Neutral Citation Number: [2024] EAT 59

Case No: EA-2021-001022-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 March 2024

Before:

HIS HONOUR JUDGE AUERBACH

Between:

MR M JASIM

Appellant

- and -

LHR AIRPORTS LIMITED

Respondent

MS FFYON REILLY for the **Appellant**
MS SORCHA DERVIN (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondent**

APPEAL FROM REGISTRAR'S ORDER
Hearing date: 28 March 2024

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – time for appealing

The claimant in the employment tribunal submitted a notice of appeal which would have been in time had it been accompanied by all the required attachments. At the time the EAT's Rules required that these include the claim and response forms.

The tribunal's decision had arisen from two claims which were heard together. The attachments with the notice of appeal included, in respect of one claim, the particulars of claim and grounds of resistance, but not the ET1 and ET3 forms. The absence of those forms meant that the appeal in relation to the decision arising from that claim was not properly instituted at that time. However, the appeal in respect of the decision arising from the other claim (for which the ET1 and ET3 and the particulars of claim and grounds of resistance had been provided) had been properly instituted. **Sud v London Borough of Ealing** [2011] EWCA Civ 995 followed and applied.

Applying Rule 37(5) of the EAT's Rules and the guidance in **Melki v Bouygues E and S Contracting UK Limited** [2024] EAT 36, in this case the omission of the ET1 and ET3 was a minor error which had been rectified. It was also just to extend time.

When considering whether it is just to extend time under Rule 37(5): (a) the EAT should weigh the balance of justice or injustice to both parties, were it either to grant or refuse the extension; (b) there is greater scope for the EAT to be forgiving of mistakes when exercising its discretion under Rule 37(5) than under the jurisprudence relating to the discretion under Rule 37(1); (c) the three particular factors mentioned in the sub-rule must be considered and treated as relevant; (d) what other circumstances are relevant is a matter for the appreciation of the EAT on the facts of the given case; (e) what weight to attach to each of the factors mentioned in the sub-rule and each of the other relevant circumstances is a matter for the EAT.

HIS HONOUR JUDGE AUERBACH:

1. The claimant in the employment tribunal brought two claims in two claim forms. The first claim included complaints in particular that he had been subjected to a series of detriments on grounds related to union membership or activities, and on grounds of having made protected disclosures. The second claim, begun following the termination of his employment, included a complaint of unfair constructive dismissal.

2. In a decision arising from a hearing in May 2021, all of the complaints in both claims were dismissed. The claimant seeks to appeal from that decision. The EAT's Registrar decided that the appeal was properly instituted out of time and declined to extend time. The claimant appealed to a judge of the EAT and I have heard that appeal today.

3. It is common ground that, following the judgment and reasons being sent to the parties on 19 July 2021, on 30 August 2021 the claimant emailed to the EAT his Notice of Appeal with certain attachments, in particular a copy of the judgment and reasons, and the Particulars of Claim, Grounds of Resistance, and Claim and Response Forms in relation to his second claim, and the Particulars of Claim and Grounds of Resistance in relation to his first claim. But it is common ground that he did not send the actual Claim Form ET1, and Response Form ET3, in relation to his first claim. On 30 August the claimant was potentially in time to appeal, but those two documents were missing.

4. On 29 November 2021 the EAT's administration wrote to the claimant identifying that those two documents were missing and indicating that, on that basis, the appeal was presently regarded as not properly instituted. The claimant then provided those documents attached to an email of 2 December 2021, but, because of the time of day when that email was received, it was treated as having been received on 3 December. The Registrar found

that it was only when those documents were received that the appeal was properly instituted, some 95 days out of time.

5. Although this is described as an appeal from the Registrar's order, in the established way I am considering the matter entirely afresh, and reaching my own decision today based on all the information and materials available to me, the skeleton arguments that have been tabled, and the oral submissions I have heard from Ms Reilly for the claimant and Ms Dervin for the respondent.

