Neutral Citation Number: [2023] EAT 27

Case No: EA-2021-000543-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 March 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT)

- -

Between :

MISS S PALIHAKKARA

Appellant

- v –

THE ENGLISH SPORT COUNCIL

Respondent

- -
- -

Miss S Palihakkara the **Appellant** in person
Ms K Gallafent KC (instructed by Fieldfisher LLP) for the **Respondent**

APPEAL FROM REGISTRAR'S ORDER
21 February 2023

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 3 March 2023

Summary

Practice and procedure – appeal from Registrar's order – extension of time

The claimant lodged an appeal 675 days out of time. The EAT Registrar having refused to extend time, the claimant appealed.

Determining the application to extend time afresh (**Muschett v London Borough of Hounslow** [2009] ICR 424 applied), whilst accepting that the claimant had suffered from mental health problems during the period in issue, that did not explain or excuse the failure to institute her appeal in this case (**J v K** [2019] EWCA Civ 5 applied). Recognising that the claimant's mental ill-health may have impacted upon her ability to appropriately engage with the legal proceedings at various points, she had in fact been able to lodge an in-time appeal (against a different ET decision) within the 42-day period that applied to the current appeal. Moreover, even if the claimant's ill-health provided any explanation for her default in failing to lodge the appeal within the required 42 days, it did not explain her continuing failure to do so for the entirety of the 675 days in issue. The claimant had been able to identify and articulate her complaints against the ET decision she was seeking to challenge, both in subsequent hearings before the ET and in a yet further appeal that she was able to lodge before she filed the present appeal. There was, therefore, no good explanation for the claimant's default. More generally, this was not a case where there were any circumstances that would justify the exceptional step of granting an extension of time. There was no proper basis for concluding that those acting for the respondent had misrepresented matters to the Employment Tribunal and the appeal was rendered academic as the claimant had in fact complied with the unless order that was the subject of her complaint. This was a case where the delay was very significant and there was no merit in the proposed appeal, in particular given that the full merits hearing of the claimant's claims had already taken place and the proposed grounds of appeal could have no effect on the decision reached at that hearing.

THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT):

Introduction

1. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is an appeal against the Registrar's order, seal dated 20 April 2022, refusing the claimant's application for an extension of time to lodge her appeal. The claimant seeks to appeal against a judgment of the London Central Employment Tribunal, Employment Judge Hodgson sitting at a preliminary hearing on 1 April 2019 ("the ET"). The ET's judgment was sent to the parties on 8 April 2019. Pursuant to the **Employment Appeal Tribunal Rules 1993** ("the EAT Rules"), any appeal against the ET's decision had to be lodged, with all the necessary supporting documents, within a period of 42 days from the date the ET's written reasons were sent out. In this case, time therefore expired at 4.00 pm on 20 May 2019.

2. The claimant's appeal was lodged on 25 March 2021, 675 days out of time.

Preliminary Matters

3. Prior to the hearing in this matter, the claimant made a number of applications for this listing to be postponed and for other alterations to be made to the directions that had otherwise been given by the EAT. By email of 6 February 2023, the EAT Registrar refused the claimant's application for a postponement, observing that the claimant had not provided any specific medical evidence in support of that application. An exceptional (short) extension of time was, however, permitted for the lodgement of the hearing bundle.

4. The claimant made a further application for a postponement of the hearing, which was then placed before me. For the reasons explained in my order seal dated 8 February 2023, I also refused the application, although I allowed a further short extension of time to lodge the hearing bundle albeit making clear that if no bundle was lodged in accordance with my direction, the hearing would proceed on the basis of the material that was already before the EAT. The claimant then made a yet further

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application for a postponement of the hearing. For the reasons explained in my order seal dated 14 February 2023, I again refused that application.

5. During the course of Monday 20 February 2023, the day before the listing in this matter, the claimant requested that the hearing be conducted remotely, asking that she be permitted to attend by audio link only. By letter of 20 February 2023, my directions in this regard – allowing the claimant's requests – were communicated to the parties.

