

Neutral Citation Number: [2026] EAT 85

Case No: EA-2024-000432-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 June 2026

Before

HIS HONOUR JUDGE JAMES TAYLER

Between

COSTCO WHOLESALE UK LIMITED

Appellant

- and -

MR JAIDEN NASH

Respondent

Paras Gorasia and Amritpal Bachu (instructed by Mills & Reeve) for the **Appellant**
Anthony Johnston (instructed by Irwin Mitchell LLP) for the **Respondent**

Hearing date: 2 June 2026

JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal did not err in law in refusing to grant an extension of time for the respondent to submit a response. **Kwik Save** considered.

HIS HONOUR JUDGE JAMES TAYLER:

The issue

1. The issue in this appeal is whether the Employment Tribunal erred in law in refusing to grant the respondent an extension of time in which to submit their response.

The judgment appealed

2. The appeal is against a judgment of Employment Judge S Knight, given after a hearing at the East London Hearing Centre on 14 February 2024. The judgment was sent to the parties on 20 February 2024. Written Reasons for the judgment were sent to the parties on 7 March 2024

The parties, claim and response

3. The parties are referred to as the claimant and respondent as they were before the Employment Tribunal.

4. The respondent is a cash and carry warehouse membership club. The claimant was employed by the respondent as a Members Services Assistant from 27 July 2022 until 30 September 2022 at its warehouse in Chingford (“the warehouse”). The claimant was informed that he was being dismissed because he had failed his probation.

5. The claimant presented a claim that was received by the Employment Tribunal on 27 December 2022. So far as is relevant to this appeal, the claimant brought complaints of direct race discrimination and race related harassment.

6. The response was submitted 10 months out of time on 22 December 2023. The response was accompanied by a written application to extend time.

The outline facts

7. On 3 October 2022, following his dismissal, the claimant sent an email to the General Manager of the warehouse complaining of his treatment and alleging race discrimination. The General Manager was away from work, but read the email that day, and replied stating that she would respond on her return to work. The General Manager did not respond on her return to the warehouse.

8. On 14 November 2022, the claimant sent the General Manager a further email requesting a

response. The General Manager subsequently sent a letter which did not respond to the issues raised, and, in particular, ignored the allegation of race discrimination.

9. The respondent asserted that it was unaware of the claim until 19 December 2023, when it received a record of a preliminary hearing that was sent to its head office.

10. On the ET1 the claimant gave the correct address of the warehouse. There was a process for receipt of post at the warehouse, which was described by the Employment Tribunal:

16. On the ET1 the Claimant had correctly entered the address of the warehouse at which he worked. It is agreed between the parties that the warehouse is able to accept post. The Respondent's evidence, which I accept, is that the process for receiving post is that it goes to the named recipient, and if it does not have a named recipient, it goes to the administrative office. Most post which arrives in the administrative office, if it was important, would then be sent on to the General Manager.

11. The Employment Tribunal held that four items of correspondence had been received at the warehouse and ignored prior to 19 December 2023, the date the respondent asserted was the first time it became aware of the claim:

17. Prior to 19 December 2023, the Tribunal sent to the Respondent at its Chingford warehouse without a named contact on the letter the following correspondence:

(1) A notice of claim enclosing the ET 1, dated 6 January 2023;

(2) A notice of hearing for 26 May 2023, dated 25 January 2023;

(3) A notice that no Response had been received, dated 24 April 2023;

(4) A notice of hearing for 12 December 2023 (wrongly stated in the heading as being 2024 but corrected in the text of the letter), dated 10 October 2023.

18. There is no reason why this correspondence would not have been received by the Respondent. **I find as a fact that all of these pieces of correspondence were received, and they have been ignored.** [emphasis added]

12. The Employment Tribunal also held that 6 emails had been sent to the General Manager which she had deliberately deleted and ignored:

19. Prior to 19 December 2023, correspondence had also repeatedly been sent to the General Manager directly by email. This correspondence included the case number and name of the case in the subject line. It included:

(1) An email of 16 May 2023 from the Claimant's solicitors to the Tribunal, copying in the General Manager.

(2) An email of 26 May 2023 from the Claimant's solicitors to the Tribunal, copying in the General Manager.

(3) An email of 2 June 2023 from the Tribunal to the Claimant, copying in the General Manager.

(4) An email of 7 July 2023 from the Claimant's solicitors to the Tribunal, copying in the General Manager.

