Neutral Citation Number: [2024] EAT 157

Case Nos: EA-2023-000282-DXA
EA-2023-000713-JOJ
EA-2023-000058-LA
EA-2022-000635-DXA
EA-2023-000344-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 September 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

EA-2023-000282-DXA

Between:
AB

Appellant

-and-

The University of East London

Respondent

EA-2023-000713-JOJ

Between:
Mr F Shina

Appellant

-and-

Rendall and Rittner Ltd

Respondent

EA-2023-000058-LA

Between:
Miss A Rehman

Appellant

-and-

Healthbridge Direct

Respondent

EA-2022-000635-DXA

Between:
Mr Wayne Adams

Appellant

-and-

Power X Equipment Ltd

Respondent

EA-2023-000344-JOJ

Between:

Mr Jamell Samuels

Appellant

-and-

Searcy Tansley and Company Limited

Respondent

- -
- -

Appeals from Orders of the Registrar

Hearing date: 3 July 2024

with further written representations, as received by 15 August 2024

- -

JUDGMENT

APPEARANCES

EA-2023-000282-DXA

AB, the **Appellant** acting in person
Afiya Amesu of counsel (instructed by Mills & Reeve LLP) for the **Respondent**

EA-2023-000713-JOJ

Frank Shina, the **Appellant** acting in person
Mrs Michele Peckham solicitor (Citation Ltd) for the **Respondent**

EA-2023-000058 - LA

Mr Chinonso Ijezie solicitor-advocate (Piperjuris Solicitors & Advocates) for the **Appellant**
Mr M Williams of counsel (instructed by DAS Law) for the **Respondent**

EA-2022-000635-DXA

Wayne Adams the **Appellant** in person
Ms S Garner of counsel (instructed by Brindley Twist Taff and James LLP) for the **Respondent**

EA-2023-000344-JOJ

The **Appellant** not attending and having submitted no written representations
Harry Sheehan of counsel (instructed by Lewis Silkin LLP) for the **Respondent**

SUMMARY

Practice and Procedure - rules 3(1) and 37 Employment Appeal Tribunal Rules 1993 - the proper institution of appeals - the EAT's discretion to extend time - appeals from orders of the EAT Registrar

This judgment concerns five appeals against decisions of the EAT Registrar refusing to extend time for the lodgement of appeals. In each case, the notice of appeal had been served within the 42-day time limit but without all documents then required under rule 3(1) **EAT Rules 1993**. Applying the guidance laid down in **United Arab Emirates v Abdelghafar** [1995] ICR 65, as clarified in **Ridley v HB Kirtley t/a Queen's Court Business Centre, Kostrova v McDermott International Inc and anor, Taylor v Lloyds Pharmacy Ltd (in liquidation)** [2024] EWCA Civ 884, and other relevant case-law (see in particular paragraphs 26-27 of the judgment for a summary of the principles applied), the appeals in **AB v University of East London**, **Shina v Rendall and Rittner Ltd**, and **Adams v Power X Group Ltd** were allowed, and extensions of time granted; the appeals in **Rehman v Healthbridge** and **Samuels v Searcy Tansley and Co Ltd** were, however, refused and the applications for extensions of time in those cases were dismissed.

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT:

Introduction

1. In this judgment, when addressing the individual cases before me, I refer to the parties by name; more generally, however, I use the titles (claimant; respondent) as before the Employment Tribunal ("ET"). Each of these cases comes before me as an appeal against a decision of the Registrar of the Employment Appeal Tribunal ("EAT"), refusing to grant an extension of time for the lodgement of an appeal in this jurisdiction. In each instance, a claimant before the ET, wishing to challenge a decision on their case at first instance, sought to file their appeal to the EAT within the 42-day time limit but failed to similarly submit all the documents then required under the **EAT Rules 1993** ("EAT Rules"). Having subsequently rectified the relevant omission, out of time, each claimant applied for an extension of time pursuant to rule 37 **EAT Rules**, but their applications were refused by the Registrar. The claimants having appealed against those decisions, these cases came before me for oral hearing on 3 July 2024 (each having been listed consecutively for hearing that day).

2. During the course of the hearings on 3 July 2024, I made clear to the parties in each appeal that I would be reserving my decision pending the decision of the Court of Appeal in **Ridley v HB Kirtley t/a Queen's Court Business Centre, Kostrova v McDermott International Inc and anor, Taylor v Lloyds Pharmacy Ltd (in liquidation)** [2024] EWCA Civ 884; in each instance, I explained that the parties would be afforded further opportunity to make representations to me as to the potential relevance of that case to their own appeal. On 25 July 2024, the Court of Appeal handed down judgment in **Ridley** and I directed that this was to be circulated to all parties in the cases before me, giving each the opportunity to make further written representations in the light of that decision. Where submissions have been received in relation to the Court of Appeal's ruling in **Ridley**, I have taken them into account when making my decisions in these appeals.

The legal framework

3. Proceedings before the EAT are governed by the **EAT Rules**, as amended. Directions about the practice and procedure of the EAT can be given by the Senior President of Tribunals and the President of the EAT (approved by the Senior President of Tribunals and the Lord Chancellor), albeit that, to the extent there is any difference between such a direction and the **EAT Rules**, the latter must take precedence. At the relevant time, the **EAT Practice Direction 2018** ("EAT PD 2018") was in force.

4. For appeals lodged prior to 30 September 2023, rule 3(1) **EAT Rules** previously provided (so far as material) that:

> "(1) Every appeal to the Appeal Tribunal shall be instituted by serving on the Tribunal the following documents— […]
> (b) in the case of an appeal from a judgment of an employment tribunal a copy of any claim and response in the proceedings before the employment tribunal or an explanation as to why either is not included;
> (c) in the case of an appeal from a judgment of an employment tribunal a copy of the written record of the judgment of the employment tribunal which is subject to appeal and the written reasons for the judgment, or an explanation as to why written reasons are not included;"

5. Similarly, at that time, paragraph 3.1 of the **EAT PD 2018**, stated that:

> "3.1 ... The Notice of Appeal must be, or be substantially, in accordance with Form 1 (in the amended form annexed to this Practice Direction) ... It must identify the date of the judgment, decision or order being appealed. Copies of the judgment, decision or order appealed against must be attached by the Appellant. In addition the Appellant must provide copies of the Employment Tribunal's written reasons, together with a copy of the claim (the form ET1 and any attached grounds) and the response (the form ET3 and any attached grounds), or if not, a written explanation for the omission of the reasons, ET1 and ET3 must be given… A Notice of Appeal without such documentation will not be validly presented."

6. By rule 3(3)(a) **EAT Rules**, it is provided that the period within which an appeal from a judgment of the ET is to be instituted is 42 days from the date on which the written record of the judgment was sent to the parties, or, where written reasons are requested or where judgment was reserved, from the date on which the ET's written reasons for its judgment were sent to the parties. Where the appeal is against an order of the ET, the 42 days start from the date of the order in question.

7. The EAT has a discretion to extend the time for the lodgement of an appeal, as provided by rule 37(1) **EAT Rules**:

> "(1) The time prescribed by these Rules or by order of the Appeal Tribunal for doing any act may be extended (whether it has already expired or not) or abridged, and the date appointed for any purpose may be altered, by order of the Tribunal."

8. Pursuant to the **Employment Appeal Tribunal (Amendment) Rules 2023** ("the Amendment Rules"), with effect from 30 September 2023, rule 3(1) **EAT Rules** was amended by the deletion of sub-paragraph (b). On the same date, the **EAT Practice Direction 2023** ("ET PD 2023") came into effect, which similarly reflected this changed position.

9. The **Amendment Rules** also introduced an amendment to rule 37 **EAT Rules**, to provide as follows:

> "(5) If the appellant makes a minor error in complying with the requirement under rule 3(1) to submit relevant documents to the [EAT], and rectifies that error (on a request from the [EAT] or otherwise), the time prescribed for the institution of an appeal under rule 3 may be extended if it is considered just to do so having regard to

> all the circumstances, including the manner in which and the timeliness with which, the error has been rectified and any prejudice to any respondent."

10. The **Amendment Rules** were considered by the EAT (Mr Andrew Burns KC sitting as a Deputy High Court Judge) in **Melki v Bouygues E and S Contracting UK Ltd** [2024] EAT 36. In that case, the claimant had appealed from the Registrar's order refusing an extension of time for the presentation of the appeal in circumstances in which the notice of appeal itself had been filed in time but the respondent's ET3 form was attached without the grounds of resistance setting out the substantive defence, an omission that was corrected six days out of time. Considering the context of the amendment to rule 37, the EAT had regard to the Consultation Report that had preceded the **Amendment Rules**, observing:

> "28. ... That confirms that the context of new rule 37(5) is to remedy the previous strict rule which was perceived to have disproportionate effects. At paragraph 24 of Annex A it was said:
>
> > "In proposing a possible amendment to rule 37 of the EAT Rules, it is not intended to change the approach laid down in **Abdelghafar**. Mindful, however, of the issues identified at paragraphs 9-10 above, the EAT is also proposing to ask the Lord Chancellor to consider amending this rule [to add rule 37(5)]."
>
> 29. Those issues identified at paragraphs 9-10 were that about one fifth of putative appeals were not properly instituted. The high proportion was said to be potentially due to the difficulty in filing documents from digital bundles. The EAT staff were often unable to spot errors before the end of the 42-day time limit. The high number of not properly instituted appeals had negative consequences for the administration of justice in the EAT. The consequent delays to all appeals could lead to unfairness to all litigants in the EAT."

It was against this background that the EAT opined:

> "27. The EAT Rules were amended to improve the fairness and justice of consideration of incomplete Notices of Appeal. ..."

11. Confirming that the removal of the requirement to file the claim and response did not apply to appeals lodged prior to 30 September 2023 (the deletion of the former rule 3(1)(b) not having retrospective effect), the EAT in **Melki** held that the position was different in relation to the new rule 37(5):

> "30. Although it is right that rule 37(5) was introduced together with other amendments, that does not mean that it does not apply to all appeals. The amendment to rule 3(1) applied to all appeals from the commencement date. As that specifies what is required to start an appeal it necessarily applies only to appeals instituted after that date. Rule 37(5) is a power that can be exercised to pending appeals. It can therefore apply to all appeals whenever they were instituted. There is no absurdity about the test being different before and after 30 September 2023. Rules, whether it be the EAT Rules or the Civil Procedure Rules change from time to time. Unless a transitional provision is included stating the opposite (or unless there is unfairness) the new provision applies to all litigation from the date it comes into force."

12. On the facts of **Melki**, however, the EAT concluded that the failure to file the grounds of resistance could not be considered to be a "*minor error*" for the purpose of rule 37(5):

> "39. It may amount to a minor error to omit one or even more pages of a document required by rule 3(1) but that it is unlikely to be a minor error to omit the whole document or a substantial or important part of the document unless there are circumstances in which it can be said that the document is irrelevant to the appeal…
> ...
> 40. I must judge the error at the date when it was made. At that date it was a requirement that the Notice of Appeal included the ET3 Response form including the Grounds of Resistance. At the time that was held to be an 'essential document' ... which was mandatory to serve with the appeal. The Practice Direction then in force ... (and available online to all parties) made it clear that the grounds must be included and without such documentation the appeal would not be validly presented. It cannot be a minor error to omit the whole of a document that was 'essential' to an appeal."

