Neutral Citation Number: [2024] EAT 142

Case No: EA-2023-000379-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 September 2024 (original Judgment)
Date: 23 January 2025 (revised Judgment)

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MR D AKHIGBE **Appellant**

- and –

(1) ST EDWARD HOMES LTD ("SEH")
(2) ALL KNIGHT SAFETY LTD (IN VOLUNTARY LIQUIDATION)
(3) MS JULIA OLDBURY-DAVIES
(4) MR ALAN EDGAR
(5) MR ALLAN MICHAELS
(6) NIBLOCK ELECTRICAL SERVICES LTD
(7) MR PETER BURCOW
(8) BERKELEY HOMES (URBAN RENAISSANCE) LTD (BERKELEY HOMES)

Respondents

- -
- -

WARREN FITT (acting under ELAAS) for the **Appellant**
JAMES WILLIAMS (instructed by Edwin Coe Solicitors) for the **Respondents**

REVIEW HEARING
Hearing date: 19 June 2024
with further submissions in writing on 13 and 15 August 2024
and subsequently revised pursuant to review order dated

- -

JUDGMENT

REVISED

SUMMARY

Practice and procedure - application for review under rule 33 ***EAT Rules 1993*** *- compliance with rule 3(1) - extension of time pursuant to rule 37(1)*

The claimant had lodged an appeal against a judgment of the Employment Tribunal ("ET") that had addressed seven separate claims, albeit his appeal was limited to decisions made in respect of only four of those claims (two presented in 2018, two in 2019). In filing his appeal within the 42-day time limit, the claimant provided the pleadings relating to one of the four claims in question (the second 2018 claim), separately providing an explanation for not including some of the other pleadings. The appeal was initially accepted by the EAT as having been properly instituted in time. At a subsequent hearing under rule 3(10) **EAT Rules**, the appeal was permitted to proceed to a full hearing on amended grounds, which further limited its focus (withdrawing the challenge to the decision relating to the 2019 claims). The respondents, however, applied for the rule 3(10) order to be revoked on the basis that the EAT had erred in treating the appeal as having been properly instituted.

Held: refusing to extend time for the appeal and allowing the respondents' application.

An explanation could be implied from the notice and grounds of appeal for the failure to provide the pleadings in the three claims that were not the subject of challenge, but the claimant had failed to comply with the requirements of rule 3(1) **EAT Rules** in respect of the 2018 and 2019 claims and the EAT had thus erred in treating the appeal as having been properly instituted within the 42-day time limit. Considering the claimant's application for an extension of time, although he had failed to demonstrate a good reason for failing to lodge the pleadings relating to the 2019 claims, he had subsequently withdrawn any challenge to the ET's decision relating to those claims, which could amount to an exceptional circumstance such as to warrant the grant of an extension of time. That reasoning could not, however, extend to the claimant's omission in relation to the 2018 claims, in respect of which he had only filed the pleadings relating to the second claim. Although the grounds of resistance in the first 2018 claim had been attached to the response to the second of the claims, and the claimant had provided an explanation for failing to provide a copy of the first ET3, his explanation did not extend to the first 2018 ET1 and particulars of claim. Allowing that those particulars were substantially incorporated within the particulars of claim provided for his second 2018 claim, there were material differences between the two ET1s, which the claimant ought reasonably to have known to be required documents when lodging his appeal. The claimant had, however, made a conscious decision not to include this pleading when submitting the appeal and had provided no explanation for this. There was no good reason for the claimant's omission and the circumstances were not such as to warrant the exceptional exercise of the EAT's discretion to extend time. As such, the order seal dated 2 February 2024 ought not to have been made and would be revoked.

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT:

Introduction

1. In giving this judgment, I refer to the parties either by their titles before the Employment Tribunal ("ET"), that is, "the claimant" and "the respondents", or, in respect of individual respondents, by name. This is the hearing of the application by St Edward Homes Limited ("SEH"), Mr Alan Edgar and Mr Allan Michaels, made under rule 33(1)(a) **Employment Appeal Tribunal Rules 1993** (as amended) ("EAT Rules"), by which I am asked to revoke my earlier order, dated 2 February 2024, setting this matter down for a full hearing.