(5) An email of 14 July 2023 from the Claimant's solicitors to the Tribunal, copying in the General Manager.

(6) An email of 11 December 2023 from the Tribunal to the Claimant, copying in the General Manager.

20. In determining what happened to the emails, the Respondent's representative asked me to take judicial notice of how email systems work when they categorise emails. I doubt that this is a matter that truly falls within the remit of judicial notice. In any event, **I have not needed to take judicial notice of anything. The documentary and oral evidence is sufficient to decide this issue.**

21. **Having heard the evidence of the General Manager and considered the documentary evidence related to the emails, I find that each of the emails was received by the General Manager. The Respondent's IT department have found the emails in the "deleted/trash" folder of their Gmail system. I have no hesitation in concluding that they were all seen and actively deleted by the General Manager.** They were not found in a spam folder. There is no reliable documentary evidence in the material placed before me that they were in fact sent to spam. Indeed, it would be surprising if correspondence from both the Tribunal and the Claimant's solicitors were sent to spam. I have no hesitation in rejecting such an explanation, in part because it is obvious that the General Manager had ignored the complaints raised by the Claimant before the Tribunal proceedings began but when proceedings were realistically in prospect. She did not take the matter seriously. In that light it is vastly more likely that she deleted the items herself than that they somehow found their way into the deleted/trash folder by some other means. [emphasis added]

13. The Employment Tribunal firmly rejected the evidence of the General Manager, Leigh Ormsby, who was called to give evidence and cross-examined, and had stated in her witness statement:

4 I never received paperwork of any description concerning the Claimant's claim at the Chingford warehouse. We are an operational trading address but we do have an office on site and are able to receive post. Any post addressed to me is directed to the office and left for my attention when on shift. My post is not opened by anyone else in the warehouse.

5 If I had received any post relating to the Claimant's claim, I would have immediately scanned and emailed it over to Sue Knowles (HR & Marketing Director). Sue is based

at the UK Home Office in Watford, which is Costco's registered address. All GMs are aware that Sue is responsible for managing employee issues, claims and threatened claims across the entirety of Costco with assistance from external solicitors. ...

9 On 29 January 2024, I was informed by Sue that the Claimant's solicitors had objected to Costco participating in the claim and forwarded emails sent from them/the employment tribunal during 2023 where I was copied (pages 38 to 46). Sue sent me a copy of the email attachments sent by the Claimant's solicitors that day. This was the first time that I had seen the emails. If I had seen them at the time of being sent I would have contacted Sue straight away.

10 Sue contacted me again on 5 February 2024 to confirm that Costco's internal IT team had tracked the emails by reference to their dates and confirmed that they had been received but were sitting in the 'deleted/trash' folder (page 61). All emails that are either deleted or sent directly to trash via junk/spam are cleared from our personal email inboxes every 30 days. I did not receive any of these emails directly into my inbox, so the only explanation I have is to think that the emails went directly to trash via junk/spam. Unfortunately, IT are not able to provide any information to show whether the emails were unopened/unread; however, as stated above, I did not see them at the time.

14. The Employment Tribunal found that the respondent's explanation for its failure to submit a response in time and delay before it applied for an extension of time was untrue. These coruscating findings of fact made by the Employment Tribunal were not challenged in the appeal.

The law on extensions of time to present a response

15. The procedure for seeking an extension of time to present a response was, at the relevant time, set out in Rule 20 **Employment Tribunal Rules 2013** ("ETR 2013"), now Rule 21 **Employment Tribunal Rules 2024**:

20(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall **set out the reason why the extension is sought** and shall, except where the time limit has not yet expired, **be accompanied by a draft of the response** which the respondent wishes to present or an explanation of why that is not possible and **if the respondent wishes to request a hearing this shall be requested in the application.**

(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.

(3) An Employment Judge may determine the application without a hearing.