13. While it was not argued that time should, in any event, be extended pursuant to rule 37(1) **EAT Rules**, the EAT in **Melki** nevertheless went on to consider that provision, but found it would not assist the appellant:

> "45. ... I do not regard this case as one involving exceptional circumstances. The Claimant left matters until the end of the 42-day period to submit his appeal, failed to follow the guidance in the Practice Direction and omitted an important document. These were not exceptional circumstances."

14. The Court of Appeal has now given permission for an appeal to be pursued against the decision in **Melki**. In the meantime, however, that decision has been followed by other compositions of the EAT; see, for example, **Jasim v LHR Airports Ltd** [2024] EAT 59, and **Hewer v HCT Group** [2024] EAT 133.

15. In **Jasim**, His Honour Judge Auerbach applied rule 37(5) to a case in which the appeal had been lodged on 30 August 2021. In **Jasim**, the problem for the appellant was that he had failed to include with his appeal the claim form ET1 and the response form ET3 in the proceedings in issue. HHJ Auerbach considered that the relevant questions that arose under rule 37(5) could be summarised as follows:

> "22. ... Firstly, has the appellant made a minor error? I suppose that can be broken down in turn into the question of whether the defect in compliance is the result of an error or something else, and, if it is an error, whether the error is a minor one. If it is not a minor error, then Rule 37(5) cannot be relied upon at all. If it is, the next question is whether the error has been rectified. If it has, then there is a power to extend time if it is considered to be just to do so, having regard to all the circumstances, including the three particular matters mentioned in the Rule."

In determining that the error made by Mr Jasim should be considered to be a "*minor error*", HHJ Auerbach explained how he had approached this question, having regard to the guidance provided in **Melki**:

> "30. ... the question of whether the error is minor is to be judged in particular by reference to the significance or not of what has been omitted, for the appeal in hand, and the issues to which it gives rise. This is a fact-sensitive matter to be decided case by case. It does not follow that in every case a failure to include the ET1 and ET3 forms will be a minor error ... It will depend upon what is in those forms in the given case, and what issues are raised by the appeal in the given case, as well, possibly, as whether information contained in those forms is also to be found in the submitted documents.
> 31. In this case [Mr Jasim] ... has demonstrated that all of the information contained in the missing ET1 and ET3 was to be found in the documents that were submitted

> with the Notice of Appeal. I do not need to go through the analysis in detail, because [the respondent] ... did not, I think, dispute this, as such. But, in particular, as well as the basic information about the identities of the parties, and so on, being available from the submitted documents, the substance of what the claimant was claiming could be gleaned from the other documents that were provided, including both his Particulars of Claim and also the respondent's Grounds of Resistance, the latter of which also included a summary of what he was claiming. I conclude that, on the particular facts of this case, the error was minor."

16. In **Jasim**, the error had been rectified within days after the omission had been drawn to the appellant's attention by the EAT. Asking whether it was just to extend time in those circumstances, HHJ Auerbach observed as follows:

> "34. First, of course, consideration of whether it is just to extend time requires consideration of justice to both parties. Essentially, what is involved is a familiar weighing exercise: weighing up the balance of justice or injustice to each of the parties were I either to extend time or not do so.
> 35. Secondly, the three aspects specifically mentioned in the sub-rule must be considered and treated as relevant, but the sub-rule does not prescribe or impose any other constraint on what may be considered by the EAT to be all the circumstances that are relevant to the exercise of the discretion in the given case.
> 36. Thirdly, whilst the three factors must be considered and treated as relevant, what weight to attach to those, and/or any other relevant circumstances, in the balancing exercise, is a fact-sensitive matter for the exercise of the EAT's discretion in the given case, applying the overall balance of justice and injustice approach that I have described."

17. Applying that approach, HHJ Auerbach considered it would be just to extend time under rule 37(5) **EAT Rules**, although he made clear that he would not have reached the same conclusion if limited to considering the question of an extension of time under rule 37(1). Accepting that Mr Jasim made an honest error when submitting his documentation (the digital versions of the particulars of claim and the grounds of resistance in that case had been labelled "*ET1*" and "*ET3*", so it was not obvious that the forms had not been included unless the documents were actually opened and checked), HHJ Auerbach considered that rule 37(5) allowed greater scope for forgiveness of such mistakes than would be the case under rule 37(1): having regard to all relevant circumstances - including the timeliness of rectifying the error and the absence of any prejudice to the respondent - he concluded that time should be extended under rule 37(5), albeit he did not consider that the explanation for the error would have been sufficient for an extension to be granted under rule 37(1).

18. In **Hewer**, in contrast, His Honour Judge James Tayler rejected the suggestion that the default in issue in that case was a "*minor error*" for the purposes of rule 37(5), but concluded that time should nevertheless be extended under rule 37(1). The omission in **Hewer** arose from the fact that the solicitors for the would-be appellants had filed the notice of appeal and the ET's written reasons within the time limit but had failed to similarly file the written record of the judgment. HHJ Tayler found that was not a "*minor error*":

> "29. I do not accept that the failure to provide the written judgment was a minor mistake. The written judgment is a required document that must be provided. The **EAT Rules** do not permit an explanation to be given for failing to submit the written judgment. It is the judgment against which an appeal is brought. It is generally necessary to consider the precise terms of the judgment when considering the grounds of appeal. Accordingly, I do not consider it appropriate to grant an extension of time pursuant to Rule 37(5) **EAT Rules**."

In going on to then extend time under rule 37(1), however, HHJ Tayler had regard to the fact that the ET's written reasons nevertheless provided the material necessary to understand the appeal (albeit noting that a Judge would be likely to want to check the ET's judgment before undertaking the initial, on-paper, consideration of the merits of that appeal). In **Hewer**, it was also considered relevant that error had been rectified as soon as it was drawn to the solicitors' attention, and that the respondents had identified no particular prejudice arising from the default.

19. The approach to be adopted to the exercise of the EAT's discretion under rule 37(1) **EAT Rules** was considered in the guideline case, **United Arab Emirates v Abdelghafar** [1995] ICR 65, in which the following three questions were identified as key (see paragraph 9): (1) what is the explanation for the default?, (2) does that provide a good excuse?, (3) are there circumstances which justify the exceptional step of granting an extension of time? In **Muschett v London Borough of Hounslow** [2009] ICR 424, the EAT noted that an explanation may not be sufficient unless it covers the entirety of the period of the default (see **Muschett** paragraph 5(vi)). More generally, the case-law that developed in respect of the application of the **Abdelghafar** guidance suggested that a very strict approach was to be taken to any request for an extension of time for the lodgement of an appeal in this jurisdiction, regardless of whether there had been a complete failure to file the appeal in time or simply an omission in filing all the required documents; as the respondent submitted in **Melki**:

> "16. The Respondent submits that ... I have to apply the strict guidance laid down for extension under rule 37(1) in *United Arab Emirates v Abdelghafar* [1995] ICR 65 endorsed by the Court of Appeal in *Aziz v Bethnal Green City Challenge Co Ltd* [2000] IRLR 111 and *Jurkowska v Hlmad Ltd* [2008] ICR 841. In the absence of rule 37(5) applying I must, it is submitted, apply a time limit that "ought only to be 'relaxed in rare and exceptional cases where the appeal tribunal is satisfied that there is a reason which justifies departure from the time limit laid down in the Rules'" (*Aziz* at [20]). Sedley LJ in *Jurkowska v Hlmad* at [65] called the policy "unforgiving" and "an equality of misery: anyone who is caught out by the 42-day time limit has, barring something quite exceptional, only himself or herself to blame for leaving it so late to institute their appeal". *Woods v Suffolk Mental Health Partnership NHS Trust* [2007] EWCA Civ 1180 held that it was not an exceptional case where a Notice of Appeal had been filed, but, through honest error, without attaching a complete ET1 Claim form."

20. Although the case-law thus suggested that time would not normally be extended where the default lay in filing all the required documentation, even though the appeal itself had been lodged in time, where there

was a failure to provide a copy of the claim or response, rule 3(1)(b) **EAT Rules** allowed that the would-be appellant might instead provide "*an explanation as to why either is not included*" (similarly, where written reasons for a judgment of the ET have not been filed with the appeal, rule 3(1)(c) provides that an explanation should be provided). In **Akhigbe v St Edward Homes** [2024] EAT 142, it was observed that allowing a would-be appellant to provide an explanation for a missing document provided:

> "37. ... a practical means of addressing potential problems arising from the requirements of rule 3(1), not least as it enables the EAT Registrar to understand the reason for an apparent omission and to take an informed view as to the case-management of the appeal. ..."

That was seen to allow a flexible approach, consistent with the overriding objective, which, by rule 2A **EAT Rules**, provides:

> "(1) The overriding objective of these Rules is to enable the Appeal Tribunal to deal with cases justly.
> (2) Dealing with a case justly includes, so far as practicable– (a) ensuring that the parties are on an equal footing; (b) dealing with the case in ways which are proportionate to the importance and complexity of the issues; (c) ensuring that it is dealt with expeditiously and fairly; and (d) saving expense.
> (3) The parties shall assist the Appeal Tribunal to further the overriding objective."

Thus having regard to the requirements of rule 2A, and to the relevant case-law, it was further observed in **Akhigbe** that:

> "37. ... Consistent with the obligation imposed on the parties to assist the EAT in furthering the overriding objective (rule 2A(3)), a would-be appellant would need to have some proper reason for failing to supply a document otherwise required to be filed under rule 3(1) and the explanation must provide an honest account that does not mislead. Thus, in **Carroll** [**Carroll v Mayor's Office for Policing and Crime** [2015] ICR 995], it was held that rule 3(1) could thus cater for an "*editorial decision*" not to include the pleadings relating to another claimant where those would not be necessary for the appeal (see paragraph 57). And, in **MTN-1** (**MTN-1 Ltd v O'Daly** [2022] EAT 130] where the putative appellant had not sought to mislead the EAT and had not been reckless in attempting to comply with the rules, it was accepted that an honest explanation for a failure to file the claim form was sufficient, even though that explanation was not entirely factually correct."

21. Where, however, the putative appellant had failed to serve the claim and/or the response *and* had also failed to provide any explanation (as might well be the case if, as in **Jasim**, they were simply unaware of their error), it had been held that the same strict approach ought to be adopted regardless of whether the appeal had otherwise been lodged in time; see **Kanapathia v London Borough of Harrow** [2003] IRLR 571 EAT. Although that did not uniformly mean that extensions of time were refused in such cases (in **Fincham v Alpha Grove Community Trust** UKEATPA/0993/18, for example, HHJ Auerbach granted an extension under rule 37(1) where one page of the grounds of resistance had been missed when Mr Fincham sent in his appeal, and

the omission was rectified the day after this error was drawn to his attention), the incomplete submission of an otherwise in-time appeal was not, of itself, seen as a reason for adopting a different approach.