6. I am hearing this matter now, in March 2024, which, in point of time, is following the amendment of the EAT's Rules on 30 September 2023. That means that, if, or to the extent that, I find that this appeal is out of time, there are now two routes available to an extension of time. The first is, as always, under Rule 37(1) of the EAT's Rules. But the second is, now, under the new Rule 37(5), it having been determined in **Melki v Bouygues E & S Contracting UK Limited** [2024] EAT 36 that Rule 37(5) may be applied in respect of a failure to comply with the requirements as they stood prior to the amendment to the Rules, in particular the former requirement for the Notice of Appeal to be accompanied by copies of the claim and response, which was in force prior to 30 September 2023.

7. For the purposes of what I have to decide, a potentially relevant consideration is the explanation for the failure to attach copies of the ET1 and ET3 in respect of one of the claims when lodging the appeal on 30 August, and I will return to this.

8. The starting point is to consider whether this appeal was out of time in respect of either, or both, of the claims in respect of which the tribunal gave its decision dismissing the underlying complaints. That issue arises because Ms Reilly submits that there were two separate claims with two separate claim numbers, and that, in respect of one of them, all of the documents that were required by the EAT's Rules at the time when the Notice of

Appeal was tabled were attached. She concedes that, in respect of the other claim, under the Rules as they stood at the time, the absence of the Form ET1 and Form ET3 means that, in respect of *that* claim, the appeal was not properly instituted in time; but in respect of the appeal from the tribunal's decision so far as it related to the claim for which those forms were provided, she says it was properly instituted. Ms Dervin submits that the failure to enclose the ET1 and ET3 forms in respect of *one* of the claims means that the appeal was not properly instituted in its entirety, because, in respect of the appeal as it related to either claim, copies of *all* the ET1 and ET3 forms in these proceedings needed to be provided.

9. I was referred to three authorities that touch on this issue. The first is a decision of the Court of Appeal: **Sud v London Borough of Ealing** [2011] EWCA Civ 995. In that case there were also two claims, and the paperwork was complete in respect of one but not the other, as there was a missing page. Etherton LJ, with whom Laws and Longmore LJJ agreed, rejected an argument that the two claims, because they had been dealt with together, with issues ranged across the two of them considered in a single decision of the tribunal, should be treated as one and could not be disentangled from each other. He said this:

> **"28. I cannot agree with that analysis. It seems to me, first of all, perfectly clear that at all times there were two separate claims before the ET. They are identified separately by the ET, both in the endorsement on each page of the ET's decision and in the decision itself. Indeed, at the appeal stage, in acknowledging receipt of the documents lodged for the purpose of the appeal by the appellant, the EAT explicitly recognised that there were two ET1s, both of those being identified separately on the document receipt form which was issued by the EAT's officers.**
>
> **29. There is no principle of common law causing those two claims to become a single claim. Nor has, Mr Downey been able to point us to any specific rule either of the ET or of the EAT which would have had the effect of merging the two claims for all purposes into one. In those circumstances it seems to me perfectly clear that an appeal was properly and fully constituted on any footing in relation to the first ET1. That being so, the discretion of the Registrar was exercised without taking into account that vital feature. Furthermore, it seems to me that, bearing in mind that the appeal in relation to the first ET1 was fully constituted**

> **and required no extension of time, there are exceptional circumstances in the present case, which inevitably would result in an extension of time being given in relation to the second ET1.**
>
> **30. Mr Downey's submission that it is in practical terms impossible to deconstruct, if I can put it that way, the ET's judgment, so as to allocate certain findings in relation only to the first ET1 and others to the second ET1, cannot result in the consequence that there can be no appeal in relation to either ET1. The consequence, it seems to me, of substantially the same matters being covered in both ET1s including, in particular, the question of whether or not the appellant's mental state fell within the DDA 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."**

