in employment tribunals – can be fairly managed, by having the unrepresented party's case put to the witness concerned in other ways.

108. In this case, the tribunal was proceeding within a context that the default position was that the respondent would not be entitled to participate in the hearing at all, except to the extent permitted. But the tribunal's approach in each case to that discretion must have due regard to what participation is sought, the extent to which such participation can be accommodated without significant disruption to the process, and what the respondent stands to lose if not permitted to participate in the way sought. This is a case where, as the tribunal noted, the respondent's case, and the elements, for example, of the medical evidence on which it sought to rely in support of it, were identified by Mr Morgan. The concern to which the tribunal's handling of this aspect at [15] gives rise is that it failed to give sufficient attention to whether, if Mr Morgan was not to be permitted to conduct cross-examination himself, the respondent's points could and should still be put to the witnesses in some way.

109. I do not accept that Mr Morgan was unfairly prevented from advancing his arguments to the tribunal, or "harangued" by the judge. The tribunal stated in terms that he needed to be reminded

about how to conduct himself, but appeared to become frustrated with the process [14]; and the judge was candid in her reply to the EAT's request for comments in saying that it was likely that she spoke firmly to him. All of that is of a piece with the uninhibited way in which Mr Morgan regularly expressed himself in writing, and the documented outbursts that had occurred at previous hearings. The judge was in this regard doing no more than properly managing the conduct of the hearing.

110. Finally, Mr Morgan's complaint that the strike-out application did not receive adequate consideration gains no purchase, as such, because the tribunal considered the date of dismissals, and hence the time point, as substantive issues, and substantively determined them.

111. Having regard to the misgivings I have expressed, about the handling of the late evidence and the tribunal's decision not to allow for any mode of challenge to the claimants' witness evidence, I have found the position in relation to the freestanding challenge to the second decision finely balanced. Ultimately, despite my misgivings, within the context of that second hearing alone, the tribunal's handling of these case management asepcts was within the range of approaches properly open to it. But in any event, because I have allowed the first appeal, in respect of the decision which led to rule 21(3) applying at the second hearing, the second appeal must be consequentially allowed.

Outcome and Next Steps

112. For the reasons I have given, I allow the first appeal, and I consequentially allow the second appeal. This means, at least, that the first decision, as to whether to permit the respondent's application for extension of time in respect of its late response, will have to be taken afresh, and then there will have to be a further substantive hearing or hearings in the employment tribunal.

113. However, a further issue that arises is whether, applying the guidance in **Jafri v Lincoln College** [2014] EWCA Civ 449; [2014] ICR 920, the fresh decision on whether to extend the respondent's time for its late response must be remitted to the tribunal, or can be retaken by the EAT. If the answer is the former, a further issue arises as what directions I should give about who is, or is

not, to take that decision upon remission. As that, in this case there is an additional point. This is that, if the retaking of that decision is remitted, it will need to be taken by a judge sitting alone, and not a full panel. This arises in the following way.

114. The regime of rules 19, 20 and 21, which all, potentially, apply where there is no response, or a late response has been rejected, is that decisions under those rules, on paper or at a hearing, are to be taken by an Employment Judge alone. See rules 19(3) and (4), 20(3), and 21(2) and (3). The provisions of rule 21 in this regard are in line with the provision in section 4 **Employment Tribunals Act 1996** that proceedings to be heard by a judge alone include those in which the respondent has ceased to contest the case, which the EAT has in the past held includes all cases of this type. I note that, while rule 20 does not expressly say that any determination on paper or at a hearing *must* be before a judge alone, it is implicit, within the overall regime of these rules, that this is mandatory.

115. In the present case, as directed at the March 2021 hearing, the September 2021 hearing was before a three-person tribunal. That was done at the request of the respondent, without opposition from the claimants, and because it was contemplated that the same hearing might move on from the respondent's extension application also to determine whether the claims were out of time, for which a three-person panel would be desirable. At the September hearing the tribunal then decided to continue with that panel for the final, December, hearing. It appears to me that this was not in accordance with rules 20 and 21. But it was done with consent on both sides, and there has been no appeal or cross-appeal in relation to the point. The outcome of these appeals does not turn upon it. Nevertheless, it appears to me that, if I do remit the fresh decision on the rule 20 application, it will be on the basis that it must be decided afresh by a judge alone, not a full panel.

116. Finally, there is an issue as to the scope of remission of the further substantive issues to be decided at the further hearing or hearings in the tribunal, once there has been a fresh adjudication of whether to extend the respondent's time in respect of the late response.

117. The parties have not yet had the opportunity to make submissions on these further points, so I will give directions enabling them to do so, following promulgation of this decision, and before I make my final orders consequential upon it.

118. I need to say a final word about the language in which Mr Morgan expressed himself at times in the course of the litigation, both in writing, and, as documented, on occasion during hearings. His targets from time to time included the claimants' solicitors, the tribunal's administration, the tribunal's judiciary in general, individual judges and the entire employment tribunal system.

119. I have only referred to this aspect in my substantive decision to the extent directly relevant to particular issues raised arising from the grounds of appeal. This is not a case where the tribunal decided that such conduct, in and of itself, meant that the respondent should not be permitted to defend the claim, and so not a case where there was a freestanding ground of appeal relating to it, as such.

120. However, it is important to say that severely abusive, intemperate or foul-mouthed conduct is not acceptable, or justifiable, no matter the strength of feeling or conviction that a party may harbour. A party can, in an extreme case, be treated as having, by such conduct, forfeited their right to defend (or pursue) a claim. Contentions of actual or apparent bias, or, for example, that a hearing has not been fairly conducted, can be properly advanced where there is said to be a basis for doing so, but that must be done in an appropriate fashion.

121. In the present case Mr Morgan, it is fair to repeat, volunteered an apology at my hearing for the way he had expressed himself in the past. I would trust and expect that there will be no repetition of it when the matter returns to the tribunal.