2. The claimant appeared in person before the ET but has had the benefit of representation by counsel (appearing *pro bono*, under ELAAS) at the relevant hearings before the Employment Appeal Tribunal ("EAT"). Since the oral hearing on 19 June 2024, the claimant has again acted in person, and has made further applications, for relief from sanction, for reporting restrictions, and for an extension of time to obtain medical evidence; I return to these applications below. At all relevant times, the interests of SEH and related respondents (relevantly: Mr Edgar and Mr Michaels) have been represented by Mr Williams.

3. At the hearing on 19 June 2024, I informed the parties that a decision of the Court of Appeal was awaited on three joined appeals that might have relevance to the points raised on this application; I made clear that the parties would have the opportunity to make further representations in relation to that decision when that was available. The Court of Appeal's judgment in **Ridley v HB Kirtley and related appeals** [2024] EWCA Civ 875 was handed down on 25 July 2024. Having provided copies of that judgment to the parties in these proceedings and allowed further time for submissions to be made in respect of the decision, written representations were then received on 13 and 15 August 2024; I have had regard to these when reaching my determination in this case.

Background history

Introductory

4. The claimant was employed within the Berkeley group (of which SEH is part) from 22 September 2014 until his dismissal on 15 February 2015. Since then, he has brought a number of ET claims against SEH, other companies and individuals within the wider Berkeley group and, more recently, their legal

representatives; I understand he has brought at least eight such claims and am told that all of the claims have either been struck out or rejected on the papers; none has even reached the stage of case management directions being given. I am further informed that the claimant has also brought three claims against SEH in the County Court, and an unknown number of claims against other respondents.

5. Further detail of past claims brought by the claimant against SEH and related respondents is provided in the judgment of Mr Matthew Gullick KC, sitting as a Deputy Judge of the High Court, in an earlier appeal before the EAT (EA-2021-000505-AS) ("the Gullick judgment"), as follows:

> "11. ... the claimant was employed by a company within the Berkeley group of companies from 22 September 2014 to 13 February 2015. In 2016, the claimant brought proceedings in the Employment Tribunal against the first respondent [that was SEH] and against Berkeley Group Plc alleging that he had been subjected to detriments on the grounds of having made protected disclosures, and on health and safety grounds. Subsequently, in 2017, a new respondent, Berkeley Homes (Urban Renaissance) Limited, was substituted for the two original respondents to those proceedings because the claimant asserted that company was his correct employer.
> 12. The claims were, however, struck out by Employment Judge Bedeau on 6 January 2017 and an appeal to the Employment Appeal Tribunal against that decision was dismissed.
> 13. A further claim made by the claimant against the first respondent in 2017 was rejected by the Employment Tribunal, again by Employment Judge Bedeau, under rule 12 of the Employment Tribunal Rules of Procedure. An appeal against that decision to the Employment Appeal Tribunal was dismissed, albeit for different reasons to those given by the Employment Judge.
> 14. Subsequently, in 2018 and 2019, the claimant issued a number of further claims. It is material to note that as against the first respondent there were two claims before the Employment Tribunal which were dealt with in the judgment presently under appeal. Claim number 3306927/18 (..."the first 2018 claim") was made against the first respondent alone and was received by the Employment Tribunal on 3 May 2018. Claim number 2303263/2018 (... "the second 2018 claim") was made against five respondents including the first, third, fourth and fifth respondents and was received by the Employment Tribunal on 5 September 2018.
> 15. As the Employment Judge set out in her decision, the detailed particulars of claim in both those cases were similar, certainly as regards the first respondent, but they were not identical. The claims, in summary, were for automatic unfair dismissal on the ground of having made protected disclosures, pre-termination and post- termination detriments on several grounds, including the making of protected disclosures and in relation to health and safety; additionally, the second 2018 claim made a claim for breach of contract and for race discrimination."

6. The Gullick judgment was handed down on 20 October 2023; it followed an oral hearing of the claimant's appeal against an order of the EAT Registrar, which had refused to grant an extension of time for the lodgement of his appeal. The claimant had represented himself when lodging the appeal but had instructed counsel to represent him at the hearing before DHCJ Gullick KC. I return to the Gullick judgment below.