22. In **Ridley v HB Kirtley and related appeals** [2024] EWCA Civ 875, the Court of Appeal undertook a comprehensive review of the case-law relating to the EAT's approach to the exercise of its discretion under rule 37(1), with particular focus on the question as to how the **Abdelghafar** guidance was to be applied to the incomplete submission of documentation in otherwise in-time appeals. Returning to **Abdelghafar**, the Court of Appeal observed that:

> "143. The principles and guidance set out in *Abdelghafar* [1995] ICR 65 concerning the EAT's approach to applications to extend the time limit for appeals have been approved by this Court on several occasions. It is perceived as being a strict, perhaps 'hard-hearted', approach. But it is not inflexible. It involves the exercise of a discretion in a way which is 'judicial', 'even-handed' and, above all, fair."

In applying the **Abdelghafar** guidance, the Court of Appeal considered there is a material distinction between the case of the would-be appellant who has lodged their appeal with the EAT but has failed to include all the documentation required under rule 3, and that of the putative appellant who has completely failed to file their appeal within the 42-day time limit:

> "144. ... The first such appellant has not fully met the requirements of rule 3(1), but has, nevertheless, substantially complied with them. How substantially depends on what document/documents is/are missing, how much of any document is missing, and how important the document is to the appeal. That appellant has also, on the face of it, complied with the time limit in rule 3(3). That difference is obviously material to the exercise of the discretion to extend time. It follows that that difference should, in principle, be reflected in the EAT's approach to the exercise of its power to extend time. ..."

Acknowledging that earlier authorities had not identified this distinction as material to the exercise of the EAT's discretion under rule 37(1), the Court of Appeal nevertheless observed:

> "... we see nothing in the reported decisions in this Court to suggest that we are wrong to hold that the distinction we have identified is material to the exercise of the discretion."

Going on to hold:

> "145. The express recognition of the importance of that distinction is consistent with, and does not conflict with, the guidelines in *Abdelghafar*, by which we are bound. ..."

23. In **Ridley**, it was considered that recognition of this distinction gave rise to three further points relevant to the EAT's exercise of discrimination under rule 3(1):

> "147. ... First, a case in which an appeal is lodged in time but a document or part of a document is missing is very likely to be a case in which the appellant has made a mistake. The mistake is the reason for invoking the discretion conferred by rule 37(1). The fact that a mistake has been made cannot, therefore, be used as a reason for barring

> the exercise of that discretion .... An understandable or reasonable mistake about the documents cannot necessarily be discounted simply on the basis that, had the litigant filed the papers earlier, the mistake might have been picked up and corrected before the expiry of the time limit. That would be to exercise the discretion in a 'programmed' way. Second, before it can lawfully consider the exercise of its discretion in such cases, the EAT must clearly understand the appellant's explanation for her mistake, because, unless it does so, it cannot properly consider whether that explanation is satisfactory or not. Third, while the EAT has no duty to correct an appellant's mistakes, when the EAT in due course tells the appellant the she has made a mistake, the delay which is relevant to the exercise of the discretion to extend time is the delay between when the EAT tells the appellant of her mistake, and when she corrects it, ..."

24. More generally, and having considered the guidance previously provided in **Jurkowska v HLMAD Ltd** [2008] EWCA Civ 321, [2008] ICR 841, the Court of Appeal observed:

> "151. ...
> i. There is no rule of law which precludes a decision to extend time in favour of a person who is professionally represented and who leaves it until the very last afternoon to lodge a notice of appeal. That is not to say that it is not a factor which may be relevant to the exercise of the discretion, but that is a different point.
> ii. There is no rule of law which precludes an extension of time for a person who is professionally represented and has made a 'venial' mistake in circumstances where she should have known better; in other words, an appellant does not always have to show a good excuse for her delay in order to get an extension of time.
> iii. An appellant does not have to show that her case is 'rare and exceptional'; rather, it will only be in rare and exceptional cases that an extension of time will be given.
> iv. The guidelines in *Abdelghafar* are exactly that. They do not lay down rules of law, as, of course, Mummery J himself acknowledged."
> ...
> 156. A court or tribunal applying the *Abdelghafar* guidance must do so (per Mummery J in *Abdelghafar*) "in a principled manner in accordance with reason and justice" by "weighing and balancing all the relevant factors" in a way (per Mummery LJ in *O'Cathail* [*O'Cathail v Transport for London* [2012] EWCA Civ 1004]) that is "even-handed" and by giving judicial consideration to "the conflicting positions of both parties and the public interest in good judicial administration". It follows that the guidance must be applied differently depending on the different circumstances. To do otherwise would be to exercise the discretion improperly in a way that was "packaged" and "programmed". One obvious difference is between a litigant who fails to file any of the appeal documents in time and a litigant who files the appeal notice in time but omits one of the accompanying documents, or a page of one of the documents. They are different circumstances, and the practice of adopting the same strict approach does not obviate the obligation to apply that practice in a principled manner in accordance with reason and justice."

25. By drawing a distinction between appeals lodged outside the 42-day time limit and appeals lodged within that period but in incomplete form, the Court of Appeal's judgment in **Ridley** is likely to address similar concerns to those that led to the changes introduced by the **Amendment Rules** in 2023; certainly, the approach adopted in **Ridley** may well mean there is a more obvious overlap between the new rule 37(5) and the EAT's exercise of its discretion under rule 37(1). The **Amendment Rules** were not, however, intended to change the approach laid down in **Abdelghafar** (see paragraph 24, Annex A to the Consultation Report); as was observed

in the postscript to the **Ridley** judgment, what rule 37(5) makes clear is that the EAT has an express discretion to extend time in the case of "*minor errors*" involving breaches of rule 3(1). Thus, where it is claimed that the default in question is a "*minor error in complying with the requirement under rule 3(1) to submit relevant documents*", it is likely that the EAT will first consider whether that is correct and, if so, (assuming the error has since been rectified) whether it would just to extend time having regard to all the circumstances, including the manner in which, and timeliness with which, the error was rectified, and any prejudice to any respondent. If the failing cannot be described as a "*minor error*", as was made clear in **Hewer**, the EAT nevertheless retains the power to extend time pursuant to rule 37(1), applying the approach laid down in **Abdelghafar**, as clarified in **Ridley**. When exercising its discretion, whether under rule 37(1) or 37(5), unless the grounds are very obviously weak (or strong), the EAT is unlikely to able to form a view as to the merits and it would not be appropriate to seek to turn a hearing on an application for an extension of time into a full investigation of the strength of the appeal (**Abdelghafar**, paragraph 8(3)).

26. The 42-day time limit for lodging an appeal against a decision of the ET serves a serious purpose; it provides for certainty, and respects the important public policy of ensuring finality in legal proceedings. It is, moreover, a generous period in which to lodge an appeal, and would-be appellants can reasonably be expected to comply, keeping in mind that it sets a limit, not merely an aspirational target. Equally, the requirements under rule 3(1), as to the documents that are to be filed with the notice of appeal, serve a very real purpose: without those documents it is unlikely to be possible for a view to be formed as to whether the proposed appeal raises any question of law arising from the ET decision in issue (absent which, the EAT has no jurisdiction to determine such an appeal; see section 21 **Employment Tribunals Act 1996**). When an appeal is lodged in this jurisdiction, the staff of the EAT are entitled to expect the appellant to comply with the rules; it is not the function of the administration to advise would-be appellants, still less to correct their errors.

27. All that said, as rule 2A makes clear, however, the **EAT Rules** are to be interpreted in a way that enables the EAT to deal justly with the cases before it; that will require regard to be had to the interests of all parties to the proceedings, and to the interests of justice more generally. In considering a proposed appeal in which there has been a failure to lodge all the documents required under rule 3(1) in time, that is likely to require the EAT to adopt the following approach:

(1) Where, when lodging the appeal, an explanation has been given for the omission of a claim or response (the former requirement under rule 3(1)(b)), or the written reasons for the ET's judgment (as provided by rule

3(1)(c)), consistent with the obligation imposed on a party under rule 2A(3) **EAT Rules**, an honest account must be given that does not seek to mislead (**Carroll**; **MTN-1**; **Akhigbe**).

(2) Where it is contended that omission of a particular document (or part of that document) was a "*minor error*" that has since been rectified (albeit outside the 42-day time limit), the EAT may first wish to consider whether this is a case that properly falls under rule 37(5) **EAT Rules**. In determining that question, the EAT would need to be satisfied that there had indeed been an "*error*", and that can properly be described as "*minor*" (**Jasim**). An error is less likely to viewed as "*minor*" where there has been a failure to lodge the entirety of a document required for the appeal (**Hewer**).

(3) If the default in question is a "*minor error*", and has since been remedied, the EAT will then need to determine whether it would be just to extend time to the point of rectification. This will involve an exercise of judicial discretion, taking into account all that is relevant and disregarding that which is irrelevant. Rule 37(5) expressly identifies the manner and timeliness of the rectification of the error, and the possible prejudice to other parties, as relevant considerations, but it does not prescribe or impose any other constraint on what might be considered to be relevant to the exercise of the EAT's discretion in any particular case; determining whether it would be just to extend time will involve a weighing of the balance of justice or injustice to each of the parties; it will always be a fact and case-sensitive exercise (**Jasim**), albeit the merit of the proposed appeal is likely to be of limited weight (**Abdelghafar**).

(4) Even if the omission in issue does not fall to be characterised as a "*minor error*" for the purposes of rule 37(5), that will not be the end of the matter; the EAT will need to consider whether it should exercise the general discretion afforded under rule 37(1). In so doing, it is again required to act in an "*even-handed*" manner, "*weighing and balancing all the relevant factors*" (**O'Cathail**); which will similarly require a case-specific assessment.

(5) Under rule 37(1), the starting point will be for the EAT to determine why the particular error was made (**Abdelghafar**); without that understanding, it would not be possible to determine whether there was a good explanation. The fact, however, that the putative appellant did not have a reason for the omission when lodging the appeal (they might have been unaware of it) does not mean there is no good explanation (**Ridley**): each case must turn on its own facts.

(6) Although an explanation may not be sufficient unless it covers the entire period of the default in question (**Muschett**), where the would-be appellant was not aware of the omission until this was pointed out to them (usually by the EAT), the relevant question is how long it then takes them to rectify the error (**Ridley**).

(7) There is a strong public interest in finality in litigation and the 42-day period for lodging an appeal to the EAT sets a limit, not simply target (and see the observations of Sedley LJ at paragraph 65 **Jurkowska**); as such, the exercise of the discretion to extend time for the lodgement of an appeal under rule 37(1) will be rare and exceptional. That does not mean, however, that, absent a good explanation, no extension of time will be granted or that the would-be appellant must demonstrate that their particular case is rare and exceptional (**Jurkowska**; **Ridley**): the nature of the discretion means that all relevant factors must be weighed, in an even-handed manner, having regard to the interests of all parties, and to the wider public policy concerns. Each case is to be considered on its own facts and in the light of its particular circumstances; the nature and significance of the default in the context of that litigation will be a relevant consideration (**Ridley**), although the actual merit of the appeal (unless very obviously weak, or strong) is less likely to be (**Abdelghafar**).

28. It is against this legal framework that I now turn to the individual appeals before me, each of which pre-dates the amendment to rule 3(1) **EAT Rules** such that the would-be appellant was still required to serve the ET claim and response with their proposed appeal, within the 42-day time limit. In each case, I have considered the applications afresh: the question for me is not whether the Registrar erred in reaching her decision but whether I should exercise the discretion afforded to me to extend time (**Muschett**, paragraph 8).