6. Further communications were received from the claimant during the course of Monday 20 February 2023 and both before and after the hearing on Tuesday 21 February 2023 and then on 22 February 2023. Those communications were put before me and I have read all the material thus submitted. The hearing on 21 February 2023 took place by MS Teams and, at her election, the claimant was permitted to keep her camera off throughout. The claimant addressed me fully, both in her initial submissions and by way of reply, and a 15 minute break was allowed, at the claimant's request, immediately following the respondent's submissions.

Background

7. The ET proceedings in issue in this matter date back to 7 April 2018, when the claimant presented her claim against the respondent. The claimant had worked for the respondent, through an agency, Robertson Bell, from 9 October to 10 November 2017. At a preliminary hearing before EJ Glennie, on 2 August 2018, it was agreed that the claims brought against the respondent were of direct race discrimination and victimisation.

8. On 4 October 2018, the claimant lodged a new claim, against Robertson Bell.

9. A further case management preliminary hearing took place before EJ Wisby on 2 November 2018, when additional directions were given.

10. On 14 February 2019, there was a preliminary hearing before EJ Brown, at which the claim against Robertson Bell was struck out and the claimant's application to amend her claim against the respondent was refused. It appears that EJ Brown also made case management directions, including

an unless order requiring the claimant to comply with orders that had previously been made at the 2 November 2018 hearing.

11. On 26 February 2019, the claimant applied for an extension of time to comply with the unless order, stating that she was having mental health issues. The claimant has explained that on or about 20 September 2018, she was involved in a car accident and, as a result, suffered physical injury by way of whiplash and back injury, and trauma which affected her mental health and lasted longer than the physical effects of the accident.

12. On 27 February 2019, the claimant filed some documents and reiterated her request for an extension of time. On 28 February 2019, the claimant applied for a reconsideration of EJ Brown's decision. That application was refused by EJ Brown on 28 March 2019.

13. In the meantime, on 8 March 2019, EJ Brown directed there be a hearing to consider the claimant's application for an extension of time for the unless order and/or to consider whether there had been compliance with that order.

14. On 12 March 2019, the claimant sent further letters to the ET, in which she appeared to seek a stay of the proceedings and a further extension of time. On 19 March 2019, she again wrote to the ET, saying she had further health difficulties arising from a migraine and dealing with various other points.

15. The matter then came before EJ Hodgson at a further preliminary hearing on 1 April 2019; the record of this hearing and the orders made were set out in a document sent to the parties on 8 April 2019.

16. The claimant did not attend the hearing on 1 April 2019; the respondent was represented by leading counsel. EJ Hodgson noted that the claimant had previously been alerted to the need to provide medical evidence (a point that EJ Wisby had referred to in her 2 November 2018 decisions and which had been reiterated by EJ Brown in her letter of 8 March 2019). Although no new medical evidence had been filed to explain the claimant's non-attendance at the hearing, the respondent referred EJ Hodgson to a letter from the claimant's GP of 2 November 2018, which recorded historical

difficulties with migraine from November 2017; it was also noted that the claimant had, herself referred to difficulties arising from migraine and to mental health and anxiety issues. At the same time, EJ Hodgson observed that the claimant had been able to engage extensively with the proceedings by writing a number of lengthy and highly detailed letters.

17. Considering the question of compliance with the unless order, EJ Hodgson determined there had been material compliance. Although this had been later than the required date, an extension of time had been sought and was granted and the claim was not to be treated as struck out. EJ Hodgson then considered the claimant's application for a stay, noting that the claimant was "*engaging in extensive correspondence*" and that the medical evidence "*did not indicate the claimant was unable to attend at a hearing or conduct the case".* Accepting that the claimant might be suffering from anxiety, that was not considered unusual and it did not, of itself, prevent the claimant preparing for, or attending at, a hearing. The application for a stay was refused. EJ Hodgson went on to give further case management directions for the case, including an unless order in relation to the claimant's statement.