10. In **Carroll v The Mayor's Office for Policing and Crime** [2015] ICR 835 (EAT) the difficulty for the would-be appellant was that he had been one of two claimants in the tribunal, and he had not submitted the claim and response forms for his fellow claimant to the EAT. The EAT concluded that these were required. An issue of interpretation of the EAT's Rule 3(1)(b) arose, whereby that sub-rule referred to the requirement for "any claim and response in the proceedings before the employment tribunal" to be provided. The EAT concluded that "the proceedings" were the overall proceedings involving both Mr Carroll and his erstwhile colleague, Mr Cook. At [56] the EAT said:

> **"In my judgment the rules do not leave this kind of editorial decision to the prospective Appellant and I reject Mr Crawford's submission that the prospective Appellant can choose, without explanation, whether or not to include the pleadings in the case of a party, who is not minded to appeal. The use of the words "any claim and response in the proceedings before the employment tribunal" in rule 3(1)(b) of the EAT Rules are to my mind clear and it is not necessary to interpret "any" as "every" in order to arrive at the meaning contended for by Ms Tuck. The "proceedings before the employment tribunal" where those involving both the Appellant and Mr Cook and "any claim and response" in my judgment clearly means both sets of pleadings in both cases."**

11. The third authority to which I was referred is **Shah v The Home Office** [2024] EAT 21, a recent decision of Deputy High Court Judge Jason Coppel KC. Judge Coppel was concerned with a claimant who had brought a number of separate claims but was seeking to appeal the outcome in respect of only one of them. Judge Coppel considered

that **Sud** fell to be distinguished, because the first two claims brought by Mr Shah had been formally consolidated by the tribunal, and on that footing they were to be regarded as a single claim. He cited the White Book (2024 ed.), notes to CPR 3.1.9 (see paragraph 15 of **Shah**).

12. I take as my starting point the decision in **Sud**. True it is that the Court of Appeal did not consider specifically the wording of Rule 3(1)(b), but what it did clearly say was that it did not consider that there was any basis on which the two claims could be treated as having merged into one. Furthermore, in the passage that I have cited, it did not consider that the argument that, in practice, the issues or evidential territory covered by the two claims overlapped and could not be disentangled, affected the outcome that there were nevertheless two claims; and it considered that if all the paperwork was in order in relation to one of them in time, then the appeal from the decision relating to that one claim was properly instituted in time. The fact that what was missing in respect of the *other* claim was only one page was said to be relevant to the issue of whether time should be extended in relation to *that* claim, but did not go to the point about whether, if the paperwork in relation to the *first* claim was complete, the appeal in respect of the decision on that claim was properly instituted.

13. Turning to **Carroll**, while that decision did consider the wording of Rule 3(1)(b), **Sud** does not appear to have been considered by the EAT in that case. It also appears to me, respectfully, that in paragraph 56, whilst stating that it was not necessary to interpret "any" as meaning "every", in order to arrive at the conclusion that Mr Carroll's paperwork was defective without copies of the claim and responses in Mr Cook's case being provided, the EAT went on effectively to reach exactly that conclusion.

14. I am not persuaded that this is the only possible or, indeed, the correct, interpretation of Rule 3(1)(b). True it is that it refers to the "proceedings", and I accept the argument, as such, that the overall proceedings may involve more than one claim, whether by the same claimant or by more than one claimant. But it seems to me that the words "any claim and response" in the proceedings do not by themselves necessarily mean "every claim and response". By themselves they might equally mean "the claim and response, if any."

15. Furthermore, I note that the rule (as it was) went on to say "… or an explanation as to why either is not included", suggesting that the drafter was making the assumption that only one of each would be needed. This interpretation is also supported by the wording in Form 1, with which rule 3(1)(a) requires an aspirant appellant to comply, which referred to "the claim (ET1)" and "the response (ET3)" and the wording of the **2018 Practice Direction** at paragraph 3.1 which referred to "the claim" and "the response".