The cases

(1) AB v University of East London

The procedural background

29. AB was employed by the University of East London ("the UEL"), and brought two ET claims against the UEL in which she complained of breach of contract, direct race discrimination, harassment related to race, and direct sex discrimination. In each case, AB had completed a form ET1 but had then attached the details of her complaints in a further document, setting out the particulars of claim; similarly, in responding, the UEL submitted ET3 forms to which detailed grounds of resistance were then attached. There was some overlap between the claims, with the second claim relying on, but also adding to, the matters set out in the first. The

completion of the formal parts of the ET1s in each case (which required individual complaints to be identified by ticking the relevant boxes on the form) assisted in clarifying the claims that AB sought to pursue.

30. AB's claims were heard by the East London ET (Employment Judge Gardiner, sitting with lay members), over some eight days in November 2022, with a further five days in chambers during January and February 2023. For reasons provided in the ET's reserved judgment, sent out on 20 February 2023, AB's claims were dismissed. AB was represented by her sister before the ET; the UEL appeared by counsel (albeit not by Ms Amesu, who represented its interests at the hearing before me).

31. The ET's judgment was sent out under cover of its standard letter, explaining any appeal would need to be lodged within 42 days of the date the judgment was sent out, and providing links to relevant guidance regarding the appeal process, including to the guidance leaflet "*How to appeal to the employment appeal tribunal (T440)*". In this case, the final date to lodge an appeal to the EAT was 3 April 2023.

32. AB sought to submit her appeal to the EAT by a series of emails, starting at 16:27 on 2 April 2023 and ending at 14:21 on 3 April 2023; the attachments provided included a "*request for future amendments to my Appeal*", explaining that AB had to prepare her appeal without any assistance (her sister, who had previously assisted her, was too ill; she had tried to instruct counsel but the barrister had returned the instructions, leaving her with only nine days to prepare and submit her appeal). The documents submitted by AB did not, however include the ET1 claim and ET3 response forms for the two claims determined by the ET (although AB did include the particulars of claim and the grounds of resistance for the claims); no explanation was provided for why these documents were not included.

33. By letter of 13 April 2023, the EAT notified AB that her appeal had not been properly instituted because she had not provided copies of the ET1 and ET3 forms for the two claims relevant to the ET decision under appeal. By email on 18 April 2023 AB forwarded copies of the relevant ET1 and ET3 forms and her appeal was duly treated as having been properly instituted on that date, 15 days outside the 42-day time limit.

34. By its letter of 6 June 2023, the EAT informed AB that her appeal was 15 days out of time, asking if she was applying for an extension of time. AB responded on 16 June 2023, confirming that she was, and that she was acting as a litigant in person, without any legal training, and had had to prepare her appeal alone. AB explained that her sister had previously acted as her representative but had suffered a recurrence of cancer and was having significant medical treatment and could not assist; AB said:

> "When I submitted the Appeal Notice I was aware that I had not submitted the ET 1 and ET 3 top sheets as I could not locate them in my sister's numerous files, she had

> also not labelled them as ET1 and ET3. I was unable to ask my representative for the top sheets as she was very ill. I genuinely believed that my request to the Employment Appeal Tribunal Court to make future amendments would allow me to submit the top sheets later once I had located them when my representative was better. I submitted the documents ET1 and ET3, (the particulars), and a separate document called the List of issues that listed all the issues which I had on my own computer. Therefore, I do not know how the absence of the top sheets will impact the substance of the case."

AB further explained that she had instructed counsel to assist her with the appeal but the barrister concerned had then said they did not have sufficient time to do this work (and suggested the fee was insufficient) and, on 23 March 2023, returned the instructions and AB's fee. At the same time, AB had had caring responsibilities for her mother and sister, which added to her stress. Although aware she had not been able to submit the ET1 and ET3 forms, AB said she had not considered these to be essential as they had not been referred to by the ET in making its decision. She pointed out that this was the first error she had made in the proceedings, in contrast to the UEL, and said there was a public interest in her appeal being heard as she was complaining of race and sex discrimination, and her case raised issues under the **Human Rights Act 1998**.

35. The UEL resisted AB's application, setting out its representations in response by letter of 30 June 2023. AB provided further written representations by way of reply on 15 July 2023.

36. By order seal dated 13 March 2024, the EAT Registrar refused AB's application for an extension of time; her reasons for so doing are attached to that order and make clear that the decision was taken without applying the amendments to the **EAT Rules** that came into effect on 30 September 2023.

AB's appeal and submissions

37. AB reminds me that she is acting in person. She says she made a diligent and genuine effort to locate the missing forms, and provided evidence of a text she sent to her sister on 28 February 2023, asking for her sister's laptop password as she needed "*the electronic bundles all witness statements and ET1 and ET3*"; she says her sister was in no state to assist. After the barrister returned the instructions, AB says she was in a "*constant state of panic and distress*" and, unable to locate the ET1 and ET3 forms, "*came to the conclusion that I would need to write a letter to state that I would be making future amendments*". After being informed that her appeal was not properly instituted, within five days, she had submitted the missing forms (her brother-in-law was then able to provide her with a usb stick with her sister's files on it); under the new provisions at rule 37(5) **EAT Rules**, she considers this should be a proper basis for granting an extension of time.

38. AB has explained that her sister had previously been diagnosed with stage 4A cancer and had suffered a recurrence of her condition in early 2023, having to have major surgery on 27 February 2023. This had meant that her sister, who had previously helped in presenting AB's case before the ET and had all the documents filed on her computer, was in no position to assist in preparing the appeal submission or in locating the ET1 and ET3 forms (and AB's brother-in-law was unwilling for his wife to be troubled at this time). AB was also caring for her mother (with whom she was living), who was suffering final stages of dementia and needed assistance day and night. AB herself suffers from sleep apnoea, stress, and situational anxiety and was under enormous pressure having to look after her sister and mother; these are matters confirmed by letters from AB's GP, which state that AB's conditions can affect her *"ability to speak, sweating episodes, cognitive ability"* and impact *"upon her concentration*". AB referred to the grant of an extension of time in the case of **MTN-1**, which concerned more significant omissions, and says this supports her application. AB contends the failure to submit the ET1 and ET3 forms on time did not prejudice the UEL nor did it prevent the EAT from properly considering her appeal; she says the Court of Appeal's decision in **Ridley** further supports her application for an extension of time under rule 37(1) **EAT Rules**.

39. For the UEL, it is said that, for the purposes of rule 37(5) **EAT Rules**, AB's error was not minor, given the importance and mandatory nature of attaching both forms, as outlined at paragraph 3.1 of the **EAT PD 2018** (then in force). If that was wrong (and rule 37(5) was thus engaged), the UEL accepts that the error was then rectified, but contends that an extension of time would not be just: first, because this was not a genuine mistake, as AB had knowingly lodged her appeal in the absence of essential documents; second, the error was not rectified promptly given AB was aware, before the deadline, that she had failed to attach the relevant documents to the Notice of Appeal; third, she was not forthcoming with an explanation as to why she was unable to attach the documents; fourth, the UEL would undoubtably be prejudiced should an extension be allowed, being at risk of having to defend an appeal and incur ongoing costs.

40. If considered under rule 37(1) **EAT Rules**, the UEL submits that the reasons provided by AB do not constitute a sufficient or good excuse: that she was a litigant in person was not relevant and, as a matter of fact, had not impacted her ability to submit a properly instituted appeal (indeed AB had produced a 22-page written appeal, submitted on 2 April 2023). The Form EAT 1 made clear that an explanation as to why these documents are not included should be attached, but AB provided no explanation until after the EAT's letter of 6 June 2023. On her own account, AB had been aware of the requirement to serve the ET1 and ET3 forms

when submitting her appeal, and was aware these documents were not attached to her appeal. Furthermore, there were no exceptional circumstances warranting the EAT's exercise of its discretion to extend time.

AB v UEL: my decision

41. In considering AB's application for an extension of time, it is helpful to first set out the nature of the default in this case and the reason why it occurred. AB had submitted two separate claims to the ET in which she made a number of complaints. Each ET1 was accompanied by a separate document, providing particulars of AB's claims: the first was a lengthy document of some 49 pages, the second much shorter (albeit, the second claim was said to rely on the same facts as the first). Similarly, the UEL's substantive responses were set out in grounds of resistance attached to each of the ET3s. When submitting her appeal, towards the end of the 42-day period, AB only served the particulars of claim and grounds of resistance for each of the claims as she could not find the ET1s and ET3s amongst her files. AB had been represented before the ET by her sister (who held all the necessary documents), but her sister was very ill, having to deal with a recurrence of her cancer, and was unable to assist. In these circumstances, AB submitted the appeal herself, knowingly absent the missing ET1s and ET3s; AB did not draw attention to this omission, nor did she provide any explanation for it (a "*request for future amendments*" did not amount to an explanation for why AB had not included the missing documents). When the error was identified by the EAT, AB provided the documents within five days (at this time, her brother-in-law was able to download her sister's files on to a usb stick).

42. On the facts of this case, I find it hard to characterise AB's default as an "*error*", although she was certainly mistaken in failing to explain the position to the EAT when submitting her appeal, or in thinking that the failure to send in the ET1s and ET3s might not matter. Moreover, having had regard to the pleadings in AB's claims, I would not describe the omission as "*minor*": the lengthy particulars (at least in the first claim) make it difficult to understand the precise nature of the claims being pursued and the information provided in the ET1 forms assists in setting out the headline complaints in each case (a clarification that is not irrelevant to the proposed appeal, given that AB seeks to criticise the ET for mischaracterising her complaints). In my judgement, this is not a case where rule 37(5) is brought into play.

43. Turning to rule 37(1), I return to the question why AB failed to submit the relevant documents with her appeal. The UEL has criticised AB for not providing medical evidence expressly addressing this question, pointing out that she was able to lodge a lengthy notice of appeal and other documentation. Notwithstanding

these criticisms, however, it seems to me that AB's explanation for what happened is not really in dispute. At the relevant time, AB's sister - who represented her throughout the ET proceedings and retained all the files on her own laptop - was seriously ill, and it was understandable (and Ms Amesu did not suggest otherwise) that she was unable to engage with AB's request for assistance in getting together the appeal documents. Soon after the ET decision was sent out, AB instructed counsel to prepare her appeal (the documents suggest this was on or around 28 February 2023), but was then let down, leaving her with only nine days to submit the appeal. At that point, AB - whose own health difficulties (as the medical evidence confirms) were exacerbated by having to provide care for her mother - panicked. Putting together the documents she was able to find, AB spent the time available formulating her grounds of appeal; unable to track down the ET1s and ET3s, AB (as I find) convinced herself this would not be fatal, in particular as the substantive cases on each side were set out in the particulars of claim and grounds of resistance that she had been able to serve. Of course, AB might have approached the ET, or the solicitors for the UEL, for copies of the ET1s and ET3s; alternatively, she might have explained the difficulty to the EAT, asking for more time to obtain these documents. I am satisfied, however, that, in the situation she was in at that time, those alternative steps simply did not occur to AB.