18. By a notice of appeal dated 17 April 2019 and filed with the EAT on 18 April 2019, the claimant sought to challenge the decisions of EJ Brown made at the hearing on 14 February 2019 (sent out on 7 March 2019) and refusing the application for reconsideration (sent out on 28 March 2019). The claimant did not, however, lodge an appeal against the decision of EJ Hodgson within the 42 days allowed for such a challenge.

19. A hearing in the appeal against EJ Brown's decision ultimately took place before HHJ Auerbach on 21 January 2021, at which the claimant was represented by counsel, acting *pro bono*. The appeal was dismissed.

20. In the meantime, the claimant continued to correspond with the ET. By letter of 19 February 2020, she made various complaints regarding the unless order made on 1 April 2019, describing it as an "*abuse of process*", and questioned whether written reasons had been provided for the order made on that occasion. The claimant also raised a number of concerns regarding the respondent's conduct

in preparations for the full hearing of her claims and requested that that hearing be extended or delayed to accommodate her potential claim against Robertson Bell (which was predicated upon her appeal against EJ Brown's earlier decision, made on 14 February 2019, being allowed). By letter of 28 February 2020, EJ Brown responded to the claimant stating that the full merits hearing would proceed as then listed (in May 2020) but that there would be a further one hour preliminary hearing to ensure that the case was ready for that hearing. Also, by letter of 5 March 2020, the ET wrote clarifying that EJ Hodgson's written reasons had been contained in the document sent out to the parties on 8 April 2019.

21. On 30 March 2020, the further preliminary hearing took place (by telephone) before EJ Brown, at which the claimant attended in person and the respondent was again represented by leading counsel. Given the restrictions that had by then been put in place due to the global pandemic, the ET directed that the full merits hearing of the claimant's claims would be adjourned and re-listed once final hearings were again taking place. The claimant raised her concerns that the respondent had not exchanged all its witness statements at precisely the time ordered by EJ Hodgson and she made clear that she felt this was unfair (in particular, given that she had been subject to an unless order). EJ Brown observed that if witness statements had been exchanged well in advance of a hearing, it was likely to be fair for the hearing to proceed as the other party would still have plenty of time to prepare. In respect of a particular statement that had been served after the respondent had seen the claimant's own statement, EJ Brown advised that this could be raised by the claimant at a yet further preliminary hearing, which would be listed in advance of the re-listed full merits hearing. There was also a discussion about the reasons for EJ Hodgson's order made on 1 April 2019 and EJ Brown confirmed that these were contained in the document that had been sent out on 8 April 2019 (recording that this had also been confirmed by EJ Hodgson), noting that, in any event, the claimant had complied with the unless order over a year ago and there seemed little point pursuing this issue further.

22. On 16 April 2020, the claimant lodged an appeal against the ET decision communicated on 5 March 2020. That was placed before me to consider on the initial on paper "sift" in January 2021.

As the ET's letter of 5 March 2020 had also referred to EJ Brown's communication of 28 February 2020, I considered both items of correspondence. Noting that the claimant had complained that the unless order made at the hearing on 1 April 2019 had been "*obtained by misleading the Employment Judge*" and was questioning whether written reasons had been provided, I observed as follows:

> "I do not have a copy of the ET's case management decision of 1 April 2019 so cannot form a view as to whether what was provided in that document constituted written reasons. There is, however, no appeal before me against the decision of 1 April 2019 (and the appeal I am considering would be out of time to challenge that decision) and I am unable to see that any arguable ground of appeal arises in this regard from the ET's confirmation of the position in its letter of 5 March 2020. …"

23. The full merits hearing of the claimant's claims was re-listed for a six-day hearing, to commence on Friday 5 February 2021. On 18 January 2021, the claimant applied for that hearing to be postponed, due to her ill-health. In particular, the claimant relied on letters of 8 January and 15 January 2021, from Consultant Clinical Psychologist Mr Modaresi.

