Neutral Citation Number: [2024] EWCA Civ 884

Case Nos: CA-2023-002121
CA-2023-001611
CA-2023-001679

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ Beard (EA-2021-001088-RN)
HHJ Shanks (EA-2021-000918-AT)
HHJ Auerbach (EA-2022-000779-DXA)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 July 2024

Before:

LORD JUSTICE BAKER
LADY JUSTICE NICOLA DAVIES
and
LADY JUSTICE ELISABETH LAING

- -

Between:

(1) SHIRLEY RIDLEY	**(1) Appellant**
- and -	
(1) HB KIRTLEY t/a QUEEN'S COURT BUSINESS CENTRE	**(1) Respondent**
(2) ALEXANDRA KOSTROVA	**(2) Appellant**
-and-	
(2) McDERMOTT INTERNATIONAL INC AND ANOTHER	**(2) Respondents**
(3) CATHERINE TAYLOR	**(3) Appellant**
-and-	
(3) LLOYDS PHARMACY LIMITED (IN LIQUIDATION)	**(3) Respondent**

- -
- -

Jesse Crozier and **Anna Greenley** instructed by **Advocate** acting pro bono for the **First Appellant**
No appearance or representation for the **First Respondent**
Alexandra Kostrova,the **Second Appellant**, in person
No appearance or representation for the **Second Respondents**

Catherine Taylor, the **Third Appellant**, in person
No appearance or representation for the **Third Respondent**

Hearing date: 24 April 2024
Further written submissions (on behalf of the First Appellant only) 29 May 2024

- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 25 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Baker, Lady Justice Nicola Davies and Lady Justice Elisabeth Laing:

Introduction

1. This is a judgment of the court on three appeals on a point of law for which Arnold LJ gave permission. The appellants (respectively Mrs Ridley, Ms Taylor and Ms Kostrova) all wished to appeal to the Employment Appeal Tribunal ('the EAT') from adverse decisions of the Employment Tribunal ('the ET').

2. Appeals to the EAT are governed by the Employment Appeal Tribunal Rules 1993, 1993 SI No 2854 ('the Rules'). Three provisions of the Rules have been the focus of the arguments in these appeals and in the authorities. Rule 3(1) stipulates which documents must be served on the EAT to 'institute' an appeal. Rule 3(3) provides a 42-day time limit for appealing from the ET to the EAT. Rule 37(1) gives the EAT an apparently wide discretion to 'alter' the time prescribed by the Rules for doing 'any act'. There are two other rules which are potentially relevant. They are rules 35 and 39, which we set out in paragraphs 15 and 18, below (see further, paragraph 7, below).

3. In all three cases, the appellants lodged a notice of appeal within that time limit, but part of one of the documents necessary to institute an appeal was missing. Each appellant was told by the EAT that part of the document was missing. Each then sent the document to the EAT, but after the expiry of the time limit. The EAT then required them to apply for an extension of time for appealing. In each case, the Registrar refused the application. Each appellant then appealed to a judge of the EAT. In each case, the judge decided, considering those applications afresh, to refuse to extend the time limit. The issue in each appeal to this Court is whether the EAT erred in law in not extending the time for bringing the appeal to the EAT.

4. Two of the appellants, Ms Taylor and Ms Kostrova, represented themselves at the appeals. They did so with economy and restraint, and very effectively. Mrs Ridley had the advantage of being represented by Mr Crozier and Ms Greenley, acting pro bono on the instructions of Advocate. We are extremely grateful to counsel, who very helpfully summarised the relevant authorities, and presented the oral arguments with great ability and fairness. Counsel divided their oral submissions so that Mr Crozier reviewed most of the authorities, and argued ground one, whereas Ms Greenley dealt with ground two.

5. None of the respondents was represented at the appeal. Ms Alex Kirtley, representing the respondent to Mrs Ridley's appeal, wrote to the court, before the hearing, to say that that she would not be attending the hearing of Mrs Ridley's appeal. We describe her written representations in paragraph 121, below. Lloyd's Pharmacy Limited, the respondent to Ms Taylor's appeal, is in liquidation. The Joint Liquidators told the court that they took no position on the appeal and would not attend the hearing. McDermott International, the respondent to Ms Kostrova's appeal, also emailed the court before the hearing to say that they would not be attending the hearing and would not be represented.

6. In short, we have concluded that all three appeals should be allowed and in each case the matter remitted for the EAT to reconsider the application to extend time in the light of this judgment. We of course accept the broad proposition, by which this Court is

bound, that the EAT is entitled to enforce the time limit strictly. We nevertheless consider, first, that in considering this type of case, in which an appellant has lodged an appeal within the time limit, but has failed to submit a document or part of a document which is required by rule 3(1), the EAT in these cases failed to take into account a factor which is relevant to the exercise of the discretion conferred by rule 37(1), that is, that the appellant had substantially complied with rule 3(1) within the time limit. Second, we accept Mr Crozier and Ms Greenley's submission that the broad power to extend time has become 'encrusted by authority' in a way which has led to the emergence of rigid sub-rules which are not justified by the broad terms of rule 37(1), or by the reasoning in the important relevant cases. As a result, some judges have tended to rely on those sub-rules for automatic answers, rather than to consider the exercise of the discretion afresh in each case, by looking closely at the facts of each case, and not relying on generalisations. We would allow the appeals on those broad grounds and remit all three cases to the EAT to reconsider.

7. It occurred to us, when considering our judgment, that rules 35(5) and 39 might also be relevant. We invited the parties to make short further written submissions about them. Mr Crozier and Ms Greenley most helpfully responded to that invitation with further written submissions dated 29 May 2024. We are very grateful to them for the time and effort which they have evidently spent on those submissions. As the effect of rules 35 and 39 is not directly in issue in these appeals, and this judgment is already very long, we will only summarise those submissions very briefly. Counsel have not been able to find a single authority in which the application rule 35(5) has been the subject of an appeal. There are, by contrast, three 'strands' of EAT authorities in which rule 39(1) has been considered. Counsel referred to ten such authorities. Counsel's further researches led them to make a submission which aligns with the general approach which we have described in paragraph 6, above, as our first reason for allowing these appeals. They also submitted that the EAT should always consider whether to exercise its powers under rules 35 and 39 in cases such as these.

The legal framework

8. Part II of the Employment Tribunals Act 1996 ('the 1996 Act') is headed 'The Employment Appeal Tribunal'. Section 20(1) of the 1996 Act provides that the EAT shall continue in existence. It is to 'be a superior court of record' (section 20(3)). Subject to section 21(3)-(4), an appeal lies to the EAT on 'any question of law arising from any decision of, or arising in any proceedings before' an ET under the legislative provisions listed in section 21(1).

9. Section 29A(1) gives the Senior President of Tribunals ('the SPT') and the President of the EAT ('the President') power to give directions about the practice and procedure of the EAT. Directions given by the President must be approved by the SPT and by the Lord Chancellor (section 29A(4)).

10. Section 30 is to be amended, from a date to be appointed, by the Judicial Review and Courts Act 2022. As currently in force, section 30(1) imposes a duty on the Lord Chancellor, after consultation with the Lord President of the Court of Session, to make rules 'with respect to proceedings before' the EAT. Section 30(2) lists the things for which 'in particular' rules made under section 30(1) may provide. They may include provision 'with respect to the manner in which, and the time within which, an appeal

may be brought' and 'for interlocutory matters…to be dealt with by an officer of' the EAT (section 30(2)(a) and (f)). They may also 'make provision of a kind which may be made by the employment tribunal procedure regulations under section 10(2), (5), (6), or (7)' of the 1996 Act. Section 10 deals with national security. Subject to such rules, and to Practice Directions under section 29A(1), the EAT 'has power to regulate its own procedure' (section 30(3)).

The relevant provisions of the Rules

11. The EAT is subject to an overriding objective (rule 2A). It 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.'

12. Rule 3 is headed 'Institution of Appeal'. Rule 3(1) provides that 'Every appeal to [the EAT] shall, subject to paragraphs (2) and (4), be instituted by serving on the [EAT] the following documents…'. The necessary documents are then listed in rule 3(1). On the dates which are relevant in these appeals, the documents listed at the end of rule 3(1) were

> '(a) a notice of appeal in, or substantially in, accordance with Form 1, 1A or 2 in the Schedule to these rules;
>
> (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; and
>
> (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;
>
> (d) in the case of an appeal made pursuant to regulation 38(8) of the 1999 Regulations or regulation 47(6) of the 2004 Regulations or regulation 35(6) of the Information and

> Consultation Regulations from a declaration or order of the CAC, a copy of that declaration or order; and
>
> (e) in the case of an appeal from an order of an employment tribunal a copy of the written record of the order of the employment tribunal which is subject to appeal and (if available) the written reasons for the order;
>
> (f) in the case of an appeal from a decision or order of the Certification Officer a copy of the decision or order of the Certification Officer which is subject to appeal and the written reasons for that decision or order'.

13. EAT Form 1, the document which an appellant lodges, is in seven sections. Section 5 says that copies of four documents (which are listed) 'are attached to this notice'. Section 5(c) refers to 'the response (ET3)'. Section 5(d) lists an alternative, introduced by 'and/or where relevant'. That alternative is 'an explanation as to why any of these documents are not included'.

14. With effect from 30 September 2023, rule 3(1) was amended by the deletion of sub-paragraph (b). Rule 3(2), 3(3)(ii) and 3(4)-(6) deal with appeals in national security proceedings. Rule 3(3) provides for the 'period within which an appeal to the [EAT] may be instituted'. That period is 42 days from the date when written reasons are sent to the parties in three cases. Those cases are (1) when a party asks for the written reasons for the judgment subject to appeal orally at the hearing, or (2) asks for it in writing, within 14 days of the date when the 'written record of the judgment' was sent to the parties, and (3) if the ET reserves its judgment (rule 3(3)(i)). The period when there has been no request for the written reasons, and the ET did not reserve its judgment, is 42 days from the date on which the written record of the judgment was sent to the parties (rule 3(3)(iii)). There is no provision in rule 3 for extending the time limit stipulated by rule 3(3).

15. Rule 35 has never been amended. It is headed 'Service of documents'. Rule 35(1)-(5) makes various provisions about service. Rule 35(1) provides for methods of service including methods of service on the EAT, which, perhaps curiously, enable proceedings in the EAT to be instituted 'by post sent or delivered to the Registrar …in the case of a notice instituting proceedings, at the central office or any other office of the Tribunal'. Rule 35(3) creates a presumption about the effect of posting a document. Rule 35(4) enables the EAT to 'inform itself in such manner as it thinks fit of the posting of any document by an officer of the Tribunal'. Rule 35(5) gives the EAT power to 'direct that service of any document be dispensed with or be effected otherwise than in a manner prescribed by these Rules'.

16. Rule 37(1) is headed 'Time'. Rule 37(1) gives the EAT a very wide power to change time limits. 'The time prescribed by these Rules or by an order of the [EAT] for doing any act may be extended (whether it has already expired or not) or abridged…'. That discretion, on its face, could not be wider. Rule 37 is clearly intended to apply to the time limits in rule 3 (see rule 37(4)). If there were any doubt whether this rule enables the EAT to extend the time for bringing an appeal (and we do not consider that there is

any), rule 37(5) resolves it, by preventing the EAT from hearing an application for an extension of time for bringing an appeal until a notice of appeal has been served on the EAT.

17. Rule 37(5) has been amended, also with effect from 23 October 2023. It now provides:

> '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'.