44. Accepting, as I do, that AB has provided an honest account of what happened, I further accept that, in the very particular circumstances of this case, this provides a good explanation. The position AB found herself in was quite exceptional: at a time when she was already facing her own health difficulties (worsened because of her caring responsibilities for her mother), the person who had been helping her through the ET proceedings - and who retained all the files - was seriously ill and unable to provide any assistance. Acting promptly to seek to mitigate this situation, AB instructed counsel to draw up the appeal documentation, and, to the extent that any of the required documents were missing, AB might reasonably have expected counsel to draw this to her attention and to advise as to how these might be obtained (for example, by asking the other side or the ET). Instead, however, the instructions were returned to AB less than ten days before the expiration of the 42-day time limit. In those circumstances, it is understandable that AB was unable to get together all the required documentation, and, given her confusion (due to her own health issues) and panic, was unable to identify alternative ways of dealing with this situation at the time.

45. Even if I was wrong to describe this as a good explanation, I would, in any event, consider it right to treat this as an exceptional case warranting the exercise of my discretion to extend time. As I have said, the particular circumstances that AB faced during the relevant 42-day period were truly exceptional. It would be

unjust not to take those difficulties into account, in particular given the steps AB had taken to obtain legal assistance. Although the missing documents were required for the appeal, AB managed to rectify the error within five days of the significance of the omission being drawn to her attention by the EAT. The UEL could have suffered no prejudice as a result of the short delay involved and, given the initial permission stage involved in any appeal to the EAT, would only incur costs in these proceedings if AB's appeal was found to raise a question of law that should be considered at an *inter partes* hearing. Having regard to the more general interest in finality of litigation, and weighing the justice to both sides in these proceedings, I am satisfied that the application for an extension of time should be allowed in this case.

(2) Mr F Shina v Rendall and Rittner Ltd

The procedural background

46. From September 2018, Mr Shina was employed by Rendall and Rittner Ltd ("RRL") as a night concierge. He commenced his first ET claim on 25 March 2021 and, when he was later dismissed, presented a second claim on 10 April 2022. Both claims were consolidated and Mr Shina's complaints of direct race discrimination, harassment related to race, unfair dismissal, unpaid holiday pay and breach of contract were heard by the London Central ET (Employment Judge Baty, sitting with lay members), over some six days in May 2023. As explained by the ET's judgment, sent out with its written reasons on 26 May 2023, upon Mr Shina's non-attendance on day six of the hearing, his claims were dismissed; had the claims not been dismissed for that reason, they would have been dismissed because of what the ET found to be Mr Shina's unreasonable conduct of the proceedings, alternatively because his claims had no reasonable prospects of success.

47. When submitting his first ET1, Mr Shina was represented by a solicitor, but he thereafter represented himself and appeared before the ET in person (he has similarly acted in person on this appeal, albeit he was accompanied at the hearing by a McKenzie friend); the respondent appeared by counsel (it was represented by its solicitor at the hearing before me).

48. The ET's reserved judgment was sent out under cover of the standard letter, explaining that any appeal would need to be lodged within 42 days of the date the judgment was sent out, and providing links to relevant guidance regarding the appeal process before the EAT, including to the guidance leaflet T440. In this case, the final date to lodge an appeal to the EAT was 7 July 2023.

49. Mr Shina sought to submit his appeal to the EAT by email sent at 15:04 on 6 July 2023, but the attachments to his email did not include the ET1 in his first ET claim or the grounds of resistance (which should have been attached to the ET3) for his second claim. No explanation was provided for these omissions.

50. The EAT emailed Mr Shina at 12:49 on Saturday 8 July 2023, advising that his appeal had not been properly instituted in accordance with rule 3(1) of the **EAT Rules** because he had not provided a copy of the ET1 in his first claim nor the grounds of resistance for the second claim. By email sent at 05:26 on Monday 10 July 2023, Mr Shina apologised for what he described as "*an oversight*" and provided the following documents: pages 1-9 of the ET1 in his first claim, along with the particulars for that claim, and the grounds of resistance for the second claim. On the same day, the EAT asked Mr Shina to provide the missing pages from the ET1 for the first claim (pages 10-11) and he responded, saying he was trying to get the ET1 form from his former representative; Mr Shina subsequently forwarded the complete ET1 on 12 July 2023. As the final two pages of the ET1 were blank, Mr Shina's appeal was treated as having been properly instituted on 10 July 2023, three days out of time.

51. On 21 July 2023, the EAT informed Mr Shina that his appeal was out of time, asking if he was applying for an extension. On 4 August 2023, Mr Shina confirmed he was, explaining he had not had a complete copy of the first ET1 as his then representative had submitted it; he tried to find a lawyer to help him prepare his appeal but had been unable to do so; he acted promptly to obtain the complete ET1 once he realised his error; as for the missing grounds of resistance in the second claim, he was confused because this had been attached as one document in the first claim and the second grounds of resistance had gone into a junk folder. He also said he was receiving treatment for mental health problems, which resulted in the delay.

52. In providing its written representations on 30 August 2023, RRL observed that, save for one case management hearing, Mr Shina had represented himself in the ET proceedings, and appeared not to have sought legal advice until towards the end of the 42-day period. RRL further questioned Mr Shina's suggestion that he had not been aware of the second grounds of resistance: he would have been sent a copy by the ET at an early stage and there was a copy in the bundle for the full merits hearing; as for Mr Shina's health, he had been dealing with his health issues throughout the proceedings in the ET. Mr Shina replied on 14 September 2023, reiterating that he did not have a copy of the full ET1 for the first claim; he only obtained this from his representative when told it was missing; he had tried to obtain advice early in the 42-day period but could not afford the fees (and he attached emails showing he had been trying to obtain legal assistance from 23 May

2023); as for the grounds of resistance in the second claim, those were not sent to him by the ET and as the grounds had been part of the ET3 in the first claim, he assumed there was no separate document for the second.

53. Considering this matter solely under rule 37(1) **EAT Rules**, by order seal dated 19 March 2024, the Registrar refused Mr Shina's application for an extension of time.

Mr Shina's appeal and submissions

54. Mr Shina emphasises that he had not left it late to try to obtain legal advice and assistance, and he had provided evidence to show he had been seeking legal help from an early stage in the relevant period. As for the ET3 in the second claim, as recorded at the case management preliminary hearing before the ET on 25 July 2022, due to the ET's error, that had not been served on him (albeit that position was then rectified). Mr Shina also relied on the fact of his ill-health, although the medical evidence he has provided is limited to his referral to NHS Talking Therapies in mid-May 2023 and the subsequent decision, in mid-July 2023, that he should be offered guided self-help CBT; he says that it cannot be inferred that, just because he was able to submit some documents within the time-limit, his health had not impacted upon his ability to ensure all the required documents were included.

55. For RRL it is contended that the missing documents did not amount to a minor error, so rule 37(5) **EAT Rules** did not apply. Under rule 37(1), it was relevant that Mr Shina had left it to the penultimate day to try to submit his appeal, notwithstanding that he understood the time limit. Although he had relied on the fact that he had been receiving mental health treatment, that had also been the position leading up to the ET hearing. Given the need for finality in litigation, there was prejudice to RRL if time were to be extended; exceptional circumstances such as would warrant an extension of time had not been made out.

Shina v RRL: my decision

56. The default in Mr Shina's case was two-fold: in submitting his appeal within the 42-day time limit, he both failed to include the ET1 for his first ET claim, and the grounds of resistance (setting out RRL's substantive defence) for the second claim. Within two days of these omissions being pointed out to him, on 10 July 2023 Mr Shina sent in both the missing documents (the version of the first ET1 he provided at that time was missing the last two pages but these were blank and the EAT treated his appeal as properly instituted as from 10 July 2023); in so doing, he explained that his initial error had been due to "*oversight*". That, in my

judgement, provides the explanation in Mr Shina's case. The issue regarding his former representative only went to explain why he did not have the final two pages of the first ET1, which was irrelevant (the EAT treated his appeal as having been properly instituted without these). As for the initial failure by the ET to serve the second ET3 and grounds of resistance on Mr Shina, that had been rectified at an earlier stage; Mr Shina had both the second ET3 and the grounds of resistance in his possession when he submitted his appeal but overlooked the latter document because it had been provided in a separate file: the ET3 and the grounds of resistance in his first claim had been provided as one pdf file; in the second claim, however, those documents had been saved into two separate pdf files (albeit he would also have had both documents in one place in the ET hearing bundle). In seeking to lodge his appeal, Mr Shina made a mistake and simply failed to include the two missing documents, although they had both been available to him at the time.

57. The error made by Mr Shina cannot be described as "*minor*" for the purposes of rule 37(5) **EAT Rules**. At the time, rule 3(1) made clear that both the documents in question were required to lodge an appeal. Even accepting that the ET1 in the first ET claim provided no substantive information that was not also contained in the particulars of claim in that case (which Mr Shina did serve with his appeal), the document setting out RRL's grounds of resistance in the second claim would be required reading at the initial on-paper "sift" stage, in order to assess the potential merit of his appeal.

58. As for the potential exercise of my discretion under rule 37(1), I cannot say that Mr Shina has provided a good explanation for his default. Accepting that he made an entirely honest error, he has not provided a good explanation for his oversight in failing to send in two documents that were in his possession at the relevant time. As I have pointed out, the reference to his former solicitor having the complete version of the first ET1 is irrelevant: the EAT accepted the copy that Mr Shina was able to provide early on 10 July 2023 (prior to his email to the solicitor seeking the fuller version, which included the (blank) final pages). As for RRL's grounds of resistance, while Mr Shina might have made the error of thinking these had been attached to the ET3 (as had been the case for his first claim), a simple check of the document would have made clear that was not so. Although the ET might have initially erred in failing to send RRL's response on to Mr Shina, that had been rectified at a much earlier stage and a full copy - containing both ET3 and grounds of resistance - would have been in the hearing bundle. Had Mr Shina checked the document he was forwarding to the EAT, he would have realised it did not include the grounds of resistance, and would then have been able to track down that document from his own files and send it in at the same time.

59. As the Court of Appeal has observed in **Ridley**, a mistake - even if it does not provide a good explanation - does not necessarily mean that there should be no extension of time. In the present case, in relation to the first ET claim, Mr Shina can be said to have substantially complied with the requirements of the **EAT Rules**: the particulars of claim (which had been drafted by Mr Shina's former lawyers) effectively set out all the necessary information in that case. That, however, cannot be said in respect of the second claim, and, although the mistake made (the failure to check that the document entitled "*ET3*" did, in fact, include the grounds of resistance) might well have been an entirely understandable human error, it would not, of itself, amount to a rare or exceptional circumstance.

60. That said, the question for me is not whether Mr Shina's case is necessarily exceptional, but whether the circumstances, taken as a whole, would warrant the exceptional exercise of the EAT's discretion to extend time. In determining this issue, I take into account the fact that Mr Shina was suffering a degree of stress at this time (corroborated by the medical evidence he has provided) and had been assiduously trying to get legal assistance (his emails in this regard go back to 23 May 2023; the difficulty largely appears to have been that he was unable to afford the fees quoted by any of the (numerous) lawyers he approached). I also note that Mr Shina promptly corrected his error, sending in the relevant documentation within two days of the EAT's email; RRL cannot point to any particular prejudice arising from the short delay in this regard. Accepting the very real importance of ensuring finality in litigation, having regard to all the relevant circumstances of this case, I am prepared to grant the exceptional extension of time sought.