24. Notwithstanding the respondent's objections, the claimant's application to postpone was allowed by EJ Glennie, who directed that the first day of the listed hearing should instead be used for a further preliminary hearing. In explaining the decision to postpone, EJ Glennie observed that whilst Mr Modaresi had not said in terms that the claimant was not currently fit to attend the full merits hearing, it could be inferred that there was a significant prospect of relapse if she did so.

25. The medical evidence thus provided from Mr Modaresi confirmed that the claimant had a "standing diagnosis of Depression and Anxiety", explaining as follows:

> "She was receiving support from our psychology team within the Harrow Community Mental Health Team until the end of 2020. She reported that she developed her mental health difficulties as a result of particularly harsh treatment by her then employer … [the respondent], which caused her considerable distress. This was later compounded by car accident related injuries affecting the patient.
>
> In my professional opinion this condition causes [the claimant], to have difficulty with concentration, attention and general management of administration tasks that would be required for any real time management of complex and coordinated set of tasks. Consequently, I anticipate that, [the claimant] will have difficulty with legal processes as she can become affected by rumination, as well as get fixated on excessive detail or responses, and thereafter get lost in detail. This would have been particularly prevalent in the

> period between late 2017 to late 2020.
> I understand she has already written some extensive letters to the tribunal which may represent an example of this overt attention to detail at the expense of practical functionality. I anticipate that [the claimant] was not sufficiently mentally well to conduct or participate in any meaningful legal proceedings at that time. It is my belief she is not fit for legal proceedings, especially of this complex nature, for about another 6 months.
> Given the nature of anxiety and depression the time frames required for meaningful recovery, and given some lapses in May-June and November-December 2020, [the claimant] will continue to remain at risk of significant relapse of her symptoms if she is re-exposed to various triggers (such as court proceedings) for about a 6 month period. I would anticipate her full recovery and a period after that to take approximately 12 months."

26. On 5 February 2021, the further preliminary hearing took place, this time before EJ Hildebrand. The claimant attended this hearing and the respondent was represented by leading counsel. The ET made various case management directions for the future conduct of the proceedings; it gave the respondent leave to rely on the witness statements it had served notwithstanding the claimant's objections. It was noted that the claimant remained concerned that she had been the subject of an unless order imposed on 1 April 2019, when the respondent had not. EJ Hildebrand observed, however, that:

> "1.4 … there was no unless order operating on the Respondent and there was no basis I was aware of to exclude the Respondent from relying on those statements so exchanged. Such a procedural action would gravely compromise their ability to mount any defence to the claim thereby possibly determining it against them. Further there was no breach in this instance of an order requiring such a sanction. I also accept the argument of the Respondent that these statements will have been exchanged two years and seven months in advance of the now projected hearing, so there can be no question of surprise."

27. EJ Hildebrand also recorded the claimant's continued complaint as to the adequacy of the reasons given for the order of 1 April 2019, but stated:

> "1.7… That order was not appealed as far as I am aware. There has been no application for reconsideration. It is a matter over which I have no jurisdiction. The Tribunal has already informed the EAT that written reasons were provided for the decisions made. Time for appeal and reconsideration has long past. HHJ Eady commented on the Claimant's challenge in this respect indicating she could find no arguable ground of appeal in this regard. I have no basis to comment further on this issue. Indeed it would be positively wrong for me to do so. It is not a live issue. It should be left in the past."

28. The record of the hearing before EJ Hildebrand was sent to the parties on 11 February 2021.

On 25 March 2021, the claimant lodged an appeal against that decision. It is within that Notice of Appeal that the claimant stated (at paragraph 3) that she:

> "3. … would like to make a retrospective appeal in respect of the decision of the 1st April 2019 PH, in which this Unless Order was issued and ask that it be varied so that there is sufficient consequence to both parties of non-compliance."