18. Rule 39 has never been amended. It is headed 'Non-compliance with, and waiver of, rules'. It provides:

> '(1) 'Failure to comply with any requirements of these Rules shall not invalidate any proceedings unless the [EAT] otherwise directs.
>
> (2) The [EAT] may if it considers that to do so would lead to the more expeditious or economical disposal of any proceedings or would otherwise be desirable in the interests of justice dispense with the taking of any step required or authorised by these Rules, or may direct that any such steps be taken in some other manner other than that prescribed by the Rules.
>
> (3) The powers of the [EAT] under paragraph (2) extend to authorising the institution of an appeal notwithstanding that the period prescribed in rule 3(2) may not have commenced.'

The EAT Practice Direction 2018 (amended in 2019)

19. Section 3 is headed 'Institution of appeal: what should be in a notice of appeal'. Paragraph 3.1 says that 'the Appellant must provide…a copy of the response (the form ET3) and any attached grounds…'. The final sentence of paragraph 3.1 says that 'A Notice of Appeal without such documentation will not be validly presented'.

The 2005 Practice Statement

20. On 3 February 2005, Burton J, the then President of the EAT, handed down a Practice Statement, drawing attention to rule 3(1)(b) and 3(3) and paragraph 2.1 of a 2004 Practice Direction (which was in similar terms to paragraph 3.1 of the current Practice Direction). Paragraph 2 refers to *Kanapathiar v Harrow London Borough Council* [2003] IRLR 571, a decision of Burton J (see paragraphs 34-41, below). It said the approach taken in that case applied to all the documents which the amended Rules required to be served with the notice of appeal (those were copies of the claim and of the response in the ET). Many invalid appeals were lodged before and after the change in the Rules. The reason for the Practice Statement was to 're-emphasise the requirements and the consequence of failure to comply with them', which was that a

notice of appeal 'not lodged within 42 days validly constituted, ie accompanied by the required documents, will be out of time, and extensions of time are only exceptionally granted' (paragraph 5). From that date on, the Registrar would not accept as an excuse 'ignorance or misunderstanding of the requirements…' (paragraph 6).

Practice Direction (Citation of Authorities)

21. On 9 April 2001, the Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 ('the Citation Practice Direction') was made with the concurrence of the Master of the Rolls and the Heads of Division. Its Introduction refers to the proliferation of 'readily available reports of judgments…' (paragraph 1). Efforts to increase the efficiency of the courts, and to reduce the costs of litigation while increasing access to justice were 'threatened if courts are burdened with a weight of inappropriate and unnecessary authority, and if advocates are uncertain as to the extent to which it is necessary to deploy authorities in the argument in any given case' (paragraph 2). Paragraph 3 makes it clear that the purpose of the Citation Practice Direction is to limit the citation of authority, and to make rules about 'what material may be cited and the manner in which cited material should be handled by advocates'. It was desirable in the interests of uniformity that all courts should follow the same rules (paragraph 3).

22. Paragraph 6.1 is a general rule which prevents the future citation of any judgment of the types listed in paragraph 6.2 unless 'it clearly indicates that it purports to establish a new principle or to extend the present law'. Judgments delivered after the date of the Practice Direction must have an express statement to that effect. In the case of a judgment delivered before the date of the Practice Direction, 'that indication must be present in, or clearly deducible from the language used in the judgment'. The judgments listed in paragraph 6.2 include 'applications attended by one party only' and applications for permission to appeal.

The relevant authorities

Abdelghafar

23. *United Arab Emirates v Abdelghafar* [1995] ICR 65 is a decision of Mummery J (as he then was), sitting on an appeal from a decision to refuse an extension of time to the respondent. The respondent had lodged its appeal on 2 November 1993, 52 days after the expiry of the time limit (on 10 September 1993). In short, mistakes by the ET meant that the employer's solicitors did not get the relevant decision of the ET until 2 November 1993. Mummery J summarised the relevant rules on page 69. He referred to rule 3(2), rule 3(1)(a) and rule 37.

24. At the foot of that page, he recorded that it was agreed that the EAT had a discretion to extend time. He noted that the practice of the civil courts generally might be relevant, and referred to two decisions of this court. He derived four principles from those cases:

> '(1) The grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the Appeal Tribunal. The result of an

> exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses.
>
> (2) As Sir Thomas Bingham M R pointed in *Costellow v Somerset CC* [1993] 1 WLR 256 at 263, time problems arise at the intersection of two principles, both salutary, neither absolute.

" … The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch 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…"
"The second principle is that … a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. …"

> (3) The approach indicated by these two principles is modified according to the stage which the relevant proceedings have reached. If, for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice to the other party, justice will usually favour the action proceeding to a full trial on the merits. The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. An extension may be refused, even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.
>
> (4) An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.'

25. Between pages 71 and 72 he described the approach of the EAT. He said that the EAT followed 'guidelines…They are only guidelines. They do not fetter the exercise of the discretion. They are intended to ensure, as far as possible, consistency of treatment,

predictability of result and the attainment of justice'. He summarised three such 'guidelines'.

i. The timetable in the Rules 'should be observed by the parties and their lay and professional advisers. Although more sympathy may be shown to a party who is unrepresented, as many are, there is no excuse, even in the case of an unrepresented party, for ignorance of the time limit or of the importance of compliance.' The parties are told of time limit when they are notified of reasons for the ET's decision. 'The time limit will, therefore, only be relaxed in 'rare and exceptional cases' where the EAT is satisfied that there is a reason which justifies departure from the time limit…'

ii. He repeated the point described in the second sentence of paragraph 25.iv., above. Time may be extended if there is 'a good excuse for the default'. He then gave examples of common explanations which do not excuse the delay.

iii. If there is an explanation, 'other factors may come into play in the exercise of the discretion'. It was not possible to give an exhaustive list of those. The EAT would be on the alert for 'procedural abuse, questionable tactics or intentional default'. Extensions had been refused 'even where the notice of appeal was served only one day out of time'. Appellants were 'strongly advised not to leave service of the notice of appeal until the last few days of the 42-day period. If they do, they run the risk of delay in the delivery of the post or of the misdirection of mail. That risk can be avoided by service of the notice of appeal well within the period'. The merits of the appeal were usually of 'little weight' as an investigation of the merits was not 'appropriate' on an application for an extension of time. Lack of prejudice to a respondent is 'of little or no significance'.

26. At page 72 C, he said that there are three questions.

i. What is the explanation for the default?

ii. Does it provide a good excuse for the default?

iii. Are there circumstances which justify 'the exceptional step of granting an extension of time?

27. He then considered the facts. He was not impressed by the explanation. If that had been the only relevant material, he would not have granted an extension of time. He agreed with counsel's submission that the respondent had given 'no acceptable excuse' for not complying with the time limit (page 72H). The delay seemed to have been caused by 'the employers' neglect and mismanagement of the case, involving loss or mislaying of papers, lack of internal effective communication and general inactivity and dilatoriness

in giving instructions, providing documents and obtaining or extracting documents from other sources'.

28. Having recorded counsel's submissions about the facts, he said that there was 'an exceptional feature of this case which has persuaded me that time should be extended'. That factor was the positive duty imposed on the court by section 1(2) of the State Immunity Act 1978 'to give effect to the immunity conferred by the Act even in cases where the state does not appear in the proceedings in question' (paragraph 73E-G). If the court or tribunal which heard the original proceedings 'has not given effect to the immunity conferred by the Act, then it must be the duty of appeal tribunal to give effect to it by correcting the error'. The alleged error of the tribunal could not be corrected unless the EAT gave an extension of time. There was a reasonably arguable case that the tribunal had failed to apply the law of state immunity correctly. 'That makes this an exceptional case for an extension of time'.

Aziz

29. *Aziz v Bethnal Green City Challenge Co Limited* [2000] IRLR 111 was a decision of this Court after an oral hearing of an application for permission to appeal at which both the parties were represented by counsel. The hearing was listed by an order of Ward LJ, after a hearing which only the appellant had attended. The three judgments do not say whether or not the application was listed for a 'rolled-up' hearing. This court refused permission to appeal. Its order was 'Application refused…' with provision about costs.

30. The appellant in *Aziz* had been supported by the Commission for Racial Equality ('the CRE'). The ET's extended reasons were sent to the parties on 24 March 1998, and received by the CRE on 26 March. The time limit expired on 5 May 1996. The EAT received the notice of appeal on 8 May 1996. The Registrar refused an application for an extension of time. Morison J dismissed an appeal from the order of the Registrar.

31. Butler-Sloss LJ, in a judgment with which Pill LJ expressly agreed, said that the date at the end of the ET's decision clearly began with a '2', but that it was impossible to tell what the second figure was, and difficult to see whether it was a '4' or a '7'. It was, however, clear from the CRE's own date stamp that the decision must have been sent to the parties before 26 March 1996. In a concurring judgment, Sir Christopher Staughton gave a more detailed description of the appearance of that date, adding 'No sensible person would, in my judgment, act on that in a matter of any importance'. Butler-Sloss LJ continued that 'the CRE were quite certain, rather surprisingly' that the date was 27 March, and did not refer back to the first page of the decision, which showed their own date stamp, 26 March 1996.

32. Morison J, the President of the EAT, had found it 'an extremely difficult case'. He referred to the 'very hard line' taken by the EAT in such cases. He had some doubts about the decision of the Registrar, and dismissed the appeal 'with a somewhat heavy heart'.

33. Butler-Sloss LJ summarised the four points in *Abdelghafar* (see paragraph 24, above). Her understanding of Morison J's decision was that he had found that the CRE's explanation was full and honest, but that it was not acceptable. She was not persuaded by the appellant's argument that the approach of the EAT was out of step with the

approach of this court. Her view was that there were important distinctions between the EAT and this court. The EAT only heard appeals on a point of law, had no factual jurisdiction and could regulate its own procedure (section 30(3) of the 1996 Act; see paragraph 10, above). The EAT had 'its own good reasons for requiring the parties to deal with proposed appeals expeditiously'. The merits of an appeal might be relevant. 'The refusal to extend for three days or one day was entirely within the exercise of discretion of the President of the [EAT]'. The reference to 'one day' is to a decision of Popplewell J in *Duke v Prospect Training Services* [1989] IRLR 198. That decision was not the subject of an appeal to this court.

Kanapathiar

34. The next authority to which Mr Crozier referred is *Kanapathiar v Harrow London Borough Council* [2003] IRLR 571, a decision of the then President of the EAT, Burton J. Time for appealing expired in that case on 26 September 2002. The Rules in the form in which they were at the relevant time required an appellant to lodge a copy of the order or decision of the ET, and of the extended reasons. There was no requirement to lodge the claim or response (see paragraph 3 of the judgment).

35. The appellant was ill during the 42-day period. He had an operation on 18 September 2002 and was fitted with a catheter. He posted his notice of appeal with the extended reasons on 25 September 2002. It was received on 27 September. However, on 26 September 2002, despite his catheter, and a tube strike, he went personally to the EAT and lodged the notice of appeal. He did not have another copy of the extended reasons, however, so that was missing. The deficiency was corrected the next day, when the posted copy arrived.

36. He applied for an extension of time. The Registrar granted the extension of time. The respondent appealed. Burton J explained, in paragraph 2, that after he explained to the respondent's representative (Mr Gee, a solicitor) that he proposed in the judgment 'to re-emphasise the strictness and lack of flexibility which apply to the Rule and to explain the circumstances in which the one-day extension was exceptionally given in that case, 'he does not pursue his appeal further before me today'.

37. Burton J said, in paragraph 6, that the appeal was not validly lodged until 27 September. The Registrar's decision was recorded in what Burton J called a 'speaking order'. The Registrar referred in that order to the 'lax' way in which the EAT had been applying the rules about the receipt of documents, and found that the appellant had had a 'legitimate expectation' that the original appeal would be accepted. The Registrar considered that there was an 'exceptional reason' why the appeal could not have been presented in time.