(3) Miss A Rehman v Healthbridge Direct

The procedural background

61. Healthbridge Direct ("Healthbridge") is a provider of primary care support for GP surgeries in the London Borough of Redbridge. Miss Rehman worked for Healthbridge on a casual basis from December 2019, becoming an employee on 4 February 2020, but was dismissed with effect from 19 April 2020. By a claim presented on 7 September 2020, she complained of automatic unfair dismissal by reason of having made a protected disclosure. After a hearing before the East London ET (Employment Judge Massarella, sitting with lay members) over seven days during 2022, that claim was dismissed. The ET's reserved judgment and reasons were sent out on 16 December 2022, under cover of the standard letter explaining that any appeal

would need to be lodged within 42 days, and providing links to relevant guidance regarding the EAT appeal process. In this case, the final date to lodge an appeal was 27 January 2023.

62. Acting in person (as she had in the ET proceedings), Miss Rehman sought to file her appeal by email on 26 January 2023, attaching all the required documents save for the grounds of resistance that had accompanied Healthbridge's ET3. On 1 February 2023, the EAT emailed Miss Rehman to advise that this document was missing. Nothing was heard from Miss Rehman, however, until 28 April 2023, when she called the EAT and was advised that her appeal had been treated as not properly instituted; she then provided the missing grounds of resistance by email on 2 May 2023. On 3 May 2023, the EAT emailed Miss Rehman, stating that her appeal was deemed to have been properly instituted on 2 May 2023, 95 days out of time, and informing her of the procedure to apply for an extension of time.

63. In her application for an extension of time, on 15 May 2023, Miss Rehman argued that her appeal was not in fact out of time as she had provided the form ET3 and there was nothing that stated she should also provide the separate document containing the grounds of resistance; she pointed out that the formal Notice of Appeal document - EAT Form 1 - stated that the appeal should include *"(b) the claim (ET1). (c) the response (ET3); and /or (where relevant) (d) an explanation as to why any of these documents are not included ...*". Miss Rehman further said that she had not received the EAT's email of 1 February 2023; she had been out of the country from 28 February to 31 March 2023, and had checked but had not received any emails or letters; she only learned about the missing documents in her telephone call to the EAT on 28 April 2023; she then provided the missing document on 2 May 2023.

64. By its response of 1 June 2023, the respondent resisted the application for an extension of time, observing that the obligation to submit all the required documents (including grounds of resistance attached to the Form ET3) was made clear by the **EAT PD 2018**; a litigant in person was not entitled to special treatment and it was not the duty of the EAT staff to advise parties as to what they were required to do.

65. Having considered the parties' submissions, by her order, seal dated 1 February 2024, the EAT Registrar declined Miss Rehman's application for an extension of time, making clear that she was considering this matter solely under rule 37(1) **EAT Rules**.

Miss Rehman's appeal and submissions

66. Miss Rehman did not attend the hearing on 3 July 2024; representing her interests, Mr Ijezie stated that this was because she was pregnant, although no medical evidence was provided to explain why this should mean she was unable to attend. In any event, Miss Rehman had provided a witness statement in which she explained how she sought to file her appeal, initially trying to use the digital filing system but, after having difficulties with that (and speaking to the EAT staff over the 'phone), then emailing her documents to the EAT. To find out what she needed to file, Miss Rehman says she clicked on the links in the ET covering letter but those took her to the government website, not the actual forms. Tracking down a link to the leaflet T440 "*I want to appeal to the employment appeal tribunal*", Miss Rehman says she read this, which directed her to the EAT Form 1. She says she did not "*read about any other presidential guidance or practice directions*" but, using the appeal EAT Form 1, saw this referred to the ET3 form (not the grounds of resistance), so just submitted that. Miss Rehman also stated that she had not received the EAT's email of 1 February 2023

67. I am not able to accept all of Miss Rehman's evidence. At the relevant time, HMCTS leaflet T440 (to which you are readily directed by clicking on the link in the ET's standard letter) very clearly signposted the **EAT PD 2018**, which provided, at paragraph 3.1:

> "A Notice of Appeal and accompanying documents may be delivered to the EAT by any method, such as email, fax, post, courier, or hand-delivery. The Notice of Appeal must be, or be substantially, in accordance with Form 1 (in the amended form annexed to this Practice Direction) or Forms 1A or 2 of the Schedule to the Rules. It must identify the date of the judgment, decision or order being appealed. Copies of the judgment, decision or order appealed against must be attached by the Appellant. In addition the Appellant must provide copies of the Employment Tribunal's written reasons together with a copy of the claim (the form ET1 and any attached grounds) and the response (the form ET3 and any attached grounds), or if not, a written explanation for the omission of the reasons, ET1 and ET3 must be given. It must include a postal address at or through which the Appellant can be contacted, and may also include an email address if the Appellant wishes the EAT to communicate by email. A Notice of Appeal without such documentation will not be validly presented."

68. Given the guidance available at the time, I find that it would not be reasonable for Miss Rehman to say (i) she did not read anything about a Practice Direction, and (ii) that she could not be expected to be aware of the need to include the grounds of resistance with the form ET3 as part of the response to her ET claim.

69. For Healthbridge, it is submitted that (at the relevant time) the requirement under the **EAT Rules** was for the appeal to include "*the response*", which was the ET3 form and the attached grounds of resistance (as was made clear at Box 6 of the ET3 in these proceedings); the appeal had not been properly instituted in time and the question was whether Miss Rehman should be granted an extension of time.

70. The default in Miss Rehman's case arose from her failure to serve a complete copy of Healthbridge's response to the ET claim when she submitted her appeal. She included the form ET3 but not the grounds of resistance that explained Healthbridge's defence: at box 6 of the ET3, a respondent is asked to set out the facts on which it relies to defend the claim; in response, Healthbridge had directed the reader to "*Please see attached grounds of resistance*". Notwithstanding the EAT having pointed out her omission, this error was not rectified by Miss Rehman until 2 May 2023; 95 days out of time.

71. Even if I accept that Miss Rehman's failure to send in Healthbridge's grounds of resistance was an "*error*", I am unable to accept that this can properly be described as "*minor*". In order to understand Miss Rehman's proposed challenge to the ET's rejection of her whistleblowing case, it would be necessary to have regard to Healthbridge's defence, as set out in its grounds of resistance. The failure to provide a complete copy of the response to the ET claim could not be characterised as a "*minor error*" for the purposes of rule 37(5) **EAT Rules**.

72. Turning then to consider the discretion afforded me under rule 37(1), the first difficulty is that I do not fully accept Miss Rehman's explanation for the default in this instance. Acknowledging that, at the material time, the EAT Form 1 referred to the ET1 and the ET3, the relevant rule (rule 3(1)(b)) spoke of the "*claim*" and the "*response*"; I find it difficult to understand why Miss Rehman would consider the "*response*" would not include the grounds of resistance setting out Healthbridge's defence. More than that, I have found it hard to understand how Miss Rehman could have read the HMCTS leaflet T440 - which clearly signposted the **EAT PD 2018** - and still state that she did not "*read about any other presidential guidance or practice directions*". Miss Rehman did not attend the hearing before me on 3 July 2024 so it was not possible to seek to clarify these questions with her; I am, however, unable to simply accept the evidence in her statement in this regard. For these reasons, to the extent that Miss Rehman has provided an explanation for her error, I am unable to accept that it is a good explanation. Allowing - as I do - that it is unlikely that Miss Rehman deliberately sought to hold back a required document, I can only conclude that she was careless in her reading of the guidance and failed to follow up the clear reference to the **EAT PD 2018** that was provided.

73. Notwithstanding my conclusion that no good explanation has been provided, I have nevertheless gone on to consider whether time should still be extended for Miss Rehman's appeal. I bear in mind that this is not a case where Miss Rehman simply failed to lodge any part of her appeal in time; it is relevant that, within time,

she filed her notice of appeal and other documents, omitting only the particulars of claim. This is not, however, a case where the error was speedily rectified. Although the EAT emailed Miss Rehman on 1 February 2023, identifying the missing document shortly after she had submitted her appeal, it was not until 2 May 2023 that she sent in the grounds of resistance. Miss Rehman has said she never received the EAT's email and was unaware of the omission until she telephoned in on 28 April 2023, to find out what was happening with her appeal. This is again a point on which it might have been helpful to hear from Miss Rehman in person: the EAT sent its email to the same address that it had previously used (and continued to use) without issue; it remains unclear why the email of 1 February 2023 should not have been received. Even if I accept Miss Rehman's account, however, and assume the email was not delivered, the fact remains that nothing was done to correct the error that had been made for 95 days after the expiration of the time limit. Given that she had sought to file her appeal on 26 January 2023 and had - on her case - then heard nothing from the EAT, I do not consider it was reasonable for Miss Rehman to take no further steps to check the position until 28 April 2023. Even accepting she was out of the country in February and March, I consider it reasonable to expect a would-be appellant to seek to check what was happening with their appeal before three months had passed.

74. Although Healthbridge has not sought to contend that it has suffered specific prejudice arising from the delay in this case, the fact is that, following the expiration of the 42-day time limit, a further three months passed before Miss Rehman's appeal was properly instituted. That, in my judgement, is a significant period of time that would inevitably prejudice justice in this case: should Miss Rehman ultimately succeed in her appeal, the likelihood would be that her claim would need to be remitted to the ET for re-hearing; an additional delay of three months in this process is not an insignificant consideration. In Miss Rehman's case, therefore, I do not consider the interests of justice would be served by granting the extension of time sought.

(4) Mr Wayne Adams v Power X Equipment Ltd

The procedural background

75. From 4 January 2018 until 31 October 2020, Mr Adams was employed by Power X Equipment Ltd ("Power X") as an administrator. While still employed, on 6 October 2020, Mr Adams presented a claim to the ET complaining of unpaid wages and of suffering health and safety detriment (case 1309512/2020); he was subsequently dismissed and, on 4 January 2021, presented a second claim for unfair dismissal, unpaid wages and other payments (case 1300013/2021); he was later permitted to amend his claim to add complaints of

disability discrimination and protected disclosure detriments. As part of the case management of the ET proceedings, the two claims were treated as consolidated, and Power X was not required to submit a separate ET3 for the second claim but was directed to provide amalgamated grounds of resistance for both claims. The full merits hearing took place before the Birmingham ET (Employment Judge Gaskell, sitting with one lay member) over five days in March 2022. For the reasons set out its judgment, sent out on 16 June 2022, the ET dismissed all the claims.

76. The ET's judgment was sent out under cover of the standard letter, explaining, with links to the relevant HMCTS guidance, that any appeal to the EAT would have to be presented within 42 days of the decision being sent out. In this case, the 42-day period ended on 28 July 2022.