29. The claimant's appeal against EJ Hildebrand's decision (EA-2021-000471-LA) was initially considered on the papers by HHJ Shanks, who took the view that it disclosed no arguable question of law. The claimant exercised her right to seek an oral hearing under rule 3(10) EAT Rules, which was heard by Griffiths J on 13 October 2021. Griffiths J also took the view that the claimant's appeal against EJ Hildebrand's decision was unarguable. He went on, however, to also consider the "retrospective appeal" against the decision of EJ Hodgson, made at the preliminary hearing on 1 April 2019. Noting that any such appeal against EJ Hodgson's decision (sent to the parties on 8 April 2019) was nearly two years' out of time, Griffiths J observed as follows:

> "30. [First] … I have no doubt about the honesty of the explanation which has been given to me for the delay. But it has not been a full explanation because it is not at all supported by any medical evidence and it does not really draw much distinction between any part of the period approaching two years of the delay. Therefore, it is impossible to … conclude that throughout this period when the appeal was out of time, ending with the time when it was finally presented, the circumstances of the appellant's health were so poor that this should be regarded as a rare and exceptional case in which an extension is granted.
> 31. The second point is to have regard to the length of the delay and the explanation for the delay. The length of the delay is very, very long much longer than we are used to seeing even in cases where an extension of time is applied for and therefore it is already a very, very difficult application to see succeeding. But the explanation also is unsatisfactory because it is vague, it does not deal precisely with what is happening throughout the period and it is completely unsupported by any medical evidence.
> 32. Therefore, I think it is not really arguable that time would be extended in this case, but I am nevertheless going to go on to consider the merits of the proposed appeal, even assuming it had been brought in time.
> 33. What is asked is for the decision of 1 April 2019 to be varied so that there is "sufficient consequence to both parties of non compliance". Again, the appellant is a little bit vague about what exactly the variation should be, and again what is said to me is that there should have been some sanction on the respondent. So, for example, the unless order should have been an unless order against the respondent as well as against the appellant. I think that the reason for that is because in the event the respondent did not serve the witness

> statements by 4 pm on the appointed date and therefore if there had been an unless order the respondents would have been in breach of that unless order. A retrospective change in the order of April 2019 cannot really be justified. There was no reason for EJ Hodgson to think when he made the order that the respondents were themselves in breach of the order. The appellant was clearly not ready with her witness statements by the original planned date and therefore to impose an unless order giving her some extra time before the unless order deadline fell was an appropriate reaction to what was known about her. Judge Hodgson had no information to suggest that the respondents were in breach of any order, and because the order was for exchange of statements, they were not in breach of an order because they were not bound to produce their statements at a point where the appellant was not able to produce hers. Therefore, I do not think there is any reasonable basis for arguing that Judge Hodgson made a mistake in failing to impose an unless order, also, on the respondents.
> 34. Moreover, looking at the remedy that is sought on this proposed appeal, Judge Hodgson did not make an unless order, and therefore the respondents, while missing the deadline by serving their statements after 4 pm, knew that there would be no serious consequence. If the order were varied retrospectively, what then? Is it said that, because they were retrospectively in breach of an order which was not in force at the time, they should now be considered in breach of it, so that there should be some adverse consequence imposed on them - in the same breath, as it were, that the retrospective order is imposed upon them in the first place? One only has to state the proposition to see that it is absurd, unjust, and unarguable. The appellant says that she does not say they should have had their claim struck out but that their witness statement should not have been allowed in. That would also have been completely inappropriate; it would have been completely disproportionate; and it is inconceivable that it would happen.
> 35. From every point of view, therefore, this proposed appeal against the original order is hopeless. It is brought out of time. There is no reasonable prospect of the time being extended. The underlying merits are lacking. Therefore, for all the reasons I have given, … I have come to the view that the appeal should not be allowed to proceed pursuant to my reconsideration under rule 3(10) of the opinion expressed by a previous judge under rule 3(7) - and the case is now at an end."

30. Although Griffiths J thus addressed the "retrospective appeal" as if it was one of the grounds in the appeal before him, it had in fact been treated as a separate appeal (being against an entirely separate decision of the ET) and, as it had been filed out of time, considered in the first instance by the Registrar. Having received submissions from both sides as to whether there should be an extension of time, the Registrar, by her order seal dated 20 April 2022, declined to extend time. It is against that decision that the claimant now appeals.