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

16. Rule 20 **ET Rule 2013** was to be interpreted in accordance with the overriding objective.
17. The leading authority on extensions of time to present a response is **Kwik Save Stores Ltd v Swain** [1997] ICR 49 EAT. Like so many of the judgments of Sir John Mummery, whether as President of the EAT or sitting in the Court of Appeal, it is a paradigm of clarity and concision. Despite its brevity, taking up only 9 pages in the ICRs, it must be read in full to understand the subtlety of the reasoning, in addition to the well known factors that Mummery J said should be considered when an extension of time to enter a response is sought.
18. One point that Mummery J did not expressly state is that a more generous approach is generally taken when considering an extension of time in which to submit a response to a claim than to an extension of time for the submission of the claim itself. The time limit for the submission of a claim is jurisdictional whereas the time limit for a response is essentially procedural. A respondent does not initiate litigation and should not ordinarily be shut out from advancing an arguable defence as a result of honestly admitted and explained procedural default, unless that default has caused significant prejudice to the other party or demonstrates wilful disobedience in compliance with the **ET Rules** or directions of the Employment Tribunal. While not stated expressly, this point is implicit in the judgment.
19. Mummery J starts the judgment asking the question “In what circumstances is an industrial tribunal entitled to refuse to grant an extension of time for serving a notice of appearance?”.
20. The factual situation in which that question was posed was that Kwik Save had submitted three responses late, by 23 days, 14 days and 26 days, respectively. The regional chairman’s assessment of the proffered explanation was described by Mummery J:

The grounds on which he refused the employers’ requests for extensions may be summarised as follows. The chairman was inclined to agree with the submission on behalf of one of the applicants that there had been “a total disregard by the employers of their responsibilities in respect of tribunal proceedings.” The cases revealed “tales of incompetence and delay by the legal department of the employers.” There was “no valid explanation at all” — for the delays — “other than negligence and/or incompetence at a level which I would expect the senior management of the employers to be thoroughly ashamed of.” The chairman did not see why the applicants:

“should be further inconvenienced by the inevitable further delay which would result from [his] validating the employers’ notices of appearance. They have already had to await and attend the hearing today.”

Those strong criticisms of the conduct of the employers are, in our view, justified by the uncontradicted details of the delay referred to later.

21. Mummery J identified the issue in the appeal:

The issue on this appeal is whether, in the **exercise of his admittedly wide discretion**, the chairman of the industrial tribunal erred in law in **failing to consider the substantive merits** of the employers’ defences to the claims and in **failing to balance the prejudice to the applicants in extending the time for entering notices of appearance against the prejudice to the employers in refusing to grant the extensions of time**. [emphasis added]

22. The importance of time limits was emphasised:

We agree with the regional chairman that **time limits are laid down as a matter of law, not by the tribunals themselves, and that “they are there for good reason because of the nature of industrial tribunal hearings.” This is an important factor in the exercise of the discretion to grant an extension of time** under rule 15(1) of the Industrial Tribunals Rules of Procedure 1993 . As Sir Thomas Bingham M.R. said in *Costello v. Somerset County Council* [1993] 1 W.L.R. 256 , 263:

“The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious despatch of litigation, must be observed. **The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met.**”

Those observations, made in the context of ordinary civil litigation, apply with even greater force in the case of the procedure in industrial tribunals, which were established to provide a quick, cheap and effective means of resolving employment disputes. Failure to comply with the rules causes inconvenience, results in delay and increases costs. It is also indicative of an unacceptable attitude on the part of the defaulter not only to the rights conferred and asserted, but also to the industrial tribunal system itself. This case is a striking illustration of the detrimental consequences of disregarding time limits. If the employers had observed the time limits, the hearing of the cases on the merits would probably have taken place by now. Here we are, nearly six months after the presentation of the originating applications, deliberating on an appeal on the issue of extension of time, with leading counsel appearing for the employers, with two of the applicants represented by separate counsel and the third by his trade union representative.

This delay and this additional expense would not have occurred if the employers had complied with the time limits or had made an application for and obtained a modest extension of time before the time limit for filing notices of appearance had expired. The delay, the expense and the inconvenience are all the fault of the employers. We repeat what this appeal tribunal said in *Charlton v. Charlton Thermosystems (Romsey) Ltd.* [1995] I.C.R. 56 , 61A:

“The appeal tribunal cannot emphasise too strongly the importance of respondents complying with the time limits for entering an appearance in order to avoid later expense and delay in the hearing of applications by the industrial tribunal and appeals from it.”