77. On 27 July 2022, Mr Adams sought to lodge his appeal, submitting the Form EAT 1, his grounds of appeal (in two different forms), the ET judgment (with written reasons), both ET1s and Power X's grounds of resistance in the first claim (sent (separately) both in Word format and as a pdf attachment) and its amalgamated grounds of resistance post-dating the second claim. He failed, however, to include any ET3. In his covering email, Mr Adams had said:

> "Attached documents are:
> My appeal
> My reconsideration request
> ET1 X 2
> ET3 only 1 was ever recieved *[sic]*
> Respondents grounds of resistance
> T444
> Judgement of the court including reasons

In fact he had twice attached the original grounds of resistance in one of the ET claims (one Word version; one pdf) and one copy of the combined grounds of resistance. As he had identified, there was only one form ET3, which related to the first claim, but Mr Adams had failed to include this when submitting his appeal.

78. By letter of 30 July 2022, emailed out at 13:05 that day, the EAT notified Mr Adams that his appeal had not been properly instituted because his submission had omitted the ET3 forms in the two claims before the ET. Mr Adams replied to this email at 11:17 on Sunday 31 July 2022, saying that he was attaching the ET3 in one of the claims, explaining:

> "See attached ET3, I did put this onto the upload page, I only received one ET3 from the respondent, they never completed one for the second claim."

The ET3 attached to this email was, however, incomplete, only comprising five pages.

79. On 1 August 2022, the EAT staff emailed out to Mr Adams, saying:

> "Please can you try and obtain this from the Employment Tribunal where you had the hearing"

It is unclear whether the EAT was asking Mr Adams to try to obtain the ET3 in the second claim (he had already explained this was never completed) or the full version of the ET3 that he had supplied.

80. Mr Adams does not appear to have responded to the EAT until 25 August 2022, when he replied to ask for confirmation that all was "*OK with this appeal*". He does not seem to have received a response to that message, and on 14 and 20 September 2022, Mr Adams again emailed to find out what was happening. On 21 September 2022, he received the reply:

> "It appears we have all the relevant documents, if that be the case we should be sending out a letter formally acknowledging your Notice of Appeal."

Mr Adams responded, saying:

> "OK many thanks for letting me know"

81. On 5 December 2022, however, the EAT emailed out to Mr Adams to say that he had not submitted complete ET3s for the two claims and had failed to provide the grounds of resistance for the second claim. Responding the same day, Mr Adams said:

> "As far as I was aware everything was submitted and this was all completed months ago.
> There was no ET3 completed by the respondent for the second case regarding unfair dismissal only the first case In regards to detriment. I enquired at the time and got no response I enquired again upon this request from the EAT and was told that there was only 1 ET3 on file in relation to these 2 cases and this was the one in which I sent to yourselves.
> I did enclose both grounds of resistance originally and wasn't aware that this was an issue as the EAT at the time when they called me only mentioned the 2 ET3 forms.
> I will again submit the 2 grounds of resistance in this case but please note that there was never an ET3 completed by the respondent in regards to the unfair dismissal case.
> I did question this several times with the tribunal but never got a response."

82. On 7 December 2022, the EAT emailed to Mr Adams in the following terms:

> "According to our records, you have submitted ET3 for the case 1309512/2020 however it is still not acceptable as it has pages 6 – 8 missing of the Response Form. We need a complete ET3 form with all the pages in order to process for this case.
> And for the other case of 1300013/2021, thank you for providing a reasonable explanation for the missing ET3 Response Form which makes it clear now why it was not submitted. However, in terms of the Grounds of Resistance, can you please provide copies for both cases above in order to process this appeal."

83. Mr Adams again responded the same day, saying:

> "I wasn't aware that there were any pages missing from the other ET3.
> I will send Al *[sic]* of the requested documents over by the end of the week when I can get to my laptop."

84. On 19 December 2022, Mr Adams again emailed the EAT, enclosing a complete copy of the ET3 (along with further copies of Power X's grounds of resistance), further explaining:

> "There is only one ET3 for these claims, the respondent never submitted an ET3 for the other case number.
> I did raise this point in the tribunal on day 1 but it was dismissed by the judge as unimportant.
> I have attached all of the grounds of resistance that I have recieved *[sic]* or was in the bundle."

Other than details of Power X's legal representative (on page 6), the further three pages of the ET3 were blank.

85. Upon receipt of the full ET3, the EAT treated Mr Adams' appeal as properly instituted, as from 19 December 2022, 144 days out of time.

86. After being notified by the EAT that his appeal was out of time, on 28 May 2023, Mr Adams applied for an extension of time. He stated his view that he had submitted the only ET3 he had been sent, considering he had sent it with his original appeal documents. Responding on 18 July 2023, Power X resisted the application, pointing out that Mr Adams was familiar with EAT procedures as he had previously successfully pursued an appeal in proceedings against a former employer, following an ET hearing in May 2018.

87. Considering the parties' respective submission, and considering this matter solely under rule 37(1) **EAT Rules**, by her order of 24 January 2024, the Registrar refused an extension of time for Mr Adams' appeal.

Mr Adams' appeal and submissions

88. At the hearing on 3 July, Mr Adams appeared in person, as he did before the ET. During his submissions it became apparent he was still under the impression that, when lodging his appeal, he had included the version of Power X's ET3 for the first claim that was then in his possession. On showing him the copy of his original email (with all attachments) on the EAT's digital case management system, Mr Adams accepted this had not been the case (although he had erroneously sent in two copies of the grounds of resistance for that claim); it was apparent that this initial omission came as a surprise.

89. In any event, Mr Adams made the point that he had submitted the additional pages from Power X's ET3 as soon as he was told what was missing; he would have done this earlier had the omission been made clear. He had also provided an explanation for not submitting an ET3 in the second claim (because he had never received one). He said he did not have access to an electronic bundle as this had never been sent to him but was provided through Power X's solicitor's sharepoint, and his access ceased after the ET hearing; he therefore only had a hard copy bundle, which was incomplete; he had thought he had submitted everything

required. Mr Adams also referred to the fact that he suffered a road traffic accident on 28 June 2022, which caused him to suffer various mental and physical injuries (he had a MRI head scan on 25 September 2022), impacting upon his ability to travel (he suffered severe travel anxiety after the accident), and resulting in his suffering depression and extreme anxiety, affecting his ability to focus. In his further submissions, Mr Adams says that the decision in **Ridley** supports his application for an extension of time in this case.

90. Power X was represented by counsel both before the ET and the EAT (although not the same counsel). At the hearing on 3 July, its position was that Mr Adams had failed to provide an explanation justifying a departure from the EAT's usual strict approach. Subsequently, accepting that the decision in **Ridley** applied to this case, Power X conceded that Mr Adams' error fell into the category of what would now (under rule 37(5) **EAT Rules**) be called a "*minor error*"; Mr Adams had made a mistake and the EAT was entitled to take this into account. All that said, Power X points out that Mr Adams' delays in responding to the EAT's communications in this case, and thus rectifying the omission, amounted to some 42 days (spread out over the total 144 days). Power X also contends that there is no merit in the proposed appeal, which effectively consists of a blanket request to revisit the entire claim (including the ET's findings of fact): having regard to the need to do justice to both parties, the application for an extension of time should be refused.

Adams v Power X: my decision

91. In this case, it is important to be clear about the precise nature of Mr Adams' default and when this was corrected. Having gone through all the communications between Mr Adams and the EAT, it is apparent that, when originally submitting his appeal, Mr Adams had made a mistake in submitting two versions of Power X's grounds of resistance in his first claim (one in Word, one in pdf) but failing to include the ET3 in that claim. As for the second claim, he had included no ET3 - because there was none - but he had provided an explanation: "*only 1 was ever recieved*".

92. In initially treating Mr Adams' appeal as not properly instituted, on 30 July 2022, the EAT had stated that was because he had omitted the ET3s for each of the claims. Although correct in respect of the first claim, that was not, however, the case for the second: Mr Adams had explained why no ET3 was provided in that regard (an alternative means of complying with rule 3(1), permitted by rule 3(1)(b) **EAT Rules**). Moreover, within 24 hours, Mr Adams provided the ET3 he had available for his first claim, and again explained he had never received an ET3 for the second. Although not immediately responding to the EAT's rather cryptic

message of 1 August 2022, Mr Adams sent chasing emails later that month and in September, only being told that his appeal was still being treated as not properly instituted on 5 December 2022; at that stage, however, the EAT (i) erroneously suggested he had failed to provide the grounds of resistance for the second claim, and (ii) was still failing to engage with the fact that he had provided an explanation for the absence of a form ET3 for that claim. It is right that, on 7 December 2022, the EAT clarified what was missing from the ET3 for the first claim, acknowledging the explanation that Mr Adams had provided in respect of the ET3 for the second (although still incorrectly stating that he had failed to include the grounds of resistance). As for the short delay before his response on 19 December 2022, Mr Adams has explained that was because he had to track down the fuller version of the ET3 at a different address (and he was still finding driving difficult at that time).

93. Reviewing this history, it is apparent that some confusion arose due to errors made by the EAT administration; in particular, there was a failure to engage with the fact that, from the outset, Mr Adams had provided an explanation for why there was no ET3 for the second claim. Moreover, although he initially failed to include the ET3 for the first claim, when the amalgamated grounds of resistance are read, it is apparent that these set out the details provided in that document. Accepting that, when checking to see whether an appeal is properly instituted, the EAT staff cannot be expected to analyse the content of each document, in my consideration of this application, it is relevant that there was no substantive omission: having consolidated the claims, the ET had directed Power X to provide an amalgamated grounds of resistance; in so doing, Power X had included a section providing the information set out in its earlier ET3. As Power X has conceded, the error made by Mr Adams can properly be characterised as "*minor*" for the purposes of rule 37(5) **EAT Rules**.

94. It further seems to me that Mr Adams substantively rectified this error when he sent in the ET3 within 24 hours of the EAT's email of 30 July 2022. Although this did not include the final three pages, the only information those contained related to the name and contact details of Power X's legal representatives (information Mr Adams had already provided). Even if it were to be said that full rectification did not occur until Mr Adams sent in a complete copy of the ET3, on 19 December 2022, it is relevant that I take into account the EAT's delay in raising this issue and the confusion that arose from its continued failure to engage with the explanation given for the absence of a second ET3. For its part, Power X does not suggest that it suffered any prejudice as a result of any failing on Mr Adams' part in this regard, but asks me to have regard to what it says is the lack of merit in his appeal. At this stage, however, it is difficult for me to form a view as to the potential merit of Mr Adams' 24-page grounds of appeal; even if I considered it was simply an attempt to re-argue the

case below, it would not be fair not to let Mr Adams address me in this regard (as would normally be permitted pursuant to rule 3(10) **EAT Rules**). Balancing the interests of justice on both sides, I consider that Mr Adams application for an extension of time should be permitted under rule 3(5) **EAT Rules**.

95. In any event, even if I was incorrect in treating this case as falling within rule 37(5), I would extend time under rule 37(1) **EAT Rules**. For the reasons already explained, I am satisfied that, within the 42-day time limit, Mr Adams had substantively complied with the requirements of rule 3(1). To the extent that Mr Adams had erred in failing to provide a copy of the form ET3 that had (prior to the amalgamated grounds of resistance document) been served in his first claim, this was plainly a genuine oversight and he effectively made good his error within 24 hours of the omission being identified. In my judgement, this is a case where the exceptional exercise of the discretion to extend time would be warranted.