7. The present appeal is brought by the claimant against a judgment of the ET sitting at Watford (Employment Judge George, sitting alone, on 2 December 2022), sent out to the parties on 28 March 2023 ("the March 2023 judgment"). Upon the initial, on-paper, consideration of the appeal, His Honour Judge Auerbach took the view it identified no reasonably arguable question of law such as to engage the jurisdiction of the EAT. The claimant having exercised his right to seek an oral hearing, pursuant to rule 3(10) **EAT Rules**, this matter came before me on 31 January 2024, at which the claimant was represented by counsel under ELAAS and I permitted the appeal to proceed to a full hearing on amended grounds. It is my decision on that occasion that is the subject of the present application for review.

The ET claims, and the ET and EAT decisions, relevant to the present appeal

8. At the hearing on 2 December 2022, the ET was considering applications relating to seven different ET claims brought by the claimant. Four of those claims had been struck out by EJ George in an earlier judgment sent to the parties on 19 February 2021 ("the February 2021 judgment"), which followed a hearing that had taken place over four days, on 14-15 July, 27 August, and 1 December 2020.

9. The claimant sought to appeal against the February 2021 judgment by lodging a notice of appeal with the EAT on 6 April 2021. That appeal named only SEH as a respondent to the appeal, and was limited to a challenge to the striking out of the claimant's claims against the first, fourth and fifth respondents (SEH, Mr Edgar, and Mr Michaels) and to the ET's conclusion that there had been unreasonable conduct on the part of the claimant. In lodging his notice of appeal, the claimant included the ET1 and ET3 in the second 2018 claim but none of the other pleadings, providing no explanation for omitting the pleadings in the other claims considered in the February 2021 judgment. When the EAT questioned this omission, the claimant provided an explanation for why he had not filed the required documents and his appeal was deemed to have been properly instituted on 13 May 2021, some 37 days out of time. Subsequently, the claimant filed a second appeal against the February 2021 judgment, 146 days out of time.

10. The issues relating to these appeals were listed for hearing before DHCJ Gullick KC, resulting in the Gullick judgment to which I have referred. In considering the first appeal, and applying the approach laid down by the EAT in **Carroll v Mayor's Office for Policing and Crime** [2015] ICR 995 (see further below), DHCJ Gullick KC concluded that the claimant's failure to submit the pleadings for *all* of the claims considered

by the ET in the February 2021 judgment meant his first appeal had been lodged out of time. Going on to consider whether time should nevertheless be extended, DHCJ Gullick KC accepted that the claimant had provided an explanation for his default, namely:

> "51. ... because he thought he did not have to do so and believed that they were not relevant. ..."

DHCJ Gullick KC was prepared to accept that that was a good reason for the claimant's failure to file the ET1 and ET3 forms which did not relate to SEH, that is:

> "54. ... that were entirely unrelated to the situation of the party in respect of whose position he was seeking to challenge the Employment Tribunal's decision ..."

He did not, however, accept that that was the position in respect of the first 2018 claim:

> "57. ... The claimant supplied only the ET1 and ET3 forms in the second 2018 claim. That was not, however, the only claim against the first respondent being considered by the Employment Judge. There was also the first 2018 claim, as well. That, too, was a claim made by the claimant against the first respondent ....
> 58. I accept that the particulars of these two claims insofar as they touch upon the first respondent are similar. Nonetheless, they were legally separate claims filed four months apart and it is clear that both claims were pursued together before the Employment Tribunal by the claimant. The first claim was not, for example, withdrawn so that it was in substance entirely replaced by the second. Moreover, the operative paragraphs of the Employment Tribunal's judgment in relation to which complaint was made in the first notice of appeal filed in April 2021 dealt with both those claims, ..."

DHCJ Gullick KC further rejected the claimant's contention that his appeal really related solely to the ET's findings in respect of the second 2018 claim, holding:

> "60. ... In my judgment, it is clear that the material paragraphs of the written reasons of the Employment Tribunal ... that are challenged in the notice of appeal directly address the issues that arise in both the first 2018 claim and the second 2018 claim, as does the criticism of the reasoning in those paragraphs which is contained in the notice of appeal. It is, in my judgment, unrealistic to construe the notice of appeal when read as a whole as being limited to findings in relation to the second 2018 claim alone.
> 61. For example, in the notice of appeal the claimant was clearly seeking to challenge the judge's overall conclusion that he had conducted himself unreasonably, so that the threshold for a costs order to be made against him had been passed. If such a challenge were limited to the second 2018 claim alone, then on this basis the claimant would not have been seeking to overturn the finding of unreasonable conduct in paragraph 185 of the written reasons as it applied to the costs application made for the purpose of the first 2018 claim. That is, in my judgment, a wholly untenable construction of the notice of appeal.
> 62. In my judgment, there is not a good excuse for the failure to file documents in relation to the first 2018 claim with the notice of appeal and, therefore, for the claimant's failure to comply with the rule in that respect. ..."