31. Meanwhile, the full merits hearing of the claimant's claims came before a three-member ET,

which sat over some 11 days (with two further days of deliberations in chambers) during the course of February, March and May 2022. The reserved Judgment was sent to the parties on 30 May 2022, by which the ET dismissed the claimant's claims. I understand that the claimant has filed a further appeal against that decision.

The approach

32. The 42-day time limit for presenting an appeal against a judgment of the ET is both generous and clear. Notwithstanding the generous six-week period for lodging an appeal to the EAT, there is a discretion to extend time, as provided by rule 37 of the **EAT Rules 1993**. The Registrar has declined to exercise that discretion but, as was explained by the EAT at paragraph 6 of **Muschett v London Borough of Hounslow** [2009] ICR 424, appeals from the Registrar's decision in this regard entail a fresh decision by the EAT Judge as to whether to extend time; it is not a decision as to whether the Registrar erred in law (and see **Nicol v Blackfriars Settlement** [2018] EWCA Civ 2285 at paragraph 8).

33. The approach I should adopt in deciding whether or not to exercise the discretion afforded by rule 37 is well-rehearsed in the case-law, as summarised at paragraph 4.7 of the EAT's **Practice Direction 2018** which signposts the guidance laid down by Mummery J (as he then was) in **United Arab Emirates v Abdelghafar and anor** [1995] ICR 65, subsequently approved by the Court of Appeal, for example in **Aziz v Bethnal Green City Challenge Co Ltd** [2000] IRLR 111 CA.

34. As set out in **Abdelghafar** the relevant questions on an application for an extension of time in this context are as follows: (1) what is the explanation for the default? (2) does that amount to a good explanation? (3) are there circumstances which justify the EAT taking the exceptional step of granting an extension of time? As was further observed in **Abdelghafar** at p 69H: "*An extension of time is an indulgence requested from the court by a party in default.*" Moreover, an explanation in this regard may not be sufficient unless it explains why the notice of appeal was not lodged throughout the entirety of the period; see **Muschett** paragraph 5(vi).

35. Even where a party is unrepresented, the requirement to comply with the time limit is clear; there is no excuse even in the case of an unrepresented party for the ignorance of time limits (see **Abdelghafar** at p 71C-D).

36. The position of a would-be appellant who suffers from mental health difficulties was considered by the Court of Appeal in **J v K** [2019] EWCA Civ 5, where it was accepted that a party's mental condition or other disability will be a relevant consideration in the EAT's decision whether or not to extend time. In that case, Underhill LJ observed that the starting point would be to decide whether the available evidence demonstrates that the appellant was in fact suffering from mental health difficulties at the relevant time, noting that:

> "39. (1) Such a conclusion cannot usually be safely reached simply on their say-so and will require independent support of some kind. That will preferably be in the form of a medical report directly addressing the question; but in a particular case it may be sufficiently established by less direct forms of evidence, e.g. that the applicant was receiving treatment at the appropriate time or medical reports produced for other purposes."

37. Where that first question is answered in the appellant's favour, Underhill LJ stated that the next issue will be whether the condition in question explains or excuses (possibly in combination with other good reasons) the failure to institute the appeal in time. In that regard, Underhill LJ further noted that:

> "39. (2) … Mental ill-health is of many different kinds and degrees, and the fact that a person is suffering from a particular condition – say, stress or anxiety – does not necessarily mean that their ability to take and implement the relevant decisions is seriously impaired. The EAT in such cases often takes into account evidence that the applicant was able to take other effective action and decisions during the relevant period. That is in principle entirely acceptable, … (though it should always be borne in mind that an ability to function effectively in some areas does not necessarily demonstrate an ability to take and implement a decision to appeal). Medical evidence specifically addressing whether the condition in question impaired the applicant's ability to take and implement a decision of the kind in question will of course be helpful, but it is not essential. …"

38. Even if the EAT concludes that the failure to institute the appeal in time was due (in whole or in substantial part) to the appellant's mental health issues, Underhill LJ warned that, although justice

would generally require the grant of an extension:

> "39. (3) … there may be particular cases, especially where the delay has been long, where it does not: although applicants suffering from mental ill-health must be given all reasonable accommodations, they are not the only party whose interests have to be considered."