16. Judge Coppel suggested in **Shah** that the wording of the rule and the wording of the Practice Direction were not entirely consistent with each other and that the position on this point was not entirely clear. I would respectfully suggest that the interpretation that "any" means "if any" means that the wording can be reconciled and is consistent, the focus of the Rule being on the relevant claim and response, even if there may have been others in the wider proceedings in the tribunal.

17. Nor do I think this is a fanciful interpretation, as there will be cases in which there is no response, in particular where a respondent is appealing against a rule 21 decision granting judgment against it precisely because no response has been entered. Although a case in which there is no claim may be harder to envisage, it could be said that an appeal against a rule 12 decision refusing to accept a claim would fall into that category on the

basis that – though it may be something of a linguistic point – an unaccepted claim is not a claim at all.

18. I am not persuaded, therefore, respectfully, that the reasoning in **Carroll** undermines the point made by the Court of Appeal in **Sud**, notwithstanding that Rule 3.1 was not analysed in **Sud**.

19. Nor, respectfully, am I persuaded that the distinction referred to in **Shah,** between consolidation and claims being directed to be heard together, militates against my reading of the Rules. Whilst, in the civil jurisdiction, the CPR or, at any rate, the commentary in the White Book, refer to, and identify, a formal distinction between a process of consolidation and a process of directing that claims be heard together, there is no counterpart in the Employment Tribunals Rules of Procedure 2013; and indeed, the customary direction in the employment tribunal, as was given in this case, is simply for one or more claims to be *heard* together, though a lawyer might use the word consolidation to refer to that direction.

20. For all of these reasons I consider that, insofar as the claimant is seeking to appeal from the decision on the claims brought in the claim form, in respect of which complete copies of the ET1 and ET3, Particulars of Claim and Grounds of Resistance, were included, namely Claim No. 3320062 of 2019, his appeal has been instituted in time; but, as is accepted by Ms Reilly, it was not instituted in time in respect of Claim No. 3335322 of 2018, because the ET1 and ET3 were not provided, at the time these were required documents, and providing the Particulars of Claim and Grounds of Resistance without those forms was not sufficient to comply with the Rule at the time.

21. I come then to the question of whether time should be extended in that respect. I would suggest that, often, although perhaps not always, I think it is sensible to start by

considering the position under Rule 37(5). That is because, if the appellant can get home under Rule 37(5), then there is no need to consider whether they would have got home under the more stringent jurisprudence that applies under Rule 37(1). Rule 37(5) provides:

> **"If the appellant makes a minor error in complying with the requirement under rule 3(1) to submit relevant documents to the Appeal Tribunal, and rectifies that error (on a request from the Appeal Tribunal 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."**

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

23. I come then to whether the defect in this case was the result of an error and, if so, whether it was a minor error. When he first applied for an extension of time on 9 December 2022, the claimant in an email, in summary, explained that at the time when he put in his Notice of Appeal he had relocated to Dubai. He said that he believed that he had submitted everything that was required, and referred to a screenshot of his submission showing the attached documents, including documents *described* as an ET1 and an ET3 in respect of the claim in question. He postulated that not all of the attachments had been received by the EAT, notwithstanding that they had been sent, and that he was not sure why this was. He said that he had limited resources while he was in Dubai and had had to borrow someone else's laptop and to use public Wi-Fi. He had been stuck in Dubai owing

to a lockdown-related travel ban. At that time he did not have access to legal advice and these restrictions meant it was harder for him to check the position.

24. The EAT's administration in the usual way sought submissions from the respondent's representative and then a reply from the claimant, which he sent on 3 February 2023, and which was drafted by a *pro bono* representative who he had engaged at that point. This referred again to his having been stuck in Dubai without access to legal advice. It said that he had submitted his appeal only on the last day because he had sought advice from his union representative. It referred again to his having to borrow a laptop and limited access to Wi-Fi, having no access to the physical documents and believing that he had attached all the documents that were required.