38. Two of the grounds of appeal were that the Registrar was wrong to refer to a 'lax practice' as it was contrary to the authorities (including *Aziz*) to which she had referred in the order, and that the concept of legitimate expectation was irrelevant, as no representation had been made to the appellant.

39. In paragraph 12, Burton J said that the practice of the EAT had 'certainly not been lax in relation to the lodging of a notice of appeal simpliciter within the 42 days'. That practice had been approved by this court. The 42-day time limit was regarded as

'extremely generous and thus to be applied very strictly, even where applications for an extension of time has [sic] to one day out of time'.

40. In paragraph 13, he described a different practice in a case where a notice of appeal had been lodged in time, but had not been accompanied by 'the necessary accompanying documents, namely, in this case, the extended reasons'. That made the notice of appeal invalid, as it was a requirement that it must be so accompanied. EAT officials had regarded that as 'a lesser offence'. Where a notice of appeal has been lodged without the extended reasons within the time limit, before the new Practice Direction, 'that has been regarded more leniently' and extensions of time had been granted. He added that in some cases, the associates had got in touch with the ET and obtained the extended reasons which it was the appellant's duty to 'put before the [EAT] under the Rules.' He then said, 'That will and must stop now, and certainly under the new Practice Direction there has been no application for an extension on that basis, and certainly none that has been granted'.

41. It was useful that Mr Gee had 'brought the matter forward on appeal, so that I can deliver this judgment in open court, and make the position clear for the future'. It was equally clear 'in the discretion of the Registrar this was an appropriate case, not only because of the compassionate circumstances, but also because this would be the case used as an affirmative signal of the end of the previous lax practice, for the grant of, what is, after all, only a one-day extension' (paragraph 14). He dismissed the appeal. He added that the position should now be 'entirely clear'. In the future, 'the same strict approach, approved in terms by the Court of Appeal in *Aziz*, will be adopted in respect of a notice of appeal which is not accompanied by the required documents within the 42 days, as has previously been applied to a notice of appeal not lodged at all within the 42 days'.

Woods

42. *Woods v Suffolk Mental Health Partnership NHS Trust* [2007] EWCA Civ 1180 is a decision of this court on a renewed application for permission to appeal. Permission to appeal had been refused on the papers. The application was renewed to an oral hearing before Ward LJ. He then ordered that it be listed for a 'rolled-up' hearing before three judges (paragraph 11). The respondent did not appear at that hearing, and the appellant was represented by her partner, Mr Young (see paragraphs 6 and 8 of the judgment, and the cover page). In the event, this court refused the application for permission to appeal. The order it made was 'Application refused' (see the end of the transcript).

43. The appellant had filed her claim in the ET online, using form ET1. When printed out, the ET1 was three pages long (judgment, paragraph 4). Time for appealing had expired on 20 March 2006. Mr Young tried to lodge the appeal in person on that day. He only had a copy of the first page of the ET1. The EAT wrote to the appellant the next day pointing that out, and saying that the notice of appeal could not be accepted. A complete ET1 was lodged on 28 March, 8 days late. The Registrar refused an extension of time.

44. HHJ Clark dismissed the appellant's appeal. He held that the Rules clearly required that a full copy of the claim should be lodged with the notice of appeal. That had been decided by Burton J in *Kanapathiar*, he considered. We observe that, by the time of the decision in *Woods*, the Rules had been amended so as to require the lodging of the claim and response, as well as documents recording the ET's decision and reasons (see

paragraph 34, above). HHJ Clark treated *Kanapathiar* as a binding authority on the effect of the Rules as amended.

45. The appellant made only two points on the oral application (paragraph 13).

    i. A single sheet from the ET1 was enough to comply with the requirements of rule 3(1). In paragraph 15, Smith LJ said HHJ Clark was right that the whole of the claim document was required, whether that was an ET1 or not. If the booklet 'The Judgment' was misleading, that could be taken into account in the exercise of the discretion. She added that 'the EAT was right to reject the notice as not being properly instituted'.

    ii. The next point concerned the exercise of the discretion. The discretion was the EAT's. The appellant argued that the delay was not long, the error was understandable, was 'venial and should be readily excused'. The EAT's strict approach to the time limit had been approved in *Aziz*. It was not for this court 'to say that that strict approach is wrong'.

46. In paragraph 19, Smith LJ considered and dismissed an argument based on the EAT's decision in *Muschett v Hounslow London Borough Council* [2009] ICR 424 (a decision of the EAT). In paragraph 20, she said that HHJ Clark had properly directed himself about the law. He was entitled to decide that 'the circumstances of the applicant's failure were not in any way exceptional'. In paragraph 25, she said that she did not think that 'any of the proposed grounds against HHJ Clark's decision is arguable'.

47. Arden LJ agreed with Smith LJ. Ward LJ concurred in the result, having observed that 'The denizens of the [EAT] seem to me to be a hard-hearted lot, and mercy flows thinly in the lifeblood of the rules and practice which govern their consideration of applications to extend time for applications to extend time for appeal' (paragraph 27). But this court had approved that approach in *Aziz*. It was not as clear to him as it had been to HHJ Clark that 'the expression claim and ET1 are synonymous'. Given the 'not compellingly important information' in the missing pages of the ET1, he might have come to the conclusion that the notice of appeal was 'substantially in accordance with Form 1…' (see paragraph 28 in which he described the missing information). He made further points in paragraph 29, but could not conclude that HHJ Clark was 'plainly wrong'. If the discretion had been his, he would have exercised it in favour of the appellant, 'but that is not the law'. He dismissed the application '[h]ardheartedly, like everybody who has had to deal with this area'.

Jurkowska

48. *Jurkowska v Hlmad Limited* [2008] EWCA Civ 231; [2008] ICR 841 is a decision of this court on an appeal after full argument by counsel for both the parties. The ET listed the question whether the appellant was 'disabled' for the purposes of a disability discrimination claim as a preliminary issue. Counsel were present at the hearing, but their solicitors were not. The chairman of the ET gave an oral decision at the end of the hearing. Counsel were given a copy of a formal 'judgment' before they left the building (see paragraphs 21 and 22 of the judgment of Rimer LJ). Nothing further was sent to

the parties or to their representatives. Counsel for the respondent did not give the judgment to his solicitors, or tell them about it. Underhill J (as he then was) found that counsel did not realise that he had the only copy, or that no copy was to be, or was, sent to his solicitors. When the solicitors served the appeal on the EAT, with the help of counsel's clerk, they asserted that a copy of the judgment was attached to the notice of appeal. Rimer LJ said that that assertion was 'wrong', although Underhill J had held that the solicitors did not realise that they had not included a copy of the judgment (paragraph 30, and see paragraph 32).

49. The solicitors had later asked the ET for, and were given, 'written reasons'. Those reasons were clearly not a judgment, but reasons for the judgment which had been given to counsel (paragraph 26). They lodged an appeal at 2.15pm on the last day of the 42-day period. The solicitors included the written reasons, but not the judgment. The EAT sent a fax at 3.37pm, pointing out that the judgment was missing. The respondent's solicitors then got a copy of the judgment from the ET, and faxed it to the EAT at 4.33pm. Time expired at 4pm. The EAT treated the late submission of the missing judgment as an application for an extension of time. The Registrar, despite opposition from the appellant, gave an extension of time. The appellant appealed to Underhill J. He treated the appeal as a rehearing and upheld the decision of the Registrar.

50. Underhill J noted that the ET's practice of giving the judgment to the advocates at the hearing was not sanctioned by the relevant procedure rules, and was not surprised that even, or perhaps, especially, an experienced firm of employment solicitors would have expected that the formal decision would be sent to the parties, to the postal address specified in the ET1 or ET3 (paragraph 33). Such solicitors might also expect the judgment and the written reasons to be in one document, even though a careful reading of the reasons would have shown that they were only reasons. The solicitors' failure to appreciate that they had not included the judgment was 'pardonable'. It was 'the sort of exceptional circumstance which ought to attract the exercise of a discretion to extend time where it was promptly rectified as soon as it was brought to their attention'. That was so even though the solicitors had left the service of the notice of appeal until the last day (paragraph 34). Rimer LJ summarised Underhill J's conclusion as that '…this was a case in which the circumstances were sufficiently rare and exceptional as to justify an extension of time, and it made no difference that the employer had left it until the last minute to appeal, a factor that he recognised might cause the [EAT] to regard it with a lack of sympathy (paragraph 37).

51. The appellant then appealed to this court, with permission. Her case was that Underhill J had 'misapplied the applicable principles' (paragraph 2). Rimer LJ gave the leading judgment. Rimer LJ summarised the decision in *Abdelghafar* (paragraphs 3-6). In paragraph 7, he said 'The guidance so given in *Abdelghafar* was approved by this court in *Aziz*…' (paragraph 7). He summarised the facts and the decision in *Aziz*.

52. In paragraphs 8-19, he considered whether the introduction of overriding objective in 2004 made any difference to the correct approach to the grant of an application for an extension of time. He accepted that 'dealing with cases justly' in accordance with overriding objective 'requires all the circumstances of the case to be considered' (paragraphs 18 and 19).

53. But he endorsed the approach of Underhill J in *Waller v Bromsgrove District Council* UKEATPA/19/17, 23 May 2007 that rule 2A 'has not somehow trumped the *Abdelghafar* guidelines so as to require the [EAT] to put them on one side and instead approach extension applications by reference to some wholly undefined and unprincipled appeal to justice'. Dealing with cases justly requires 'that they be dealt with in accordance with recognised principles'. The principles may have to be adapted 'on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide a structure on the basis of which a just decision may be made'. He added that 'The *Abdelghafar* principles' reflect that rules as to time limits are expected to be respected , and there is 'precisely nothing unjust of unfair about that. Litigants are not entitled to expect rules of practice to be re-written to accommodate their own negligence, idleness or incompetence. But the principles recognise that nobody is perfect, that errors will happen, that time limits will be missed and that in appropriate circumstances it may therefore be just to extend time for compliance'.

54. Rimer LJ summarised the parties' submissions in paragraphs 38-41. He accepted that the background to the case was that neither the employer nor its solicitors knew that the judgment had been given to their counsel and that the Judge had been entitled to find that counsel did not know that he was the only person with a copy of the judgment, and that he therefore should have given it to his solicitors (paragraph 42).

55. The critical issue for Underhill J had been whether the incorrect way in which the solicitors had prepared the appeal documents 'was such that they really had no excuse for omitting the inclusion of the judgment or whether they were entitled to say that the circumstances in which they came to omit it, coupled with their very prompt correction of the error once it was pointed out, fairly justified the short extension of time for which the employer applied' (paragraph 43).

56. The strict view was that they should have known better (for the reasons given in paragraph 44). The solicitors had not considered the express requirements of the Rules or other materials which would have shown that 'the judgment is one thing and the reasons are another'. The Judge had explained why he considered that the solicitors' explanation was acceptable, describing their mistake as 'venial'. His view was that these were 'the sort of exceptional circumstances' in which the court should extend time, even though the employer had waited until the last day to institute the appeal (paragraph 46).