Discussion and conclusions

39. Following the guidance in **Abdelghafar**, the first question I have to ask is a factual one: what is the explanation for the default in this case?

40. The claimant has told me that she was too mentally unfit to submit her appeal within the 42-day deadline. She has said that at that time, she was struggling to eat and feed herself, to pay her household bills, and to make even relatively basic decisions. The claimant has pointed to the requests she made to the ET for the proceedings to be stayed and says that it was a reflection of her mental health condition that she did not know what evidence she needed to provide in order to demonstrate that she had these difficulties. She has emphasised the impact that the unless order made on 1 April 2019 had on her and had told me that she had a complete breakdown at that point. Acknowledging that this would not necessarily explain the entirety of the delay, the claimant has said that although she had some improvement in her condition, the pandemic then hit and that was very difficult for her. She has also told me of the health difficulties of a close relative in 2020 (I will not go into further details given the rights to privacy of that individual) that further took its toll on her. The claimant further claims that those acting for the respondent misrepresented the position to the ET at the hearing on 1 April 2019. In particular, she says that they stated that they were ready to exchange witness statements but that was not the case (as was demonstrated subsequently) and they failed to provide the ET with the complete picture regarding her health issues. The claimant objects that regard had apparently been had to her (sometimes lengthy) correspondence when that was in fact a sign of her ill-health (her inability to focus and her fixation on excessive detail).

41. I accept that, during the period in question, the claimant has suffered mental health issues that have at times impacted upon her ability to engage fully or appropriately with these proceedings. To

some degree, what the claimant has said is supported by the medical evidence available. Although this is limited in nature, it does confirm that the claimant has a "*standing diagnosis*" of depression and anxiety, which may well have caused her difficulties in engaging with the legal process. The best evidence available to me is in the form of the letter from Mr Modaresi, from January 2021. Whilst not expressly dealing with the 42-day period after 8 April 2019, that does say that the claimant may have experienced difficulties throughout the period from late 2017 to late 2020. I have also had regard to such other medical evidence that is available, which has confirmed particular issues experienced by the claimant at specific times (for example, in early March 2022); that material is less helpful than the opinion provided by Mr Modaresi, but I accept that it also paints a picture of someone who has struggled with various health issues.

42. Having thus considered the evidence available, I have asked myself whether I am satisfied that this demonstrates that the claimant was in fact suffering mental health difficulties at the relevant time (that is, for the 675 days that I have to consider, between 8 April 2019 and 25 March 2021)? Given the "*standing diagnosis*" confirmed by Mr Modaresi, I am prepared to answer this in the affirmative. Although Mr Modaresi does not specifically address the entirety of the period I have to consider, I note that he was writing in January 2021 and considered both the period to the end of 2020 and that going forward into 2021 (advising that the claimant might still suffer risk of relapse). Adopting a broad approach to what might be described as "mental ill-health", I therefore answer the first question identified in **J v K** in the claimant's favour.

43. Turning then to the second question posed by Underhill LJ in **J v K**, I do not, however, find that the claimant's mental health condition explains or excuses the failure to institute her appeal in time in this case. Although I have recognised the impact that the claimant's difficulties might have had on her ability to appropriately engage with these legal proceedings (in particular, I can accept Mr Modaresi's opinion as a potential explanation for some of the claimant's correspondence), the fact is that the claimant *was* able to institute an appeal within the relevant 42-day period: that is precisely what she did in respect of EJ Brown's decisions made at the hearing on 14 February 2019 and on 28

March 2019, when refusing the claimant's reconsideration application. I note that the claimant says that it was the decision to make the unless order that caused her to relapse, but the effect of the order was not such that she could not file an appeal within the following two weeks. Given that the claimant was plainly capable of instituting an appeal to the EAT on 17 April 2019, I do not find that her mental ill-health explains or excuses her failure to similarly institute an appeal against the decision of EJ Hodgson sent to her on 8 April 2019.