23. **Kwik Save** provides little encouragement for those who seek to appeal a decision of an Employment Tribunal on an application to extend time to enter a response:

Under their Rules of Procedure, industrial tribunals have many wide discretions. When they exercise them, the result should, in general, be accepted by the unsuccessful party and appeals to this appeal tribunal ought only to be brought when it is clear (or at the very least clearly arguable) that the industrial tribunal has exercised the discretion contrary to well established legal principles, such as failing to take any account of relevant factors or taking into account irrelevant factors. The question of the weight to be given to the various factors and of the balancing of them one against the other is for the industrial tribunal, not for the appeal tribunal. Appeals to this appeal tribunal which seek a rehearing on the weighing or balancing exercise will be dismissed, usually with an order for costs on the basis that it is unreasonable to appeal against the exercise of a discretion, save in the case where it is clearly arguable that that exercise is flawed. [emphasis added]

24. It is in this context that Mummery J went on to set out the three discretionary factors for which **Kwik Save** is usually quoted; the explanation for the delay, the balance of prejudice and the merits of the defence.

25. In considering the explanation for the delay, Mummery J stated:

The **explanation for the delay** which has necessitated the application for an extension is **always an important factor** in the exercise of the discretion. An applicant for an extension of time should explain why he has not complied with the time limits. The tribunal is entitled to take into account the nature of the explanation and to form a view about it. **The tribunal may form the view that it is a case of procedural abuse, questionable tactics, even, in some cases, intentional default.** In other cases it may form the view that the delay is the result of a genuine misunderstanding or an accidental or understandable oversight. In each case **it is for the tribunal to decide what weight to give to this factor in the exercise of the discretion. In general, the more serious the delay, the more important it is for an applicant for an extension of time to provide a satisfactory explanation which is full, as well as honest.** [emphasis added]

26. In the context of this appeal, the final passage should be noted. It is for the Employment Tribunal to decide what weight to give to the explanation for the delay and the longer the delay the greater the importance of a full, honest and satisfactory explanation. In the case I am considering the delay was very lengthy and so a full, honest and satisfactory explanation was of the greatest importance were an extension to be granted. As we shall see, Mummery J considered that the lack of

a satisfactory explanation may be the decisive factor when balancing the other matters that should be considered.

27. Mummery J then considered the balance of prejudice:

In some cases, the explanation, or lack of it, may be a decisive factor in the exercise of the discretion, but it is important to note that it is not the only factor to be considered. The process of exercising a discretion involves taking into account all relevant factors, weighing and balancing them one against the other and reaching a conclusion which is objectively justified on the grounds of reason and justice. An important part of exercising this discretion is to ask these questions: what prejudice will the applicant for an extension of time suffer if the extension is refused? What prejudice will the other party suffer if the extension is granted? If the likely prejudice to the applicant for an extension outweighs the likely prejudice to the other party, then that is a factor in favour in granting the extension of time, but it is not always decisive. There may be countervailing factors. It is this process of judgment that often renders the exercise of a discretion more difficult than the process of finding facts in dispute and applying to them a rule of law not tempered by discretion.

28. The balance of prejudice is important, but not necessarily decisive. If the likely prejudice to the respondent by refusing the extension outweighs the likely prejudice to the claimant of granting an extension that “is a factor in favour in granting the extension” but “it is not always decisive”. Were it otherwise granting the extension would be close to being the norm because generally the prejudice to the respondent of refusing an extension will be greater than that to the claimant of granting it because the respondent will be prevented from defending the claim if the extension is refused whereas the claimant will be able to pursue the claim if the extension is granted and the claim will succeed if meritorious. That said there may be cases in which the claimant would suffer prejudice should the extension be granted that cannot be remedied by appropriate procedural action, possibly including an order for costs, such as where an important witness may no longer be available.

29. Delay may cause forensic prejudice because memories fade and witnesses may become unavailable. Delay may also cause financial prejudice by a party being kept out of money that they are entitled to receive as compensation or prejudice as a result of the litigation remaining unresolved for a long period.

30. In considering the merits, Mummery J held:

It is well established that another factor to be taken into account in deciding

whether to grant an extension of time is what may be called the merits factor identified by Sir Thomas Bingham M.R. in *Costello v. Somerset County Council* [1993] 1 W.L.R. 256, 263:

“a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.”