57. Rimer LJ accepted that the circumstances were 'unusual' but had 'reservations' about Underhill J's conclusion, for the reasons he gave in paragraph 47. But to take a 'strict view' was 'probably' to rely too much on hindsight. The question whether to extend time was 'pre-eminently a discretionary one for the judge'. Underhill J was an experienced judge of the EAT, and was fully aware of the principles in *Abdelghafar*. Rimer LJ rejected a submission that Underhill J erred in not exploring why the solicitors had not lodged the appeal until the last day. '…an appellant is fully entitled to take the full 42 days for instituting his appeal. He… runs a risk in doing so because things can go wrong at the last minute. But the judge in terms decided… that this was a case for a discretionary extension even though everything had been left to the last day'. Rimer LJ concluded that Underhill J had been entitled to do that (paragraph 48). This court ought only to consider reviewing the exercise of that discretion if satisfied that 'he misdirected

himself …in applying the *Abdelghafar* guidance'. Rimer LJ was not satisfied that he had (paragraph 49).

58. Hooper LJ agreed that the appeal should be dismissed, 'essentially' for the same reasons (paragraph 50). In paragraph 54, he referred to the definition of 'Appeal Tribunal' in rule 2, which includes the Registrar, and to rule 39(1) and (2). He opined that a fax sent by the Registrar at 15.37 saying that the appeal had not been properly instituted 'appears to be a direction under rule 39'.

59. At paragraph 60, Hooper LJ also expressed doubts about the passage in *Abdelghafar* (cited above) in which Mummery J had said that "lack of prejudice or of injustice to the successful party in the original proceedings is also a factor of little or no significance." He continued:

> '61. I do not follow why a lack of prejudice is an irrelevant factor if an application is to be dealt with justly. I would be concerned if any desire on the part of the EAT to reduce the work involved in handling applications for extensions of time was given undue weight.
>
> 62. In reaching the conclusion that Rimer LJ is right to dismiss the appeal, I am comforted by the fact that the very experienced Registrar of the EAT thought it right to grant an extension as well as Underhill J. I am also comforted by the fact that if Miss Jurkowska had lost before the ET and had omitted to include before 4.00 pm a copy of the written record of the judgment, I am quite sure that an extension would have been granted.'

60. In paragraph 65, Sedley LJ described the EAT's policy 'for the administration of the statutory rule' as 'unforgiving', although its effect was not to 'stifle the discretion given to the judge to enlarge time'. Its purpose and effect could 'nevertheless fairly be said to be 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' (paragraph 65). If the discretion had been Sedley LJ's to exercise, he would not have given an extension of time, for the two reasons in paragraph 70. He nevertheless accepted 'with the very greatest of hesitation' that Underhill J had been entitled to extend the time for appealing. That was all that the appeal to this court decided. The decision of this court left the 'doctrine in *Abdelghafar*' intact; that is, both the judgment and the practice of the EAT (paragraph 71).

61. It is convenient to record here, as Mr Crozier pointed out in his submissions, that in *Jurkowska* Rimer LJ added two qualifications to the guidelines in *Abdelghafar*.

62. First, in paragraph 16, Rimer LJ said that despite apparent indications to the contrary in the second sentence of the second guideline at p 71E and question (b), at p 72C, he would accept that 'it may not in every case be a precondition of success for the appellant to show a good excuse for the delay, although, in the ordinary run of cases, it probably will be' (paragraph 16). That approach was consistent, (a) with Mummery J's statement that 'once the excuse is in, the [EAT] must still consider all the circumstances of the case in order to consider whether it will be just to grant an extension', and (b) the fact

that Mummery J had given an extension of time in *Abdelghafar*, even though the employer in that case had not put forward an 'acceptable excuse'. Rimer LJ added that 'The decision in *Abdelghafar* underlines that the principles set out by Mummery J are indeed guidelines and that every case will turn on its own facts'. It followed that, as in *Abdelghafar*, there would be cases in which time will be extended even though there is no good excuse for the delay, although, 'In the ordinary run of cases…and absent some such exceptional circumstance as …in *Abdelghafar*, it *will* be necessary for a good excuse to be shown'. A similar approach is evident in the middle of paragraph 19.

63. Second, in paragraph 20, he commented on a passage in Mummery J's judgment (at p 71D). He did not interpret that passage as meaning that an appellant must show that this case is 'rare and exceptional'. It meant 'no more than that, given the thrust of the guidelines, it will only be in rare and exceptional cases that it will be appropriate to extend time'. He added that this case was 'one which both the registrar and the judge concluded was such a rare and exceptional one'.

Sud

64. *Sud v Ealing London Borough Council* [2011] EWCA Civ 995 is a decision of this court after a 'rolled-up' hearing. This court gave permission to appeal, allowed the appeal and remitted the appeal to the EAT, having itself exercised the EAT's discretion to give a two-day extension of time.

65. The appellant had made two separate claims in the ET (paragraphs 3 and 4). The ET upheld her claim for reasonable adjustments but dismissed her other claims (paragraph 6). She lodged her notice of appeal on 25 January 2010, the last day of the 42. On the same day, the EAT wrote to her to say that page 3 of the grounds of complaint in the second ET1 was missing. She denied that it had been missing when she lodged the documents (paragraph 7). She sent in the missing page under cover of a letter dated 27 January 2010. She asked for an extension of time. Her application was refused by the Registrar and her appeal was dismissed by a judge (paragraph 8).

66. Etherton LJ (as he then was) gave the judgment of this court (with which Laws LJ and Longmore LJ agreed). He referred to rules 3 and 37. He also referred to paragraphs 2.1 and 3.7 of the EAT's Practice Direction, and to paragraphs 5 and 6 of the EAT's Practice Statement [2005] IRLR 189a (see paragraph 20, above). He noted in paragraph 14 that *Abdelghafar* and *Jurkowska* 'emphasise the strictness with which the EAT approaches the issue of time limits for the lodging of documents on an appeal'.

67. Etherton LJ summarised the judge's judgment in paragraphs 15-20. His conclusion had been that the appellant had left 'the whole process too late'. Her excuse was not a good excuse. Everything would have been fine if she had submitted the appeal two or three days earlier. The system would break down and there would be chaos without this strict rule.

68. In paragraph 22, Etherton LJ said that there was only one point which he needed to consider. Counsel representing the appellant pro bono had pointed out that the page which was missing from one of the relevant ET1s 'in fact added nothing of substance at all to what was contained in the first ET1 and its supporting material'. He then

submitted that the appeal in relation to the first ET1 was properly and fully constituted. No leave was necessary for that appeal (paragraph 24).

69. Counsel further submitted that the appeal in relation to the second ET1 was properly instituted only two days late, and the missing page 'added nothing of any significance whatsoever to what was already contained in the first ET1, certainly in relation to the disability claim'. In the light of those factors, the discretion had been wrongly exercised, and could only be exercised by granting the necessary extension of time (paragraph 25). Counsel for the respondent submitted that it was not possible to disentangle neatly the subjects of the two ET1s or to map them neatly onto the judgment of the ET (paragraph 26). There was a single judgment on both of the ET1s, and a single appeal. Both claim forms were a necessary part of the appeal and had to be lodged in their entirety. An extension of time was required for the entire appeal, even though the default related only to one ET1 (paragraph 27).

70. Etherton LJ disagreed. There were two separate claims in the ET, as the documents showed. The two claims had not merged. An appeal in relation to the first ET1 was properly instituted. The Registrar had exercised the discretion without taking that 'vital feature' into account. The existence of that properly instituted appeal, which required no extension of time, meant that there were 'exceptional circumstances, which inevitably would result in an extension of time being given in relation to the second ET1' (paragraph 29). The submission that the judgment could not be allocated as between the two ET1s 'cannot result in the consequence that there can be no appeal in relation to either ET1'. Rather, the consequence of the overlap between the claims made in the two ET1s 'is that it is just and right, in accordance with the Overriding Objective, that the two-day extension should be granted in relation to the second ET1 so as to constitute that also a proper appeal' (paragraph 30). The issue 'turns on the particular facts of this case…and they include the fact that the missing page added nothing whatever of substance to the first ET1' (paragraph 31).

O'Cathail

71. *O'Cathail v Transport for London* [2012] EWCA Civ 1004; [2013] ICR Digest D2 is a decision of this court on an appeal. Elias LJ refused permission to appeal on the papers, describing it as 'a hard case'. Jackson LJ gave permission after a renewal hearing 'after some considerable hesitation' and 'without the benefit of citation of the authorities' (paragraph 3 of the judgment of Mummery LJ, with which Rimer LJ and Pitchford LJ agreed). The appellant appeared in person. The respondent was represented by counsel.

72. The appellant had made seven claims against the respondent. The first claim succeeded in part (paragraph 6). The appellant had 42 days from 16 December 2009 in which to appeal. He lodged the appeal at 15.40 on 26 January 2010, mistakenly thinking that that was the last day for appealing. He failed to lodge the judgment and the reasons of the ET with the notice of appeal. The stress of forgetting two of the documents caused him to have a panic attack. He was ill on 27 January. He posted the missing written reasons by special delivery on 27 January and scanned the missing documents and emailed the judgment to the EAT on 28 January 2010 (paragraph 7). The EAT rejected the appeal on the grounds that it was late. The Registrar refused his application for an extension of time of one day. There was no exceptional reason why the appeal could not have been presented in time. The appellant appealed to Slade J ('the judge') (paragraph 8). He

relied on uncontradicted evidence that he suffered from depression, anxiety and panic attacks exacerbated by court hearings (paragraph 9).

73. Mummery LJ described the evidence before the judge in paragraph 10. The judge said that there was no evidence to explain why the appellant had not lodged the appeal until what he believed was the last day. He had had 'ample opportunity and ability to lodge the notice of appeal before the very last moment'. The reason why he did not bring the necessary documents on 26 January 'related to his disability' and his illness contributed to his inability to travel to the EAT on 27 January to lodge the documents. His disability, was not, however, the reason why he had not lodged the appeal on time. The reason for that was that he had left it until the very last moment. He ran the risk that if something went wrong, he would not have time to put it right (paragraph 11).

74. The appellant lodged a 33-page skeleton argument and a further 25-page skeleton argument for reading out at the hearing. Mummery LJ concentrated on his 'core submissions', which he summarised in paragraphs 14-20.

75. Mummery LJ said that this court can only set aside an exercise by the EAT of its discretion on limited grounds, which he described in paragraph 21. The EAT's general approach to applications to extend the 'generous' time limit…is well settled on a principled basis, which has been approved by this court. He referred to *Abdelghafar*, *Aziz*, *Kanapathiar*, *Jurkowska* and *Muschett v Hounslow London Borough Council*. In paragraph 23, he quoted the remarks of *Ward* LJ in *Woods* (see paragraph 48, above). He did not agree with that criticism. He added, 'The EAT must be even-handed: it must consider judicially the conflicting positions of both parties and the public interest in good judicial administration, not just the plight and pleas of an applicant seeking an indulgence from the EAT. I have not seen any judicial comment that the approved approach is unfair or unjust. It is binding on the EAT and on this court, unless and until the rules are changed, or a higher court substitutes a different judicial regime for reviewing the procedural discretions of the EAT'.

76. The appellant had 'lodged his notice of appeal on time. …that, on its own, was not enough to institute the appeal'. He also had to comply with rule 3(2). 'That requirement is as strictly enforced as the obligation to lodge a notice of appeal form in time…' He referred to *Kanapathiar* and to *Woods* (paragraph 25).

77. The fact that the documents had been lodged only one day out of time was a material factor, 'but the crucial issue is whether there is a good excuse for that delay, not whether the delay was long or short'. He had left it until the end of the period to lodge his appeal. That obviously entailed the risk that something might go wrong (paragraph 26).

78. He did suffer from a recognised disability. Its effects were relevant factors in deciding whether he had a good excuse and in deciding whether there were exceptional circumstances justifying an extension of time. The judge took those factors into account in deciding that he had not been able to start work until there were four weeks left. The judge had found as a fact that he was not disabled from lodging his appeal within the time limit. He was able to produce 'long and complex grounds of appeal and to submit them in time'. His disability did not explain or excuse his inability to attach the required documentation (paragraph 27).