44. Even if I was wrong about the position of the claimant during the initial 42-day period, I do not find that her mental health difficulties explain the entirety of the delay in this case. As the respondent has observed, in further hearings before the ET, the claimant was able to both identify and articulate the very complaints that she seeks to make in the current appeal. The points made by the claimant at the preliminary hearing on 30 March 2020 (before EJ Brown) and then again at the preliminary hearing on 5 February 2021 (before EJ Hildebrand) demonstrate that the claimant's depression and anxiety did not in fact mean that she could not identify and express her concerns. More than this, however, the claimant was also able to file a further appeal, which she did on 16 April 2020. Although that was an appeal against the decision communicated by ET letter of 5 March 2020, the claimant made a number of complaints regarding the unless order. The evidence before me thus demonstrates that, notwithstanding her mental health issues, the claimant was able to engage with the appeal process, lodge an appeal within the relevant time limit, and set out her complaints in a way that was entirely clear.

45. Returning then to the questions identified in **Abdelghafar**, I am not satisfied that I have been provided with an explanation for the delay in this case or, even if I was wrong about the initial 42-day period, for an explanation that would excuse the entirety of the delay. It is certainly not a good explanation. That is not to say that I do not accept the medical evidence relating to the claimant's mental ill-health, or that I underestimate the impact of her depression and anxiety, but the evidence before me simply does not support a finding that these are matters that in fact impeded the claimant's ability to lodge this appeal in time.

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46. Notwithstanding my findings, I have also gone on to consider, more generally, whether there are any circumstances which would justify my taking the exceptional step of granting an extension of time. The first point to note is the very significant delay in this case. As the Court of Appeal recognised in **J v K**, even where the default arises from a mental health condition, a long delay may mean that it would be wrong to grant an extension of time. In the present case, the lengthy delay has meant that further steps have been undertaken in the proceedings – including the claimant's service of her witness statement in compliance with the order – which render the appeal academic. Whilst the circumstances might be exceptional, they do not support the granting of a 675-day extension of time.

47. The claimant contends that I should take into account the misrepresentations made by the respondent before the ET and the unfair nature of the unless order imposed on her when there was no equivalent direction made against the respondent. As Griffiths J has already observed, however, there was no reason for EJ Hodgson to think that the respondent had acted in breach of any order and, thus, that an unless order was necessary against that party. And the fact that the respondent subsequently provided its witness statements after 4 pm on the day of exchange does not mean that it should be inferred that this would have warranted a pre-emptive unless order. Moreover, although I appreciate that the claimant will not accept this, there is no proper basis for considering that the respondent made any misrepresentation to the ET. It is apparent that those acting for the respondent properly drew EJ Hodgson's attention to medical evidence relating to the claimant, and explanations have been given for the subsequent late provision of witness statements that would not support any suggestion of misrepresentation. Even if there was any basis for the claimant's concerns, however, (and I make clear that I do not find that there was), the point goes nowhere: given the claimant's earlier conduct of the proceedings, EJ Hodgson was entitled to take the view – independently of any representation made by the respondent – that the imposition of an unless order was a necessary case management step to ensure the claimant's engagement with the proceedings. There was no reason for him to consider it was necessary to adopt the same approach in respect of the respondent.

48. Although it is not always appropriate to consider the merits of the proposed appeal when determining whether to grant an extension of time, it can be relevant to do so where the appeal would be academic or where it is apparent that it is totally without merit. That, in my judgement, is the position here. As a number of Judges have now pointed out: the unless order has no continuing implications in this case; it was effectively discharged upon the claimant's compliance with its terms. The proceedings have since progressed to trial and the full merits hearing of the claim took place in the early part of 2022. Even if an extension of time was allowed for the present appeal and it progressed to a full hearing, it could have no effect on the decision reached at that hearing.

49. For all the reasons given, therefore, I refuse the application to extend time for the lodgement of this appeal and duly dismiss the appeal against the Registrar's order.

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