25. Following the Registrar's decision, the claimant applied to appeal from her order to the judge and attached a revised version of the submission from his representative, citing an additional authority. He also attached a submission of his own, in which he repeated a number of the points previously made, and maintained that he believed that he had sent what was required, but that it had not been received at the EAT because of some IT glitch. He referred also to health problems of depression and a sleeping disorder and stressed the impact of the Covid pandemic on him, once having relocated to Dubai, being unable, in practice, to return to the UK. He also submitted that it would be unfair to count the full 95 days against him, given that he had responded promptly once the matter was raised with him by the EAT.

26. In response to a letter written by the respondent's solicitors in the run-up to this hearing, there was a further submission from the claimant on 28 February this year in which he covered similar ground to previous submissions, although he now accepted that it was the case, having looked into it further, that the missing documents had not been

attached to the email when he sent it. He said he had worked hard, with his former union representative helping him at the time to put the attachments to the appeal together, and had done the best that he could. I have been referred to other materials in my bundle including WhatsApp exchanges with his former union representative around the time, on 29 and 30 August 2021, when he was putting together his Notice of Appeal and attachments.

27. From all the material that I have seen it is clear to me that the appellant genuinely believed when he submitted his Notice of Appeal and attachments that he had submitted everything that was required. The reason he did not attach the ET1 and ET3 forms was because he made a mistake. I am not persuaded that the claimant being located in Dubai, IT difficulties or ill health significantly go to explain why he made the mistake. It appears to me that these documents were available to him, because, once the error was pointed out by the EAT's administration, he was able to get hold of them and send them in to the EAT. It appears to me most likely that the mistake occurred because the documents that he attached to his email, which were in fact only the Particulars of Claim and the Grounds of Resistance in respect of this particular claim, were labelled ET1 and ET3, so that one would not appreciate that the ET1 and the ET3 forms might be missing, unless one took the trouble to click on the documents, open and scrutinise them.

28. This omission was, therefore, for Rule 37(5) purposes, the result of an error. Was it a minor error?

29. There is guidance on that question given by DHCJ Andrew Burns KC in the case of **Melki** to which I have already referred. In particular, he says this:

> **"35. The ordinary meaning of 'minor' is something that is comparatively unimportant. In the context of this rule it can be contrasted with a serious or substantial error. Rule 37(5) is designed to forgive errors which are negligible or of no real importance to the proper progress of an appeal.**

36. The EAT Rules did and still do require an appellant to serve a Notice of Appeal substantially in accordance with the standard forms. It requires a written record of the ET's Judgment or Order and Written Reasons for it (or an explanation why they are not included). These are core documents in an appeal. Without the Notice the EAT cannot understand the complaint. Without the Judgment and/or Reasons the EAT cannot normally assess whether there has been an arguable error of law. It would be a rare case in which it could be said that the omission of one of these documents was a minor error. Such an error would normally be serious and of real importance to the proper progress of the appeal.

37. The other end of the spectrum is where all the required documents have been attached but just one or two pages are missing. It is likely to be a minor error to omit a single page of a document that is otherwise intelligible. Indeed even under the existing stricter test there were extensions granted where a single irrelevant page was omitted (*Sud v London Borough of Ealing* [2011] EWCA Civ 995 and HHJ Auerbach mentioned further examples of omission of isolated pages in *Fincham v Alpha Grove Community Trust* UKEATPA/0993/18 (2 March 2020, unreported)).

38. HHJ Auerbach in *Anghel v Middlesex University* [2022] EAT 176 at [28] said that the grounds of claim or resistance are essential documents. They set out the substance of the claim and the defence to it which are likely to be essential in understanding the decision appealed. I agree. The EAT is likely to be more interested in the substance of the claim or the response set out in the grounds rather than the information in the formal parts of the ET1 and ET3 forms which record the personal and contact details of the parties, the dates of employment, earnings and representatives' details. The core elements of the claim and defence as set out in the grounds will often be relevant when assessing a judgment. The contact details of the parties and their representatives are not needed as they are contained in the opening paragraphs of the Form 1 Notice of Appeal. There may be some appeals were the ACAS Early Conciliation information or earnings information is a central issue in the appeal in which case the formal information may be important. However in many other appeals that formal information may have no bearing on issues in the appeal as all the important information about the parties' respective positions below will be contained in the Grounds of Claim and Grounds of Resistance.