Thus, if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time, since otherwise there will never be a full hearing of the claim on the merits. If no extension of time is granted for entering a notice of appearance, the industrial tribunal will only hear one side of the case. It will decide it without hearing the other side. The result may be that an applicant wins a case and obtains remedies to which he would not be entitled if the other side had been heard. The respondent may be held liable for a wrong which he has not committed. **This does not mean that a party has a right to an extension of time on the basis that, if he is not granted one, he will be unjustly denied a hearing. The applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner. That will involve some consideration of the merits of his case.** [emphasis added]

31. While the fact that a defence appears to have some merit will often favour the granting of an extension of time to enter a response, a defaulting respondent can have no expectation that an extension will be granted, but only has a right to expect that there will be “some consideration of the merits of his case”.

32. In **Kwik Save** the EAT allowed the appeal on the basis that the Employment Tribunal had given no consideration to the prejudice to the respondent of refusing the extension, the prejudice to the claimant of granting the extension or the merits of the defence:

We have reluctantly reached the conclusion that the chairman of the industrial tribunal did err in law in the exercise of his discretion. **It does not appear from his reasons that he took express account of the merits of the employers’ case or of the prejudice that they would suffer if he withheld the extensions, as against the prejudice which the applicants would suffer if the extensions of time were granted.**

We make it clear, however, that we are not holding the chairman’s exercise of discretion to be perverse. We cannot say that no reasonable tribunal, taking into account all the relevant discretionary factors, would inevitably have granted an extension. It is for the industrial tribunal to exercise the discretion. We therefore remit the matter to a different chairman to determine whether extensions of time should be granted. **That chairman may, having taken all the factors into account, still come to the conclusion that the discretion should not be exercised in favour of the employers.** Those factors include the circumstances in which, over a short period, they failed to comply with time limits in all these cases. [emphasis added]

33. Notwithstanding the clarity of the reasoning in **Kwik Save**, it is not a statute and should not be treated as if it were, or that it set out hard and fast rules as to how the discretion to grant an extension of time in which to submit a response should be exercised. All relevant factors are to be taken into account.

34. The three discretionary factors to which Mummery J referred need not necessarily be considered in the order in which he dealt with them. The mere fact that the prejudice to the respondent of refusing the extension of time outweighs that to the claimant of allowing it, does not necessarily mean that an extension will be granted. It is not a threshold question to which there must be a binary answer that the balance of prejudice favours one or other party, so that the prejudice to the party that suffers more is taken into account but the prejudice to the party that suffers less is ignored. The Employment Tribunal may take account of the prejudice to both parties as components of its overall assessment.

35. In some cases the lack of an explanation, or the presentation of a false explanation, for the delay may be the decisive factor. Conversely, where the explanation for the delay advanced by the respondent is rejected that does not inevitably mean that an extension will be refused.

36. If the respondent shows that it has an arguable defence that does not mean that an extension must be granted. The existence of an arguable defence is not a threshold to which a yes or no answer must be given. The Employment Tribunal can consider the apparent strength or weakness of the defence more generally.

37. Where one or more factors weighs heavily against the granting of an extension of time, the Employment Tribunal is likely to require that any countervailing factors more strongly support the grant of an extension. It is not sufficient for the respondent to have the better of the argument in respect of one of the factors, an overall assessment must be made. And this has to be assessed by application of the overriding objective, including that the time of the Employment Tribunal is not wasted, with the consequences that will have on other parties who are awaiting the hearing of their claims.

38. The Employment Tribunal directed itself briefly to the relevant law. There has been no specific challenge to that self-direction.

39. In considering the appeal I have reminded myself of another of Sir John Mummery's most frequently quoted judgments; **Brent London Borough Council v Fuller** [2011] ICR 806, in which he held:

The reading of an employment tribunal decision must not, however, be so fussy that it produces pernicky critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid.

40. I have also reminded myself of the counterpoint given by Lord Justice Sedley in **Anyia v University of Oxford** [2001] ICR 847 :

The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues.

The analysis of the Employment Tribunal

41. The Employment Tribunal decided not to grant an extension of time for the respondent to submit a response for the following reasons:

26. **I firstly consider the employer's explanation** as to why an extension of time is required.

27. **The reason for the delay in filing the Response is that on 10 occasions the Respondent was notified of the claim and it decided to do nothing about it. On at least 6 of those occasions a senior manager - the General Manager - decided to do nothing about it.** The Respondent says that it responded to the claim as soon as its head office became aware of it. That appears to be true. But the Respondent appears not to ensure that correspondence relating to claims is drawn to the attention of its head office. The Respondent has no one but itself to blame for that.

28. **I then consider the balance of prejudice** of allowing or refusing the application.