(5) Mr J Samuels v Searcy Tansley and Company Ltd

The procedural background

96. Searcy Tansley and Company Ltd ("Searcy") operate a restaurant in the Barbican where, in April and May 2022, Mr Samuels worked as a kitchen porter. By an ET claim presented on 29 October 2022, Mr Samuels made complaints of unfair dismissal and race discrimination, subsequently adding claims of protected disclosure detriment/dismissal and wrongful dismissal. Searcy set out its defence to these claims in seven page attachment to its form ET3 (within the form, it said "*Please see Grounds of Resistance attached*"). After a preliminary hearing before the London Central ET (Employment Judge Tinnion, sitting alone) on 15 February 2023, Mr Samuels' claims of unfair dismissal and race discrimination were dismissed for reasons set out in the ET's reserved judgment, sent out on 13 March 2023 (in summary: he had insufficient service to claim unfair dismissal, and his complaint of race discrimination was out of time); further case management directions were given in respect of his other claims. The ET's judgment was sent out under cover of the standard letter, providing details of the appeal process (including the time limit) and links to relevant guidance. In this case, the 42-day time limit for presenting an appeal to the EAT expired at 16:00 on 24 April 2023.

97. Acting in person (as he had before the ET), Mr Samuels sought to lodge his appeal on 13 April 2023 using the EAT's digital case management system; he successfully uploaded all the required documents save the grounds of resistance that had been attached to Searcy's ET3. By letter of 2 May 2023, the EAT wrote to Mr Samuels, pointing out this omission. His initial response (sent by email on 21 May 2023) asserted that he

had sent all the required documents. After further email correspondence on this issue, on 12 June 2023, Mr Samuels provided the following explanation for the fact that the grounds of resistance had not been uploaded:

> "I did in fact submit the file properly. However, it appears that the way the pdf file is formatted empties the filled sections 1-7 on submission of the document or the handler of the document is not being careful and is clearing the sections themselves. That is clear now, after viewing both documents. The court may need to convert the downloaded pdf file into a word document or another format such as a png so that it can be viewed properly as I have submitted the required documents completed twice. I will attach a screenshot to make clear what I mean and this does in fact prove that I properly instituted the appeal with the correct documents as provided by HM Court. ...
> I can also see that you must be playing some game with me, as the grounds of resistance is to be filed by the defendant and clearly the defendant did not attach a grounds of resistance and therefore I can not attach a grounds of resistance if they have not sent me one. To remind you sir, the grounds of resistance is for the defendant, the grounds of appeal is for the claimant when appealing. The defendant did not attach a grounds of resistance and it is not my duty to do so, nor should I be penalised for them not doing so. ..."

98. From my consideration of the various screenshots attached to Mr Samuels' email, I am unable to see that there is any evidence that he provided a copy of the grounds of resistance; nevertheless, on the basis of the explanation that he had provided, the EAT treated Mr Samuels' appeal as having been properly instituted on 12 June 2023, 49 days out of time. By its letter of 6 July 2023, the EAT asked Mr Samuels whether he was seeking an extension of time, which he confirmed that he was by email of 7 July 2023.

99. In setting out his representations to support his application for an extension of time, Mr Samuels explained, as follows:

> "I am sorry that the grounds of resistance were missing from my Notice of Appeal. I would like to appeal this decision as I expressly did attach the ET3 form onto my appeal. The fact that the grounds of resistance were not included is a matter to do with how the Respondent has filled out their form. The respondent did not fill out the form as intended by the creators of the form who left plenty of space for a comprehensive ground of resistance to be written in the space provided ...
> The respondent proceeded to write a single sentence in the box and did not use the blank space provided as written in the guidance and on the form directions. The respondent then sent the document as 2 separate documents which clearly goes against the instructions. Therefore, the Respondent did not fill out the form properly and this resulted in myself not including the grounds of resistance.
> As the instructions are to complete the ET3 form as is directed and not to send any other documents the respondent did not fill the form out at intended by HMCT and sent an expressly denied second document. This had the eventual effect that when I completed my Notice of Appeal I did not include the grounds of resistance with my ET3, although I did attach the ET3 document."

100. Mr Samuels provided further written submissions in support of his application for an extension on 11 July 2023.

101. Searcy resisted the application, providing (through its solicitors) its response on 20 July 2023, in which it objected that Mr Samuels had not provided a reasonable explanation for his failure to file the complete response: the ET had sent the full response (the form ET3 with the grounds of resistance) to Mr Samuels by

email on 23 December 2022, and both the ET3 and grounds of resistance had been included in the preliminary hearing bundle (evidence supporting these contentions being attached to the 20 July 2023 response). It further pointed out that, as well as the links within the covering letter to the ET's judgment, the EAT page on www.judiciary.uk provided multiple guidance documents, including the one-page "*Lodging an appeal – checklist*", which included, as one of the check points:

> "Have you included any document sent to the ET with the Response (ET3) e.g. a document setting out the defence to the claim as referred to at box 6.1 of the ET3?"

and stated:

> "It is your responsibility to submit EVERY page of the required documents. Make sure the copies you use are complete and not missing any pages."

102. On 2 August 2023, Mr Samuels replied to Searcy's submissions; explaining that 23 December 2022 was a religious holiday for him and he was not aware of the ET's email on that day, and that he had had to:

> "cut the ET3 form from the Respondent's Bundle" and "missed the grounds of resistance as the box provided for it is empty ... It would have been better if the document was titled 'ET3 - GROUNDS OF RESISTANCE'..."

103. Having regard to these submissions, and considering this matter under rule 37(1) *and* (5) **EAT Rules**, by order of 10 January 2024, the Registrar refused Mr Samuels' application for an extension of time.

Mr Samuels' appeal and submissions

104. Appealing against the Registrar's decision, Mr Samuels argued that the substantial part of his appeal had been lodged in time and he had not been aware that the grounds of resistance document was missing. In any event, he considered that to be Searcy's fault: it had wrongly failed to set out its defence in the boxes available within the form ET3, but had used a separate document; it had also failed to attached the grounds of resistance when first sending him the ET3.

105. When listing this matter for hearing, the EAT received email confirmation from Mr Samuels that he should be available to attend on 3 July 2024 (and would let the EAT know if not). Thereafter, however, nothing further has been heard from Mr Samuels and he did not attend the hearing before me or seek to make any further written representations at that stage or when provided with the Court of Appeal's judgment in **Ridley**.

106. Searcy was represented on 3 July 2024 by counsel (albeit Mr Sheehan did not appear below). It contended that Mr Samuels' error could not be described as "*minor*" for the purposes of rule 37(5) **EAT Rules**; his appeal had not been properly instituted, and there was no adequate explanation for his default (even if Mr

Samuels had not received the grounds of resistance with the ET3 (which was denied), a copy was available to him in the hearing bundle), and no circumstances justifying an extension of time. Acknowledging this was a case to which **Ridley** would apply, Searcy said it was relevant that Mr Samuels had omitted the entirety of the grounds of resistance, which set out why he had insufficient service to pursue his unfair dismissal claim and why his race case was out of time; it was an important document in considering the appeal.

Samuels v Power X: my decision

107. As in Miss Rehman's case, the default in this instance arose from Mr Samuels' failure to serve a complete copy of the response to his ET claim when submitting his appeal; like Miss Rehman, Mr Samuels had included the form ET3 but not the grounds of resistance that explained Searcy's defence, even though it had been made clear within the ET3 that it was relying on the document that it had attached as setting out its case.

108. Although the omission was pointed out to Mr Samuels on 2 May 2023, it was not until 12 June 2023 that he provided some form of explanation for not including the grounds of resistance; whilst that was treated by the EAT as sufficient, such that the appeal was deemed to be properly instituted on that date, in truth it failed to comply with the obligation imposed by rule 2A(3) **EAT Rules** and gave a misleading impression as to why Mr Samuels had not provided a full copy of Searcy's response. From the evidence I have seen, I accept that it was misleading to suggest (as Mr Samuels had done on 12 June 2023) that he had not been sent the grounds of resistance: the ET provided him with that document when it emailed him Searcy's response to his claim (both the ET3 and the grounds of resistance) on 23 December 2022, and both of these documents were included within the bundle for the preliminary hearing on 15 February 2023.

109. As Mr Samuels was required to serve the response to his claim when submitting his appeal within the 42-day time limit (rule 3(1)(b) **EAT Rules**), his failure to include the grounds of resistance meant that his appeal was not properly instituted. From the explanations provided by Mr Samuels, it is not entirely clear to me whether that was an "*error*" - there appears to have been an element of deliberation in extracting the form ET3 from the hearing bundle but not including the grounds of resistance - but even assuming this to have been a mistake, I cannot see that it was a "*minor error*" for the purposes of rule 37(5). The grounds of resistance set out Searcy's defence to Mr Samuels' claims, not only clarifying his period of service (relevant to the unfair dismissal claim) but also providing particulars of the incidents relied on, such as to explain why the

discrimination complaint was out of time and why it would not be just and equitable to extend time. Even if I was wrong as to the characterisation of the default in this case, I cannot accept that the error in issue was then rectified by Mr Samuels: to the extent that his response to the EAT on 12 June 2023 provided any explanation of his default, it can only be described as misleading; that, in my judgement, did not amount to belated compliance with rule 3(1)(b) **EAT Rules**.

110. I also find that this is not a case that would warrant the exceptional grant of an extension of time under rule 37(1). Acknowledging that Mr Samuels submitted his notice and grounds of appeal comfortably within the 42-day time limit, he nevertheless failed to comply with the **EAT Rules**, omitting a substantive part of the response to his ET claim. Moreover, having been provided with the opportunity to remedy his omission, Mr Samuels failed to do so and, after a delay of over a month, provided an explanation for his default that served to mislead the EAT (suggesting he had not been provided with a copy of the grounds of resistance when that was not the case). Subsequently, Mr Samuels sought to blame Searcy for his error, and/or to suggest that he had somehow overlooked the ET's email sending him the response to his claim because that was sent on 23 December 2023, which he described as a religious holiday. Even if Mr Samuels failed to engage with an email sent to him by the ET on 23 December 2023, I am, however, unable to see why that provides an explanation for why he could not have sent the EAT the full copy of the ET3 and grounds of resistance as had been included in the ET hearing bundle. As Mr Samuels did not attend the hearing before me on 3 July 2024, I am left without further explanation or clarification on these points.

111. Accepting that the failure to provide a good explanation might not mean that an extension of time should not be granted under rule 37(1) **EAT Rules**, I do not consider this is a case that warrants the exceptional exercise of the EAT's discretion in this regard. By his appeal, Mr Samuels was seeking to challenge the ET's decisions on jurisdictional questions relating to two of his claims. Without descending into the potential merits of the appeal (and I note that, by email of 27 June 2023, Mr Samuels sought to amend his grounds of appeal), it is apparent that, if successful, this is a matter that would need to return to the ET either for substantive hearing or for further consideration of the jurisdictional questions. Prejudice is inevitably caused by the further delay imported into the process by Mr Samuels' initial failure to comply with the **EAT Rules**, coupled with his continuing failure to comply with his obligations under rule 2A(3) and to remedy his error and/or to provide an accurate explanation for his default. Balancing the interests of the parties, together with the interests of justice more generally, I dismiss the application for an extension of time in this case.