79. His disability was relevant on 27 January, but it did not mean that he could not have lodged the necessary documents before the deadline. The notice of appeal did not have to be as long as it was. He did not have to lodge the documents in person (paragraph 28).

80. Mummery LJ considered that the appeal should be dismissed. The appellant had not shown that the EAT had erred in law in exercising its discretion.

Green v Mears

81. *Green v Mears Limited* [2018] EWCA Civ 791; [2019] ICR 771 was an appeal to this court with the permission of Ryder LJ (paragraph 33). The appellant and the respondent were both represented by counsel. Underhill LJ gave the judgment. Leggat LJ and Sir Brian Leveson PQBD agreed with it.

82. The ET sent its judgment and reasons to the parties on 1 October 2014. Time for appealing expired on 12 November, even though the ET posted those documents by second class post and they only reached the appellant on 10 October. The covering letter referred to 'The Judgment' booklet and advised the appellant to read it, and said that an appeal and an application for reconsideration were different and that strict time limits applied to both. If he had read 'The Judgment' booklet he would have discovered that an application for reconsideration does not affect the time limit for an appeal (paragraph 24).

83. The ET refused the appellant's application for reconsideration dated 13 October by a letter dated 30 October 2013. He applied again. The ET refused that application on 10 December 2013, after the expiry of the time limit for an appeal. He lodged an appeal on 17 January 2014. Some of the necessary documents were missing. The appeal was not 'formally instituted' until 24 January 2014. It was 'some 73 days out of time' (paragraph 27). He was invited to apply for an extension of time, which the Registrar refused. He then appealed to HHJ Eady QC (as she then was) ('the judge'). The appellant had pro bono help with his skeleton argument but was not represented at the appeal. She did not accept that staff at the ET had told the appellant that he need not appeal until he knew the outcome of his application for reconsideration (paragraph 30).

84. She accepted his evidence about various difficulties he had had at and around the six-week period for appealing, and that he did not use a computer (paragraph 30). He found the idea of appealing 'daunting' and opted to apply for reconsideration first. His case was that he understood that the letter accompanying the judgment and reasons meant that the time limit for an appeal was 42 days from the date of any final decision on any application for reconsideration. The judge's assessment was that 'he read what he wanted to read and interpreted the letter in the way he wanted it to be interpreted. That is certainly not what it says' (paragraph 31).

85. In any event, his explanation did not cover the whole of the relevant period. There was a further unexplained delay of almost a month. She did not accept that his explanation was a reason for giving an extension of time (paragraph 32).

86. In paragraphs 6-21 of his judgment (with which the other members of this court agreed), Underhill LJ described the principles governing the grant of an extension of time. He

summarised *Abdelghafar*, *Aziz*, '*Kanapathiar//Woods*', *Muschett*, and *Jurkowska*. In paragraph 21, he said 'It will be seen that on at least three occasions…this court has considered whether the *Abdelghafar* approach is too strict…and on each occasion its application has been upheld. Subject to the issue raised in this appeal, we are bound by those decisions'. In footnote 3, he accepted that whether this court was bound by *Aziz* and *Woods* 'might, I suppose, be formally debatable since they were technically decisions to refuse permission to appeal. However they were decisions of the full court after hearing argument for both parties and they are for practical purposes binding. In any event, *Jurkowska* was a decision on a substantive appeal'.

87. The appellant's argument on the appeal (paragraph 33) was that the guidance in *Abdelghafar* had been superseded by the approach in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537; [2014] 1 WL795 and *Denton v TH Whited Limited (Practice Note)* [2014] EWCA Civ 906; [2014] 1 WLR 3926, as applied to time limits for appeals in *R (Hysaj) v Secretary of State for the Home Department (Practice Note)* [2014] EWCA Civ 1633; [2015] 1 WLR 2472.

88. In paragraph 36, Underhill LJ commented that *Jurkowska* showed that the guidance in *Abdelghafar* 'does not absolutely rule out the grant of an extension of time even where no good reason has been shown for non-compliance'. He rejected the appellant's argument (paragraph 39) because his view was that this court was bound by *Aziz*, *Woods* and *Jurkowska* 'which uphold the lawfulness of the *Abdelghafar* guidance'. He added, in paragraph 40, that even if the court were not bound by the earlier cases, he would have rejected the appellant's submission. There is no right approach to the balance between fairness to an appellant and fairness to a respondent in this context. Different courts may strike that balance differently. The main difference between appeals to this court and to the EAT is that the time limit is twice as long. The Supreme Court had recognised, in *Birnberg Peirce Holdings Limited v Revenue and Customs Commissioners* [2017] UKSC 55; [2017] 1 WLR 2945, that one of the functions of the Upper Tribunal (in tax cases) was to develop principles which it would apply to procedural questions. This court should also be cautious about interfering with guidance developed by the EAT as this court's jurisdiction is limited to England and Wales whereas that of the EAT extends to the whole of Great Britain (paragraph 42). Underhill LJ concluded that the judge 'was right not to apply the *Mitchell/Denton* guidance' (paragraph 45).

Nicol

89. *Nicol v Blackfriars Settlement* [2018] EWCA Civ 2285 is a decision of this court on a 'rolled-up' hearing of an application for permission to appeal. The appellant and the respondent were represented by counsel. This court granted permission to appeal, allowed the appeal and remitted the case to the ET. The ground on which it did so was that the judge in the EAT appeared not to have treated the appeal from the Registrar as an appeal by way of rehearing (paragraph 16).

J v K

90. In *J v K* [2019] EWCA Civ 5; [2019] ICR 815 the appellant tried to email the documents for his appeal to the EAT at 3.55pm on the day on which the time limit expired. The EAT's email server could only accept an attachment of 10MB. The attachment to the appellant's email was bigger than that. It was not delivered in time. He then sent the

documents in a number of smaller files. The EAT received them all by 5pm that day. The EAT treated the appeal as being out of time.

91. The judge in the EAT found that the appellant had not received a hard copy of the ET's decision or the covering letter on how to appeal, which would have alerted him to guidance on a government website which warned potential appellants about the limitations of the EAT's server. The Registrar and the judge refused his application for an extension of time. He appealed to this court. Both the appellant and the respondent were represented by counsel. The Equality and Human Rights Commission intervened, at the invitation of this court, to help the court with the question whether guidance about a party's mental ill health was relevant in this context.

92. The judge had no evidence about the appellant's mental condition, although the appellant relied on it as a reason why he submitted his notice of appeal at virtually the last minute. This court had a letter from the appellant's GP (paragraph 6). The appellant had refused an assessment by a psychiatrist and the GP had not been able to assess him recently. The GP said that the appellant suffered from a 'cyclothymic mood variation pattern'. This court could not be specific about his condition but was prepared to accept, like the judge, that he was 'suffering from a degree of mental ill-health' (paragraph 6). This court noted that the judge had summarised the law about extensions of time in 15 points (paragraph 8).

93. Lewison LJ gave permission to appeal on two points. The first point related to the duty to make reasonable adjustments. The second was whether the very modest delay, and the limitations of the EAT's server, amounted to exceptional circumstances 'such as to require an extension of time in order to comply with overriding objective'. Underhill LJ, with whose judgment the other members of this court agreed, summarised the position in this way: 'In bare outline, where there is no good reason for the time limit being missed, even by a very short time, an extension will only be granted in exceptional circumstances, and a strict view is taken as to what constitutes such circumstances' (paragraph 13).

94. In paragraph 16, Underhill LJ explained that HMCTS published a guide on the government website, T440, which explained how to appeal to the EAT. This guide, among other things, warned about the capacity of the EAT's server. When the ET sends its decision to the parties, the covering letter refers them to a booklet called 'The Judgment' (T426). It gives basic guidance and also refers to T440, giving a link to it, and telling the parties that if they want a hard copy, they should ask for it.

95. In paragraphs 17-19, he summarised two EAT decisions in which judges had given extensions of time in very similar cases, in circumstances in which the appellants had submitted appeals very late, and should have known about the limitations of the server because of the information in T440. The first question was whether the appellant should reasonably have anticipated that the EAT server might not be able to receive a large attachment (paragraph 24). Other things being equal, a person would expect the server to be able to receive a large attachment. Underhill LJ disagreed with the judge that guidance about the capacity of the server was 'freely and easily available'. The important point was that the appellant had not received the covering letter with its

'somewhat' indirect pointer to T440. Underhill LJ saw the force of the argument that the appellant had left the appeal until the last minute and therefore could not expect any indulgence, while acknowledging, as *Jurkowska* shows, that there is no such absolute rule. It is an important factor in the exercise of the discretion. The fact that the confounding factor was caused by the EAT was relevant. 'It is inconceivable…that an extension could fairly be refused' if an appellant having left appealing to the last minute, arrived at the EAT at 3.55pm to find the doors locked (paragraph 28).

96. Underhill LJ concluded that the judge had been 'wrong' to refuse an extension of time. The correct analysis was probably that the appellant had given a good explanation for missing the deadline, that is, his reasonable ignorance of the limitations of the server. But if, contrary to that view, the appellant should have found T440 for himself, 'any failing in that regard seems to me to have been venial'. When the real cause of the problem was the EAT's equipment, and service was correctly completed within the hour, it was an exceptional case in which an extension of time was required as a matter of justice (paragraph 29).

97. In paragraphs 33-46, he made some obiter comments about mental illness. Had that been the only point in the appeal, Underhill LJ would have dismissed it (paragraph 46). If mental illness had contributed to a failure to institute and appeal within the time limit, it was common ground, 'that will always be an important consideration' (paragraph 33). He described three general 'basic propositions' in paragraph 39.

    i. An appellant's assertions about the effect of his condition should if possible be supported directly or indirectly by independent evidence, ideally by a medical report.

    ii. The next question is whether that condition (on its own or in combination with other factors) explains the failure to institute the appeal in time.

    iii. If the condition was a substantial cause of that failure justice will usually require an extension; but not necessarily, especially if the delay has been long.

Ridley v HB Queen's Court Business Centre

The facts

98. We take the facts from the transcript of the ex tempore judgment of HHJ Beard, ('Judge 1') giving the decision of the EAT. The judgment is a mixture of findings of fact and a record of Mrs Ridley's arguments. We have included Judge 1's record of those arguments in this section of the judgment. Mrs Ridley and Ms Kirtley (for the respondent) attended the hearing at the EAT.

99. He found that the judgment of the ET was sent to the parties on 19 October 2021. The written reasons were sent to the parties on 3 November 2021. Time for lodging the notice of appeal, including all the necessary documents, expired at 4pm on 15 December 2021. The EAT received the notice of appeal on 13 December 2021. All the necessary documents were included with the notice of appeal, apart from the employer's grounds

of resistance, that is to say, an attachment to the employer's response to the claim form in the ET. The claim form is usually referred to as 'the ET1' and the response as 'the ET3'. He held that the appeal was not properly instituted on 13 December 2021.

100. The EAT emailed Mrs Ridley on 23 December 2021. The EAT told her that the appeal had not been properly instituted. The EAT sent the email to the wrong email address. The EAT relied on an email address in the ET1. The notice of appeal did not contain an email address.

101. On 13 May 2022, Mrs Ridley, having heard nothing from the EAT, contacted it, 'not for the first time'. She had contacted the EAT before, to 'find out how things were progressing'. She had been left with the impression, before that date, that she had provided all the necessary documents. We infer that the EAT then told her about the missing grounds of resistance. She then provided '[t]he grounds of resistance, or additional information or attachment to the ET3, whatever label it is given' on 13 May, but after 4pm, so that they were not received by the EAT until 16 May 2022.