29. **If I refused the application then the Respondent would plainly be prejudiced by being unable to answer the claim. Further, a finding of having discriminated would cause reputational damage to the Respondent. Further, the individuals who**

are alleged to have carried out discriminatory acts would not be able to defend themselves. However, **that is the fault of the Respondent in not responding to the claim.** Further, any prejudice to individuals can be addressed by appropriate levels of anonymisation of those individuals in the judgment without the need for an order under Rule 50 of the Tribunal Procedure Rules, by expressing any reasons in a way which do not allow for jigsaw identification. Such prejudice to individuals can also be addressed by noting the Respondent's actions in not responding to the claim are what prevent individuals from answering the allegations against them. Of course, while considering the impact of an allegation of discrimination against a person or organisation, it is important to note that an accusation of discriminating against someone is nowhere near as bad as actually being discriminated against.

30. **The Claimant would be prejudiced by any delay** that arose from allowing the claim to be defended by extending time for filing the Response. **This case has been delayed by about a year by the Respondent's inaction.** Delays are scandalous. Delay is capable of bringing the justice system into disrepute. Justice delayed may be justice denied, as people wait years for compensation which they are due, all that time being out of pocket. **Avoiding delay, so far as compatible with proper consideration of the issues, is an essential component of the overriding objective of dealing with cases fairly and justly.** The parties are required to assist the Tribunal in furthering the overriding objective. **Costs for legal expenses cannot compensate the Claimant for the delay in this case, and therefore would not address the prejudice he has suffered by the delay.**

31. As a result, **both sides would suffer prejudice by losing this application.**

32. I note at this point by way of an aside that part of why delay is to be avoided where compatible with proper consideration of the issues is that **delay not only affects the case it occurs within: it also causes knock-on delays to other cases in the system. That of course does not relate to prejudice in this case, but it is relevant to consideration of the overriding objective.**

33. I then turn to the issue of **the merits** of the Response.

34. **The Response in this case is not a knockout response. It is not possible for me to say on the material that I have seen that it is a strong Response. The ET3 and Grounds of Response are lacking in particulars in response to the specific allegations made by the Claimant.** The Respondent has not served witness evidence which deals with the substantive allegations, so **I do not know what the Respondent's detailed case would be.** The Respondent said that it was not proportional for them to do so, but it is for the Respondent to present all the evidence they need to in order to support their application. Their choice to not bring evidence at this stage means that the Tribunal is deprived of knowing of material that may assist them. ...

38. **I conclude by looking overall at what justice requires.**

39. **The Respondent is responsible for a year's delay in the progress of the case by failing to file their Response for about 10 months and despite 10 pieces of correspondence being sent to them. Both sides would be prejudiced by this application being decided against them. The case for the Respondent is not particularly strong. Weighing up all of the issues and considering the overriding**

objective of dealing with cases fairly and justly, justice does not require an extension of time. The application under Rule 20 was therefore refused.

40. I therefore decided to refuse the Respondent permission to participate in the liability part of the hearing except for making submissions on the law.

42. Considering this analysis, in the context of the whole judgment read fairly, the following key strands of reasoning are clear:

42.1. The respondent was 10 months late in submitting its response; this was a very substantial delay

42.2. There was no good reason for either the failure to submit the response in time or the subsequent delay in seeking an extension

42.3. The respondent had given an untruthful explanation for the failure to submit the response in time and the delay in seeking an extension of time; in particular the General Manager had deliberately ignored and deleted emails

42.4. The claimant was prejudiced by the delay, albeit there was no finding of forensic prejudice

42.5. The respondent would be prejudiced if the extension was not granted, by not being able to defend a complaint of race discrimination

42.6. The respondent had not put forward a strong defence

42.7. Weighing the relevant factors it was not in the interests of justice to grant the extension of time in which to submit the response

The appeal

43. The respondent advances three overlapping grounds of appeal: asserting that the Employment Tribunal erred in law in its assessment of the balance of prejudice in allowing or refusing the extension of time; in considering the merits of the defence; and in the overall conclusion not to grant an extension of time.