Finding this was not an exceptional case in which time should be extended, DHCJ Gullick KC rejected the claimant's application in that regard.

11. As for the second appeal, DHCJ Gullick KC did not accept the claimant's explanation for why this had been presented outside the time limit and refused the application for an extension of time, specifically rejecting:

> "70. ... the claimant's arguments based on the impact of his mental health condition, or avoidance behaviour ... in circumstances where notwithstanding that condition, he was able to, and did, challenge the material paragraph of [the ET's] decision in a notice of appeal filed within the time limit."

12. The claimant sought permission to appeal to the Court of Appeal against the Gullick judgment, also applying for (amongst other things) an order for reporting restrictions. Those applications were refused on the papers by Laing LJ, by order seal dated 13 May 2024.

13. Returning to the present appeal, the seven claims before EJ George on 2 December 2022, can be summarised as follows:

(a) Claim 3306927/2018: brought against SEH alone, this claim had been struck out by EJ George in the February 2021 judgment; at the hearing on 2 December 2022, the ET was considering SEH's application for costs in relation to this claim.

(b) Claim 2303263/2018: brought against SEH and the second to fifth respondents, also struck out by EJ George in the February 2021 judgment; this was also the subject of an application for costs by SEH, which was being considered at the hearing on 2 December 2022.

(c) Claim 2300054/2019: a claim against Niblock Electrical Services Ltd ("Niblock") and Mr Peter Burcow, a manager within the Niblock group (the sixth and seventh respondents; neither of which has any relationship with SEH or its wider group), which had been struck out by EJ George in the February 2021 judgment; at the hearing on 2 December 2022, the ET was considering an application by those respondents for a preparation time order in relation to this claim.

(d) Claim 2205013/2019: a claim solely against Niblock, which had also been struck out in the February 2021 judgment; at the hearing on 2 December 2022, the ET was also considering Niblock's application for a preparation time order in respect of this claim.

(e) Claim 3301405/2021: another claim against SEH, post-dating the 2020 hearings and raising a series of complaints about events during the litigation of the claimant's other claims; at the hearing on 2 December 2022, the ET was considering an application by SEH to strike out this claim.

(f) Claim 2301105/2021: brought against SEH and the eighth respondent (a company within the wider Berkeley group), again post-dating the 2020 hearings and similarly raising a series of complaints about events during the litigation of the other claims; at the hearing on 2 December 2022, the ET was again considering an application by the respondents to strike out this claim.

(g) Claim 3310936/2022: another claim against SEH and the eighth respondent, post-dating the 2020 hearings and raising a series of complaints about events during the litigation of the earlier claims; at the hearing on 2 December 2022, the ET was considering an application by the respondents to strike out this claim.

14. Following the hearing on 2 December 2022, by the March 2023 judgment, the ET: (1) struck out both 2021 claims and the 2022 claim, declaring them to be totally without merit; (2) made an order that the claimant was to pay SEH £20,000 costs in relation to the 2018 claims; (3) made a preparation time order against the claimant in the sum of £1,786, in relation to the two Niblock claims.

Proceedings before the EAT

15. On 26 April 2023, the claimant sent two emails to the EAT, both timed at 14:55. The first (headed "*Notice of Appeal (email 1 of 2)*") had ten attachments, as follows: (i) an application for an expedited hearing, with three appendices; (ii) an application "*FOR THE EAT TO EXERCISE IT'S [sic] HAMID JURISDICTION*", with five appendices; (iii) a document headed "*APPLICATION FOR RECONSIDERATION*" to the Watford ET dated 11 April 2023 with 13 appendices; (iv) the ET3 form in claim 2303263/2018 from Julia Oldbury-Davies (the third respondent), with attachments; (v) the ET1 form in claim 2303263/2018; (vi) a document headed "*BACKGROUND INFORMATION*" attached to the ET1 in claim 2303263/2018 (effectively the grounds of complaint in that claim); (vii) the ET3 form in claim 2303263/2018 from SEH (the first respondent in that claim), and the grounds of resistance filed on behalf of SEH, Mr Edgar and Mr Michaels (the first, fourth and fifth respondents in that claim); (viii) a document headed "*EXPLANATION/STATEMENT IF AND*