102. Judge 1 accepted Mrs Ridley's contention, at the hearing, that she had intended to lodge the notice of appeal some two weeks before the deadline, in order that any issues could be resolved before the expiry of the time limit. 'However, matters conspired to prevent her as she could not get the support or information that she needed'. As a result, she did not lodge the appeal until 13 December. The information before Judge 1 was that Mrs Ridley had thought that material provided to her by her solicitor with the ET3 headed 'additional reasons' was not 'the grounds of resistance'. She had been told by her solicitor that she had to include 'the grounds of resistance'. She had thought that the ET3 form was, in and of itself, 'the grounds of resistance'.

103. She relied on a new reason before Judge 1, her health. She had not given that explanation to the Registrar. It was clear to Judge 1 from a report dated 24 January 2022 from a consultant psychologist, Dr Bradley, that Mrs Ridley had been the victim of a mugging in 2019. As a result, she suffered 'symptoms which increased her stress and anxiety'. The report gave a diagnosis and a prognosis. In Dr Bradley's opinion, Mrs Ridley had 'trauma-related symptoms', and she still had them at the date of the report. Her symptoms were disturbed sleep, agitation, hypervigilance, poor concentration and restlessness.

104. Judge 1 quoted a passage from the report which referred to Mrs Ridley's preoccupation with her personal safety, and her 'obsessive rituals' such as checking that the doors are locked and looking out for potential threats when she left the house. The diagnosis was not as clear as it might be. It did record that Mrs Ridley had a 'specified trauma answer stress-related disorder', which can cause 'significant distress or impairment in social occupations or other important areas of functioning'. Judge 1 added, 'and this is crucial' that Mrs Ridley did not 'meet the full criteria for trauma or stress-related disorder classification'.

105. Mrs Ridley had told Judge 1 at the hearing that she was acting illogically when she lodged the notice of appeal. She related that to 'having stress and trauma disorder at that time'. A key element of that was that she did not ask anyone at the relevant time what

the 'grounds of resistance' were when she was asking for advice when she was preparing to appeal. Judge 1 had 'no doubt I have been provided with an honest explanation'.

The EAT's reasons for not extending time

106. Judge 1 made clear that although he was dealing with an appeal, it was an appeal by way of re-hearing, so he was not testing the Registrar's reasons, but, rather, making the decision 'entirely afresh'. This mattered, because, on the appeal, Mrs Ridley had relied on a new reason which she had not put before the Registrar. He had to answer two questions: (1) whether the appeal was lodged out of time and (2) whether he should exercise his discretion to extend time pursuant to rule 37 of the Rules.

107. Judge 1 held that the appeal was not properly instituted on 13 December 2021. He also held that the EAT should not have used the email address given in the ET1. As Mrs Ridley had not given an email address in the notice of appeal, the EAT should have contacted her by post.

108. Judge 1 held that 'The appeal …was only complete, in terms of the rules, by 16 May 2022, some 142 days after it was required to be lodged'.

109. The law which Judge 1 had to apply was set out in the judgment of the Registrar. He had to consider the explanation for the default, whether it was a good excuse for the default, and whether there were circumstances which justified the exceptional step of extending time. He had to bear in mind that an extension of time is 'an indulgence'. The claimant must give 'a full, honest and acceptable explanation of the reasons for the delay'. A claimant cannot expect an extension of time unless she gives an explanation. A good excuse must cover the whole of the relevant period. If there is no good excuse, there might still be exceptional circumstances which could justify an extension of time.

110. He recognised on the basis, for example, of *J v K,* that if there is 'a clear connection' between 'the impairment, the diagnosis and behaviour of the employee', there can be a 'genuine excuse for the late presentation because of the disability'. The length of the delay does not necessarily matter, particularly when there are delays in telling the parties about the status of an appeal. What is most important is the reason for the delay. It is not the duty of the EAT to correct the parties' mistakes. Where only one document is missing it is important to consider the importance of the document to the appeal.

111. Judge 1 took into account that 'the description of the grounds of resistance could have been confusing to the claimant' but, as she had acknowledged, she could have asked what the 'grounds of resistance' were. In 'the absence of a medical explanation', it was the appellant's 'duty to ensure that the documents were lodged'. He referred to written guidance. That guidance refers to 'the ET3 and attached documents'. The failure to provide 'that document because it was marked "additional reasons" and not grounds of resistance would not amount to a good reason for the delay'. A mistake is not a good reason for delay. The grounds of resistance were important for the appeal, because they explained the respondent's position at the ET.

112. He then asked whether Mrs Ridley's mental condition affected her ability to lodge the appeal. The medical evidence was that the appellant's symptoms 'appear to affect matters of personal security rather than anything beyond that'. Nothing in that evidence explained why 'the particular document which was sent to the [appellant] by her solicitors would have been ignored'. The explanation was that she did not properly understand what documents needed to be attached. That was not a good excuse. 'It is a commonplace form of default, and …it is the duty of the party to ensure that they have done everything correctly. The appeal was out of time by 142 days and the explanation for the default whilst honest is not a good excuse'. The only possible exceptional circumstance was the medical condition, but that did not 'provide a reason for the conduct of the appeal...'

113. Judge 1 also referred to other authorities. They included *Fincham v Alpha Grove Community Trust* UKEATPA/0993/18/RN. In that case, HHJ Auerbach decided that it is not the duty of the staff at the EAT to correct the parties' mistakes. It is the appellant's duty, rather, to check and make sure that he or she has provided all the documents. It is only in the case when one document is missing that it is relevant to consider the importance of the document to the appeal.

114. Judge 1 had no doubt that he had been given an honest explanation. He took into account that the description of the grounds of resistance could have been confusing for Mrs Ridley. But as she had said, she could have asked someone. A simple question like that would have prompted 'a proper response immediately'. In the absence of a medical explanation, it was Mrs Ridley's responsibility to ensure that she lodged the documents. There is written guidance to help appellants. The wording refers to the ET3 and 'attached documents'. The rule does not refer to 'grounds of resistance'. A failure to provide 'a document because it was marked "additional reasons" and not grounds of resistance would not amount to a good reason for the delay'. People make mistakes, but that does not mean that a mistake is a good reason for delay. It could not be said that the grounds of resistance were not important to the appeal. 'That was a key document in understanding the respondent's case, as it as before the [ET]'.

115. The next question was whether the medical and other information affected Mrs Ridley's ability to lodge the appeal. The main impact of the symptoms seemed to 'affect matters of personal security rather than anything beyond that'. He could not see that those symptoms could have affected Mrs Ridley's ability to present the appeal on time with all the documents. The report did not explain why Mrs Ridley's symptoms would have led her to ignore one of the documents which was sent to her by her solicitors.

116. The explanation was that Mrs Ridley did not understand which documents to send with the notice of appeal. That was not a good excuse. It was a common type of default. It is the duty of an appellant to ensure that he or she has done everything correctly. The appeal was out of time by 142 days and the explanation for the default was not a good excuse. Judge 1 did not consider that there were any exceptional circumstances to justify granting an extension of time. The only potentially exceptional circumstance was Mrs Ridley's medical condition. But that did not provide a reason for Mrs Ridley's conduct.

Counsel's submissions in Mrs Ridley's case

117. Mrs Ridley's explanation was that she knew from somewhere that she needed to submit a document entitled 'grounds of resistance' with her appeal but that she did not know what that document was, or that it was the document which her former solicitors had given her. Contrary to Judge 1's apparent view, that document was not headed 'Additional reasons'. It had no title or heading. It had been sent to her by her former solicitors with the description 'additional information'. It was not referred to in the relevant box of the ET3, box 6.1, which is blank. Because it was described as 'additional information', she thought that it was 'extra, so not necessary'. Her description was that 'Overall, I think I was in a state of panic'.

118. The first ground of appeal is that Judge 1's view that Mrs Ridley's explanation could not be a good excuse because such mistakes are 'commonplace' was wrong. First, he should have considered her particular explanation with care. Mrs Ridley's own confusion, and her inability to understand the requirement to include 'the ET3 and any additional response' could be a good excuse, either on its own, or when coupled with her mental condition, even if, in normal circumstances, the failure to include a document would not be a good excuse. He erred in apparently treating the EAT's decision in *Fincham* as decisive.

119. His second error was to fail to consider whether Mrs Ridley's confusion about what was required could, itself, amount to exceptional circumstances. He did not recognise the inherent flexibility of the guidance in *Abdelghafar*. The requirement for the ET1/ET3 and 'additional reasons' is confusing. Neither rule 3 nor Form 1 nor the information leaflet refers to 'additional reasons' (the phrase is only seen in the Practice Direction). The ET3 may be a self-contained document, and may come with an attachment; different labels are in practice given to such attachments and sometimes, as here, no label at all. Mrs Ridley was genuinely confused, as Judge 1 found. The EAT did tell her, but sent the notification to the wrong address. The mischief recognised by the later changes in the Rules is relevant to the exercise of the discretion.

120. Judge 1's answer was that Mrs Ridley could have asked someone. But she had asked her former solicitors, and the CAB. Neither was able to identify the right document clearly to her.

121. The second ground of appeal concerns the Judge's approach to the medical evidence. The report on which she relied was not aimed at the application for an extension of time, and so did not specifically address the effect of her condition on her ability to understand and comply with the Rules. Despite *J v K,* the EAT put too much weight on that fact. But the report did refer to symptoms such as 'sleep disturbance, agitation, hypervigilance' and 'poor concentration'. It said that 'the severity of her anxiety condition impacts activities of daily living'. It also said that 'she explained that her concentration is poor due to her anxiety condition'. It is not clear why her failure to 'meet the full criteria' was 'crucial'. The EAT failed to ask what impact her condition would have had on her ability to understand what she needed to do, and her confusion about the grounds of resistance.

The Respondent's submissions

122. In her letter to the court explaining that she would not be attending the hearing, Ms Kirtley made some brief submissions on the appeal. She said that the Respondent supported HHJ Beard. She continued: 'In my judgment there are no prospects for successfully appealing the decision not to grant an extension. It is clear that the appeal lodged was incomplete as it did not include relevant documentation. Although the Appellant was honest and straightforward in her explanations, those explanations did not provide what is considered to be a "good excuse" in the authorities. There were no exceptional circumstances upon which discretion could be exercised. Discretionary decisions are only appealable if plainly wrong, in my judgment that could not be the case here'.

Kostrova v McDermott International Inc

The facts

123. The Registrar refused Ms Kostrova's application for an extension of time. The Registrar recorded that the last day for submitting an appeal was 15 October 2021. The EAT received the appeal by email after 4pm on 13 October. The EAT therefore treated it as having been received on 14 October 2021. The 'grounds of resistance' were missing. On 16 October (a Saturday), the EAT told Ms Kostrova that the grounds of resistance were missing. Ms Kostrova provided the grounds of resistance on 16 October. The EAT treated those as having been received on 18 October 2021. That made the appeal three days out of time. The Registrar said that the separate ET3 forms for each respondent 'confirmed that' the respondent were defending the claim and said 'Please see attached grounds of resistance'. The respondents all relied on the same grounds of resistance.

124. The Registrar summarised Ms Kostrova's case. She followed steps in the ET's letter of 3 September on how to appeal and the link to documents T444 and T440 on the government website. She was certain that she had submitted all the necessary documents and did not realise that the grounds of resistance were missing until the EAT told her. The Registrar considered that it was Ms Kostrova's responsibility to find out what she needed to do. The letter accompanying the ET's decision gives details of how to appeal and links to 'The Judgment' (T426) and 'I want to appeal to the Employment Appeal Tribunal' (T440). The latter says that T440 should be read with the Practice Direction. Paragraph 3 of the Practice Direction tells appellants what should be in the notice of appeal.