Analysis

44. The respondent argued that the Employment Tribunal was required to decide on which side

the balance of prejudice fell; whether the respondent would suffer greater prejudice if the extension of time to enter a response was refused or the claimant if it was permitted. I do not accept that it was an error of law for the Employment Tribunal not to do so. The task of the Employment Tribunal was to assess all relevant factors in determining whether to grant an extension. It was not required to reach an interim conclusion that the prejudice to the respondent of refusing the extension outweighed that to the claimant of allowing it. It was permissible for the Employment Tribunal to assess the prejudice to each and take it into account as part of the final overall assessment. If an Employment Tribunal merely decided that one party would suffer greater prejudice than the other and then fed that binary determination into its overall conclusion, it would ignore the prejudice suffered by the other party completely.

45. It will generally be helpful for the Employment Tribunal to say something about how severe the prejudice is and about the relative extent of prejudice to each party but it was not an error of law for the Employment Tribunal not to do so in the circumstances of this case.

46. I do not accept that the Employment Tribunal erred in law because it sought to “underplay the clear and serious prejudice” to the respondent of refusing the extension. The Employment Tribunal expressly stated that the respondent would not be able to defend a claim of race discrimination. There is no reason to think that the Employment Tribunal was unaware of the seriousness of claims of discrimination to those that bring them and to those that they are brought against. The Employment Tribunal specifically noted the reputational damage that the respondent could suffer from an adverse finding that it was guilty of race discrimination.

47. The Employment Tribunal was entitled to take account of the prejudice to the claimant caused by delay. The Employment Tribunal would have been aware that there would be further delay should the application be allowed. I do not consider that there was a requirement that the Employment Tribunal estimate what further delay would be caused. The Employment Tribunal did not suggest that the claimant would suffer forensic delay and so did not take any such delay into account. The Employment Tribunal was entitled to take account of the prejudice that would be caused to other

litigants by additional tribunal time being taken up should an extension be granted, as part of its assessment of the overriding objective.

48. The Employment Tribunal recognised that costs were not a factor because the claimant was funded in the litigation. If the claimant was successful interest could be awarded. There is no reason to think that the Employment Tribunal was not aware of this possibility. It is not an error of law for an Employment Tribunal to fail to refer to every single minor factor that may be of relevance in reaching a discretionary decision.

49. I do not accept it was an error of law for the Employment Tribunal to state that the cause of the prejudice to the respondent was its own default. This did not involve double counting, but was part of the overall assessment of where the balance of justice lay.

50. I do not accept that the Employment Tribunal erred in law by applying the wrong merits test. The respondent asserts that the Employment Tribunal should have considered whether the defence had “some merit” but instead imposed a higher threshold, requiring a “knock out” or strong defence. In **Kwik Save Mummery J** said that “if a defence is shown to have some merit in it, justice will often favour the granting of an extension of time” but in so doing he did not set a threshold which if surpassed has the consequence that the merits factor is in favour of the respondent. The Employment Tribunal is entitled to consider the merits in more detail. On a fair reading of the judgment, the Employment Tribunal accepted that the defence had some merit. If it thought that the defence had no merit the Employment Judge would have said so. The Employment Tribunal clearly thought that the defence was not so strong that it countervailed the very serious default of the respondent in failing to respond to postal correspondence and by the General Manager deliberately deleting and ignoring emails.

51. I do not accept that the Employment Tribunal was required to refer to the fact that the respondent had pleaded the employer’s defence, in a generic fashion, referring to procedures, without referring to specific provisions. The Employment Tribunal is not required to refer to every factor that may be of some limited relevance to the decision.

52. The Employment Tribunal noted that the complaint was of race discrimination and will have been well aware of the fact that the claimant would need to establish a prima facie case of discrimination at the least.

53. In **Kwik Save** Mummery J stated that an “applicant for an extension has only a reasonable expectation that the discretion relating to extensions of time will be exercised in a fair, reasonable and principled manner” which “will involve some consideration of the merits of his case”. The Employment Tribunal clearly did consider the merits of the defence.

54. I do not accept that the Employment Tribunal gave insufficient reasons for the overall assessment of the interests of justice in deciding to refuse the extension of time. The Employment Judge considered the very extensive delay, the prejudice it caused to the claimant and the more general interests of the administration of justice. The Employment Tribunal took account of its finding that the respondent had given a false explanation for the failure to submit the response in time and the delay in seeking an extension of time. The Employment Tribunal appreciated the significant prejudice that the respondent would suffer by not being able to defend a race discrimination complaint. The Employment Tribunal had regard to the merits of the defence. The reasons are more than adequate for the respondent to understand why the application was refused.

55. The appeal fails.