39. It may amount to a minor error to omit one or even more pages of a document required by rule 3(1) but that it is unlikely to be a minor error to omit the whole document or a substantial or important part of the document unless there are circumstances in which it can be said that the document is irrelevant to the appeal. One example of this might be as in the recent appeal in *Shah v Home Office* [2024] EAT 21. Jason Coppel KC, sitting as a Deputy High Court Judge, allowed an appeal from the Registrar refusing an extension where the Appellant had filed the complete ET1 and ET3 forms relating to the claim under appeal, but not the equivalent documents for his six other claims which were heard at the same time. The EAT held that there was room for confusion between the old rule 3 read together with Form 1, the Practice Direction and a guidance leaflet. The Deputy Judge went on to say:

"The default which caused the time limit to be missed was minor and technical. The claim form and response for the claim that was under appeal were included with the notice of appeal; the claim and response for the other claims was, at

> **best, of little relevance to the appeal. In this regard, I place some weight upon the fact that the EAT Rules were subsequently amended so as to remove the requirement for any claim form or response to be included with a notice of appeal." ”**

30. What I take from this, and with which I respectfully agree, is that the question of whether the error is minor is to be judged in particular by reference to the significance or not of what has been omitted, for the appeal in hand, and the issues to which it gives rise. This is a fact-sensitive matter to be decided case by case. It does not follow that in every case a failure to include the ET1 and ET3 forms will be a minor error and Judge Burns himself made some points about that. It will depend upon what is in those forms in the given case, and what issues are raised by the appeal in the given case, as well, possibly, as whether information contained in those forms is also to be found in the submitted documents.

31. In this case Ms Reilly has demonstrated that all of the information contained in the missing ET1 and ET3 was to be found in the documents that were submitted with the Notice of Appeal. I do not need to go through the analysis in detail, because Ms Dervin did not, I think, dispute this, as such. But, in particular, as well as the basic information about the identities of the parties, and so on, being available from the submitted documents, the substance of what the claimant was claiming could be gleaned from the other documents that were provided, including both his Particulars of Claim and also the respondent’s Grounds of Resistance, the latter of which also included a summary of what he was claiming. I conclude that, on the particular facts of this case, the error was minor.

32. The next question is whether the error has been rectified. The answer is yes, because the missing documents have been provided to the EAT when they were sent in, attached to the email of 2 December 2021.

33. I come then to the question of whether it is just to extend time, having regard to all the circumstances, including the three matters mentioned in Rule 37(5). I make the following general observations about this part of the exercise.

34. First, of course, consideration of whether it is just to extend time requires consideration of justice to both parties. Essentially, what is involved is a familiar weighing exercise: weighing up the balance of justice or injustice to each of the parties were I either to extend time or not do so.

35. Secondly, the three aspects specifically mentioned in the sub-rule must be considered and treated as relevant, but the sub-rule does not prescribe or impose any other constraint on what may be considered by the EAT to be all the circumstances that are relevant to the exercise of the discretion in the given case.

36. Thirdly, whilst the three factors must be considered and treated as relevant, what weight to attach to those, and/or any other relevant circumstances, in the balancing exercise, is a fact-sensitive matter for the exercise of the EAT's discretion in the given case, applying the overall balance of justice and injustice approach that I have described.

37. Turning then, in this case, to these three factors first, the manner in which the defect was rectified in this case was by providing copies of the missing documents and doing so fairly promptly, within a couple of days of the matter having been brought to the claimant's attention. That covers the point about timeliness in part, insofar as it was done promptly once it was brought to the claimant's attention.