125. To the extent that Ms Kostrova relied on having applied to the ET for a reconsideration, the respondent pointed out that paragraph 4.4 of the Practice Direction makes it clear that time for appealing continues to run when an applicant applies for reconsideration, and that she had, in any event, appealed before her application for reconsideration had been decided.

126. She appealed. HHJ Shanks ('Judge 2') heard the appeal. He gave an ex tempore judgment, which is recorded in a transcript. He made the same findings of fact as the Registrar. As in many cases which he had heard, Ms Kostrova had left out one document, the grounds of resistance, which, he said, were an essential part of the document.

The EAT's reasons for not extending time

127. There could be no doubt that the appeal was not properly instituted. The appeal was 'a short time out of time, and in fact most of it had been over a weekend'. Ms Kostrova had been 'certain' that she had submitted 'all the necessary documentation'. She also told Judge 2 that she was under a lot of stress at the time of submitting the appeal, and had thought that she had time to put things right. Both her parents were ill and she had medical problems. Her mother was in a medical facility in southern Russia near the border with Ukraine. She had not put in any medical evidence.

128. Judge 2 did not agree with Ms Kostrova that she submitted the appeal 'well before the deadline'. He could not accept that she was entitled to rely on the staff at the EAT to put things right for her. It was 'far too late' for the EAT 'to take on board any medical evidence'. Judge 2 was prepared to accept that it was a stressful time, that her parents were unwell and that she had 'her own pressures and medical issues'. The fact was that she was 'perfectly capable of understanding the time limit, of assembling documents and of sending them in'. It was 'perfectly apparent that' she had made 'a human and simple error, which I can also say happens all the time, of leaving out part of one of the documents… So it does not seem to me that health or stress really comes into the equation'.

129. The law was 'very harsh' and the rules about extending time were 'harsh but clear'. Judge 2 said that 'Save in really exceptional circumstances, an applicant for an extension of time must show that there was a good reason for the failure to lodge the appeal on time. A simple failure to assemble all the correct papers in time really cannot amount to a good reason'. Everyone makes mistakes, 'even lawyers'. The error 'was rectified very quickly'. Judge 2 could not believe that anyone had suffered any prejudice, apart from Ms Kostrova. It was also 'embarrassing, frankly' that there were such delays between the submission of appeals and the hearing of an appeal in a case like this. The gap in this case was some 32 months.

Ms Kostrova's arguments on the appeal

130. Ms Kostrova's written argument was, in part, similar to the argument she put forward in the EAT. In her oral submissions she suggested that she was not clear whether the ET3 was one document or more than one document. She had the grounds of resistance and was not sure whether to send them as a separate document, so she sent the ET3. She explained that she had found Covid very difficult as she lives alone and was very isolated for 9 months. It had a 'huge impact' on her wellbeing. She had some therapy which was suggested by her GP, but only for a few weeks. She was then given one week's notice and became much worse. She went to her GP and was prescribed anti-depressants. Then her parents were ill. She was also taken to hospital herself. She was having panic attacks. They were hard to deal with. In February 2022, the war between Russia and Ukraine started. Her family are in Ukraine and in Russia. She was having severe panic attacks because she did not know when she would see her parents again.

131. In answer to a question from Baker LJ, she told us that she did not submit any medical evidence to the EAT. Her GP had been willing to provide it. She accepted that she had the ET3 and its separate attachment when she lodged her appeal.

Taylor

The facts

132. Ms Taylor was a litigant in person in the ET and in the EAT. The ET dismissed her claims of unfair dismissal, harassment related to race, and victimisation. On 1 April 2022, the ET announced its decision. It sent a written judgment to the parties on 13 April 2022. The covering letter referred the parties to 'The Judgment' booklet T426, which gave guidance about how to appeal, and how to apply for a reconsideration, and that those were different processes, with strict but different time limits. It also referred to the website and the T440 booklet. On 27 April, Ms Taylor asked for written reasons and for a reconsideration.

133. The ET sent written reasons on 15 June 2022. Ms Taylor added to her reconsideration application on 29 June 2022. The last day for appealing was 27 July 2022. Ms Taylor sent her notice of appeal and supporting documents in hard copy using a method which guaranteed their delivery. They were received by the EAT on 27 July, which was a Wednesday. Ms Taylor enclosed all of the necessary documents except the grounds of resistance, which were headed 'grounds of resistance' and referred to in box 6.1 of the ET3. The EAT emailed her on 30 July to tell her. She emailed them the same day, and posted a hard copy. On 14 September, the EAT told her that the appeal was late, inviting her to apply for an extension of time. She did so. The respondent opposed that application. The Registrar refused it.

134. Ms Taylor appealed against the decision of the Registrar. The appeal was heard by HHJ Auerbach ('Judge 3'). The respondent was represented by counsel. Ms Taylor represented herself. Judge 3 acknowledged that he was considering the matter afresh.

The EAT's reasons for not granting an extension of time

135. Judge 3 explained that the merits of the underlying appeal are not, generally, relevant, unless the appeal is obviously hopeless, or 'obviously very strong and important' (a reference, no doubt, to the facts of *Abdelghafar*). If an appeal is out of time, the authorities establish that there is a 'high hurdle' for extending time. Judge 2 explained why. The authorities also showed that an appeal will be treated as out of time both where there has been no appeal at all within the time limit and where steps have been taken, but required documents are missing, 'and the things often relied upon by litigants as their explanation or reason why time should be extended are not regarded as good excuses or good reasons for extending time. In particular, the fact that someone has made a mistake and did not do so intentionally is not by itself a sufficient reason to extend time'.

136. He applied the guidance in *Abdelghafar*, as endorsed by this court in *Green v Mears*. He was satisfied that the appeal was 'instituted out of time' because one of the documents required by the Rules, 'and as confirmed in its Practice Direction, is the response, and in this case the response consisted of the ET3 form and the grounds of resistance document which was referred to and incorporated in it'. He added that in some cases the ET3 is self-contained, but in this case, it was not. Box 6.1 referred to the grounds of resistance document 'that was indeed attached and that therefore formed part of the response in this case'. Ms Taylor did not provide the complete response within the time limit.

137. There was 'a body of authority' which 'guides me and which I must follow'. He would consider each aspect of Ms Taylor's explanation in turn. He distinguished *Fincham v Alpha Grove Community Trust* UKEATPA/0993/18 ('Fincham') because in that case only one insignificant page of the grounds of resistance was missing as the result of a copying error. In this case all the grounds of resistance were missing and they were 'plainly material'. He rejected her argument that EAT Form 1 and the guidance which she looked at did not refer to 'grounds of resistance' because the ET3 itself referred to them, which is also explained in the EAT's Practice Direction. It was not a case in which Ms Taylor did not know that the document existed, or did not have a copy of it. 'With care, she could and should have spotted that this document needed to be included'. The fact that she used the ET bundle to extract the documents, as Judge 3 accepted, was not an explanation for this error. All the relevant documents were in the index, so this did not explain the mistake. He was 'bound to say' that 'even if' he had accepted that explanation, 'I would not – following the case law that I am bound to follow - have regarded that as a sufficient excuse'. The authorities were 'very clear' that the requirements apply to litigants in person and to those who are represented alike. There is ample guidance available on the internet and elsewhere'.

138. It was within her control not to leave things until the last minute. 'Again, the authorities which I must follow are very clear on this point'. A litigant who leaves it until the last moment must 'in principle' bear the consequences if something goes wrong. The fact that she had applied for a reconsideration was not a reason for giving an extension of time, on the authorities. The merits were not compelling in either direction.

139. The final issue was the medical evidence. Ms Taylor argued that this either had a bearing on why she left it so late to appeal or on why she made the mistake. Judge 3 referred to the guidance in *J v K*. He fully accepted that she had fibromyalgia and irritable bowel syndrome, and that she had been prescribed fluoxetine for a period, although it was not clear whether that was during the 42-day period. He was prepared to accept that she had anxiety and depression during that period. On her own account she had good and bad days. He did not accept that the impact of her conditions was 'so persistent and severe and uninterrupted that it meant that she was simply incapacitated from being able to find periods of time when she could devote the necessary concentration required to checking and making sure exactly what documents were required, and to checking and making sure that she had collated all of those documents and there was nothing missing from the materials she sent in to the EAT'. He was not satisfied that it was 'practically impossible for her complete that task in good time'.

140. The warnings are there from the first time the judgment arrives. Ms Taylor was able to go to the bundle and put together the documents which were needed. She was able to organise, albeit very late, for the documents to be received on the very last day. Judge 3 'must apply and follow the established guidance which indicates that the fact of her medical conditions and her ill health - which I entirely accept - is not by itself sufficient'. He was not persuaded that 'it provides a sufficient excuse or exceptional reason for why [Ms Taylor] did not institute her appeal in time because she did not include a copy of the grounds of resistance document that formed part of the ET3 response'.

Ms Taylor's arguments on the appeal

141. In her oral submissions, Ms Taylor explained, as she had in her grounds of appeal, how she had submitted her appeal. She had looked at the index of the documents for the ET hearing, and at the information requested on Form EAT1. Item 2 on the ET index was the whole of the ET1 (pages 12-26). The ET bundle index then listed 'ET3 Response Form' (pages 29-36) as item 5 and 'Amended grounds of resistance' (pages 46-48) as item 7. Ms Taylor attached item 5 to the notice of appeal, but not item 7. She thought that she had complied with the requirements by doing that. In her submissions to this court, she relied on the facts and decision in *Jurkowska*.

142. She also had underlying health conditions which made it difficult to prepare, 'and the stress all took its toll'. She provided evidence of her health issues. She felt that Judge 3 did not take full account of her medical conditions. She referred to a letter from her doctor dated 13 March 2023. She was diagnosed with fibromyalgia in June 2019. She has had that condition ever since. Her doctor said 'This will affect her on a daily basis and will make it hard for her to concentrate and complete tasks'.

Discussion

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.

144. We conclude that the exercise of the discretion involves recognising a material distinction. There is a legally significant difference between the case of an appellant who lodges a notice of appeal and nearly all of the documents required by rule 3(1) inside the time limit, and an appellant who lodges nothing until after the time limit has passed. 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. We accept that the authorities about cases in which documents were missing do not refer to this distinction, and, it follows, do not consider it whether or not it is material to the exercise of the discretion. But 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.

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. The basis of those guidelines is that the EAT takes a strict view of the importance of submitting an appeal within the time limit in rule 3(3). The three appeals with which we are concerned, however, are all cases in which an appellant has substantially complied with that rubric. Moreover, the guidelines are just that. They are not rigid rules of thumb. Rather, they are intended to guide the exercise of a very wide discretion, not to dictate the outcome

of that exercise, as Mummery J made clear in *Abdelghafar* and as Rimer LJ repeated in *Jurkowska* (see paragraphs 24-28 and 53, 57 and 61-63, above).

146. We consider it important to note that, before setting out the specific guidance in *Abdelghafar*, Mummery J was careful to identify the underlying principles. We have set them out at paragraph 24 above. The key principles are the first two (at pages 70-71):

> '(1) The grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the appeal tribunal. The result of an exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses.
>
> (2) As Sir Thomas Bingham M.R. pointed out in *Costellow v. Somerset County Council* [1993] 1 W.L.R. 256, 263, time problems arise at the intersection of two principles, both salutary, neither absolute:
>
> "The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch 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 …. The second principle is that 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."'

Nothing has been said in the subsequent authorities in this Court to derogate from these expressions of principle. Indeed, they have been repeated and endorsed – see for example Underhill LJ in *Green v Mears* at paragraph 8.