38. I do consider that I should also weigh in the balance that this did occur only some 95 days after it should have occurred, but I also accept that this is a case where, because the claimant believed that he had done everything he needed to do – and, indeed, this is

borne out by the WhatsApp exchanges where he and his former union representative talked about the prospects for the appeal getting through the sift, he was not going to put this right unless or until it was pointed out to him that the mistake had been made. That said, I do weigh in the balance that the mistake was his and that, apart from the other delay associated with the process of adjudicating the application for an extension of time and the appeal from the Registrar's order, there was an initial delay of three months, which has an impact on the consideration of the interests of finality in litigation and the position of the respondent.

39. Turning, indeed, further to the question of prejudice to the respondent, of course, as always in cases of this type, the respondent faces the prejudice that, if I extend time, it will be on risk of having to defend an appeal, in whole or in part, that it would not otherwise have to defend, and the litigation will, from its point of view, not be over, or at least not for the moment. The respondent is also potentially on risk of the further cost of having to defend an appeal or part of it. I have already mentioned the point about the element of delay bearing on the issue of finality. Ms Dervin, however, fairly, did not submit that the respondent would be in any greater difficulty defending the appeal if it has to, as such, owing to some development in the intervening period.

40. In the context of Rule 37(1), should I need to consider it, the fact that this was a mistake and how it occurred would not be capable of being regarded as a good excuse. I do not regard the question of why the mistake occurred as entirely irrelevant in the Rule 37(5) context, but it seems to me implicit in Rule 37(5) that it must be intended that the EAT can take a more forgiving view of such mistakes in the Rule 37(5) context, once the would-be appellant is over the threshold of a finding that the mistake was minor and that it

has been rectified. There is greater scope for mistakes of that sort to be forgiven by an extension of time under Rule 37(5) than under Rule 37(1).

41. Ms Dervin submits that a factor that should weigh against the claimant is that he has not been consistent or straightforward in his explanations, from time to time. She says that he has shifted back and forth on whether he maintains that the documents were actually attached to his original email, but not received by the EAT because of some computer glitch.

42. However, it seems to me that there have been broadly the same running themes throughout the submissions, but these have developed, as often occurs, as further opportunities are given to make additional submissions. For example, the claimant at later stages introduced additional factors such as seeking to rely upon his ill health.

43. True it is that the claimant did return at a later stage to his initial argument that he was not convinced that he had not attached the documents, even at a point when his own advocate had prepared a submission acknowledging that they were not attached; but it seems to me that this is symptomatic of a reluctance of the claimant to let go of this possibility, of which he perhaps was not entirely convinced until finally, with the benefit of having been through it all again with the assistance of someone, he did definitively accept that the documents had not been attached by him at all.

44. Overall, I am not persuaded that this is a case where the claimant was being deliberately disingenuous or deliberately seeking to mislead or cover up what had gone on, or anything of that sort; and so I have not considered that variations in his account of matters over time should weigh significantly against him in the balance, as Ms Dervin suggested.

45. Weighing it all up, having regard to all the circumstances, including the manner in which the mistake was rectified, the timeliness with which it was rectified and any prejudice to the respondent, I will extend time. Accepting, as I do, that this was a genuine mistake and that it was rectified promptly once it was brought to the claimant's attention, and (whilst, as has often been said, it is not the responsibility of the EAT's administration to bring such matters to the attention of the defaulting party, or to do so within any given timescale), accepting, as I do, that it can be inferred that it would have taken the administration longer to bring this matter to his attention in part because of the impact of the pandemic on the EAT's workload, I consider that the prejudice to the claimant of not extending time outweighs that to the respondent of doing so. I say that bearing in mind also the overall timescales involved and that this is not a case where the respondent is going to be at greater difficulty defending the appeal, or part of it, if called upon to do so following the sift process.

46. As I have reached the conclusion that time should be extended under Rule 37(5), it does not matter that I would not have been persuaded under Rule 37(1) that the explanation amounted to a sufficient excuse to extend time under that sub-rule.