147. Three further points follow. 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 (and see paragraph 152.ii., below). 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, a point recognised by Judge 1 (see paragraph 109, above).

148. Despite not expressly recognising the difference between these two types of case which we described in paragraph 144, above, the EAT has sometimes applied a more flexible approach in missing document cases. In one such decision, *Fincham*, time for appealing expired on 22 November 2018. The appellant appealed in time, on 20 November 2018, but one page was missing from the grounds of resistance. The EAT told him on 11 December 2018 about the missing page. He sent the missing page the next day. The Registrar held that the appeal was not properly instituted within the time limit and refused an extension of time. HHJ Auberbach allowed the appellant's appeal. We are grateful to him for his careful review of the relevant authorities, on which we have drawn in this judgment. He referred to *Woods*, to *Sud*, and to two cases in which the EAT had extended time when parts of documents were missing. HHJ Auerbach extended time even though the missing page was relevant, because he did not consider that it was 'material which needed to be seen in order for the EAT to appreciate the substantive basis on which' the appellant sought to appeal (paragraph 37).

149. We recognise that these observations will be seen as a departure from the very strict approach advocated in *Kanapathiar*. But there are two points which undermine the potential value of *Kanapathiar* as a precedent in the current appeals. The first is that the judgment was promulgated after the appellant had agreed not to pursue the appeal, an appeal which, in the event, the appellant lost. It was therefore, as between the parties, an unnecessary decision. Nor did it decide any material issue of law. The relevant part of the judgment is obiter. The second is that it is a decision on the Rules before rule 3(1) was amended by the insertion of what was sub-paragraph (b) at the relevant times in these appeals; a sub-paragraph which has, in turn, been removed by the more recent amendment. It is doubtful, therefore, whether it is authority at all (at the level of the EAT), and if and to the extent that it is, it is only authority about the meaning of rule 3(1) before the insertion of sub-paragraph (b). The effect of the 2005 Practice Statement is to extend, by judicial fiat, that obiter reasoning about the Rules in the form in which they were when these appeals were decided by the EAT. It follows the value of the 2005 Practice Statement, if any, derives solely from its status as a public Statement of the EAT's practice. It is not the same as that of a Practice Direction, which has a statutory basis.

150. The next issue is whether, and if so to what extent, despite these somewhat rickety foundations, *Kanapathiar* has been approved in a binding decision of this court. The judge in the EAT in *Woods* extended the approach in *Kanapathiar* to the version of the Rules which included paragraph 3(1)(b). This court approved his approach and dismissed an application for permission to appeal. Although *Kanapathiar* was cited seemingly with approval by Smith LJ in *Woods*, it should be noted that the decision was made on a renewed application for permission to appeal, rather than a full appeal hearing, and that the respondent was not present nor represented. There is nothing in the judgments to indicate that the decision could be cited in future. Strictly speaking, *Woods* is not binding on this Court.

151. *Jurkowska* was a decision on a full appeal and therefore is binding on this Court. It is a case in which a document was missing, but that factor does not expressly feature in the

reasoning. The reasoning assumes, without expressly deciding, that, if the judgment of the ET is not lodged with an appeal which is lodged within the time limit, the appeal has not been lodged in time, and that the only issue for the court is whether time for appealing should be extended. The comments made by the members of this Court endorsing the strict approach in the *Abdelghafar* guidance were all made in the course of judgments in which the Court upheld a decision to allow an extension of time.

152. We draw four points from the decision in *Jurkowska* which are relevant to the present appeals.

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.

153. In *Sud*, this court allowed the appeal and exercised the EAT's discretion afresh. The case is potentially relevant because it concerns an appeal lodged on the last available day with a page missing from the grounds of complaint attached to one of the two ET1s which related to her appeal. Etherton LJ did not expressly approve any of the previous decisions of this court, as all that was in dispute was whether, in the context of the one issue he identified, and against an agreed legal background, the EAT had erred in law in refusing to extend time in that case. On the facts, not only had the EAT erred in law in not identifying a mandatory relevant consideration, but there was only one way in which the discretion could lawfully have been exercised. Etherton LJ was careful to emphasise that *Sud* was very much a decision on its own facts. There was no extensive discussion of the law. In particular, there was no consideration of the material distinction we have identified as relevant in "missing documents" cases.

154. The judgment in *O'Cathail* was delivered after a full appeal hearing. In dismissing the appeal, Mummery LJ, citing *Kanapathiar* and *Woods*, said that the requirement to lodge specific additional documents with the notice of appeal form within the same time limit was "as strictly enforced as the obligation to lodge a notice of appeal form". But in rejecting Ward LJ's characterisation of this approach in *Woods* as "hard-hearted",

Mummery LJ was careful to observe that "the EAT must be even-handed: it must consider judicially the conflicting positions of *both* parties and the public interest in good judicial administration". These observations are consistent with the important principles underlying the guidance which, as Mummery J, he had given in *Abdelghafar*. In the light of those observations, we do not think it follows that his assertion that the requirement to lodge additional documents with the notice of appeal form is "as strictly enforced as the obligation to lodge the notice of appeal form" means that a failure to include a document or page of a document when lodging the notice of appeal in time is to be treated in exactly the same way as a failure to file the notice of appeal in time. As we have said, there is, in our view, a material distinction between the two circumstances. Although the guidance is strict, the application of the guidance may vary depending on the circumstances.

155. *Green v Mears* is a decision of this court on an appeal and is binding on these appeals, other things being equal. We consider that, when Underhill LJ referred to 'the *Abdelghafar* approach', what he meant was the general approach that the time limit for an appeal should be strictly observed, and that excuses for lodging late appeals will be scrutinised carefully. The only issue which *Green v Mears* decided was whether the general approach in *Abdelghafar* should be modified by the approach in *Mitchell* and in *Denton v White*. On the facts, although it was a case in which documents were missing, the express reasoning and decision turned on the long delay before the defective appeal was lodged.

156. The ratio of *J v K* is also binding on this court. *J v K* decides that, on the facts of that case, the EAT was 'wrong' to refuse an extension of time. None of the reasoning is relevant to the main issues on this appeal. The obiter guidance about medical issues is potentially relevant. We see nothing in Underhill LJ's judgments in either case to undermine our view about the material distinction between cases where the appeal notice is filed out of time and cases where it is filed in time but an additional document, or page of a document, is inadvertently omitted.

157. 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*) 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.

158. Having identified this material distinction, we turn back to the decisions under appeal.

Issue 2: the three appeals
Ridley

159. Mrs Ridley appealed in time. Box 6.1 of the ET3 was blank, which might have given the impression that the ET3 was self-contained. The untitled attachment to the ET3, referred to by the Judge 1 as 'the grounds of resistance' (and in the Practice Direction as 'additional grounds') was the only document which was missing from her notice of appeal. As soon as the EAT told her this, Mrs Ridley sent the missing document to the EAT. The reason why there was a very long delay between Mrs Ridley's attempt to lodge the appeal and her provision of the grounds of resistance was that the EAT, wrongly, as Judge 1 found, emailed her when the EAT should have contacted her by post.

160. Having considered Judge 1's judgment and counsel's submissions (see paragraphs 116-120, above, we accept counsel's submissions on both grounds of appeal. In short, we consider that Judge 1 erred in law in four main ways.

    i. He did not recognise that the distinction to which we have referred in paragraph 143, above, was relevant to the exercise of his discretion. We do not criticise him in that respect, because the authorities do not recognise this distinction.

    ii. He held that a 'mistake' could not be a good reason for delay.

    iii. He accepted that Mrs Ridley's account was honest, but in our view he failed to appreciate Mrs Ridley's explanation for her mistake. She had not understood from her former solicitor precisely what needed to be attached to her notice of appeal. Box 6.1 of the ET3 was blank. The relevant document had no heading at all. She did not understand that the untitled document was the 'grounds of resistance'; or 'additional reasons' (as described in the Practice Direction).

    iv. Judge 1 accepted that Mrs Ridley's health was relevant. Her case was that her stress-related disorder meant that she acted illogically, which contributed to her failure to ask for advice about what was required. Judge 1 erred by giving determinative weight on this issue to his partial account of what the medical evidence showed.

161. We consider that these errors of law are material, and that had Judge 1 not made them, he might have exercised his discretion differently, as *Fincham* and the two other EAT decisions to which HHJ Auerbach referred suggest. We allow Mrs Ridley's appeal. We remit her case to the EAT for the EAT to consider the exercise of the discretion afresh.

Kostrova

162. Ms Kostrova's appeal was lodged, in effect, on the last day, 15 October, a Friday. The attachment to the ET3 was signalled in box 6.1 of the ET3 as 'the attached grounds of resistance', and was headed 'grounds of resistance'. As soon as she was told that she had failed to lodge the attachment (on Saturday 16 October) she did so, and the appeal was treated as properly instituted on Monday 18 October.

163. We consider that Judge 2 erred in law in four respects.
    i. He did not recognise that the distinction to which we have referred in paragraph 143, above, was relevant to the exercise of his discretion. We do not criticise him in that respect, because the authorities do not recognise this distinction.

    ii. He held that a 'mistake' could not be a good reason for delay.

    iii. He overstated the strictness of the EAT's approach in missing document cases, as *Fincham* and the two decisions referred to in *Fincham* show.

    iv. He was prepared to accept that Ms Kostrova was under stress and suffering from medical issues, but failed to appreciate that that was her explanation for what might otherwise have been an inexplicable mistake.

164. For reasons which are similar to those in Mrs Ridley's case, we consider that those errors of law are material (see paragraph 160, above). We allow Ms Kostrova's appeal and remit her case to the EAT for the EAT to reconsider her application for an extension of time afresh.

Taylor

165. Ms Taylor lodged her appeal on the last day. As in Ms Kostrova's case, the grounds of resistance were referred to in box 6.1 of the ET3 and were headed 'grounds of resistance'. As soon as the EAT told her that the grounds of resistance were missing, she emailed them to the EAT.

166. We consider that Judge 3 erred in law in four respects.
    i. He did not recognise that the distinction to which we have referred in paragraph 143, above, was relevant to the exercise of his discretion. We do not criticise him in that respect, because the authorities do not recognise this distinction.

    ii. He also overstated the strictness of the EAT's approach in missing document cases, despite having decided *Fincham* in the appellant's favour. In particular, we consider that he went too far in suggesting that the fact that an appellant had made an unintentional mistake could not be a sufficient reason to extend time (cf *Jurkowska*). The discretion under the Rules is wide, and the EAT must always consider the nature of any mistake which has been made. This error led him, we consider, to fail to understand Ms Taylor's explanation for her mistake, which was that she had carefully followed the structure of the bundle index for the ET hearing. Following those headings she only lodged the document described in the index as the 'ET3'.

iii. He appears to have thought that an appellant could not get an extension of time if she did not lodge the appeal until the last minute (cf *Jurkowska*).

iv. He did not consider whether her particular mistake was contributed to by her medical issues, but rather, considered those issues in isolation.

167. For reasons which are similar to those in the cases of Mrs Ridley and Ms Kostrova, we consider that those errors of law are material (see paragraph 160, above). We allow Ms Taylor's appeal and remit her case to the EAT for the EAT to reconsider her application for an extension of time.

Postscript

Mr Crozier also submitted that the recent amendments to the Rules were relevant to the issues in this appeal. We reject that submission. The amendments are not relevant to the construction of the Rules before they were amended. The amendments suggest no more than that the rule-maker now considers that, as was the position before the amendment in 2002, an appellant should not be required to include the ET1 and ET3 when an appeal is lodged, and that the EAT should have an express discretion to extend time in the case of 'minor' breaches of rule 3(1).