WHY THERE ARE MISSING DOCUMENTS"; (ix) the February 2021 judgment; and (x) the March 2023 judgment. Although that first email was copied to the solicitor for SEH, Mr Edgar and Mr Michaels, it was not received by her (it seems that the size of the attachments meant it did not get through). The other email did, however, get through to both the EAT and the solicitor for SEH, Mr Edgar and Mr Michaels; it was headed "*Notice of Appeal (email 2 of 2)*" and attached a single pdf file running to some 33 pages, which included: (i) the EAT Form 1, and (ii) separate grounds of appeal, including 14 appendices.

16. In providing an explanation "*IF AND WHY THERE ARE MISSING DOCUMENTS*" ((viii) above), the claimant first stated that he would be appealing the three later claims separately, for reasons relating to his mental health. Accepting that, even in relation to the claims to which his appeal did relate, he had not provided copies of all the claims and responses, the claimant explained as follows:

> "Please note that though St Edward Homes submitted 3 or 4 ET3s, I only put one as they were all saying the same thing.
> I didn't put the ET1s and ET3s of the other cases in this Appeal as I'm appealing the Cost Application on the grounds of Apparent Bias (Racial Bias)
> I also added Julia Oldbury-Davies' ET3.
> I have included most things and I hope the Appeal Tribunal gives me leniency if I left anything out as I believe I have included the relevant materials and any other thing is mere technicalities"

17. It is helpful at this stage to address the first part of the claimant's explanation, that is: "*that though St Edward Homes submitted 3 or 4 ET3s, ... they were all saying the same thing*". I understand this to refer to the ET3s and grounds of resistance submitted in the 2018 claims (the claimant had provided the pleadings in the second of these claims but not the first). Although there was a degree of overlap to the 2018 claims, as was observed in the Gullick judgment, they were not, however, identical; in this regard, the position was set out in the grounds of resistance filed in respect of the second 2018 claim (3306927/2018) on behalf of SEH, Mr Edgar and Mr Michaels, as follows:

> "6. The position of the First, Fourth and Fifth Respondents is that almost all of this latest claim against it duplicates the First 2018 Claim (and, to a lesser extent, the other two claims) and should be struck out under ET Rule 37, ... Indeed, paragraphs 1-157 and 191-200 of the separate document headed "Background Information" (called the "Grounds of Complaint" in these Grounds of Resistance) reproduce the contents of the First 2018 Claim more or less verbatim.
> 7. The following other passages of the ET1 Form and Grounds of Complaint are new (or differently worded), but should also be struck out, at least to the extent they relate to the First, Fourth or Fifth Respondents: (a) The tick in Box 8.1 of the ET1 Form relating to "religion or belief"; (b) Paragraphs 1-25 in the box at 8.2 of the ET1 Form; (c) Paragraphs 109 and 154 of the Grounds of Complaint; (d) Paragraphs 158-84 of the Grounds of Complaint (which appears to be a claim against the Second and Third

> Respondents); (e) Paragraphs 185-190 of the Grounds of Complaint (a claim against the Fourth and Fifth Respondents); and (f) Paragraph 198 of the Grounds of Complaint (a breach of contract claim against, presumably, the First Respondent).
> 8. Accordingly, the First, Fourth and Fifth Respondents propose to respond to the Claimant's latest ET1 as follows: (a) The matters set out at paragraphs 1-157 and 191-2003 have already been addressed in the Grounds of Resistance to the First 2018 Claim (the "First 2018 GoR"), which the First Respondent adopts and repeats. A copy of the First 2018 GoR is included at Appendix 1 together with a table showing how the paragraph references therein relate to the Grounds of Complaint in this claim. ...; and (b) The remaining allegations, as summarised at paragraph 7, will be addressed in turn below."

The grounds of resistance filed by SEH in the first 2018 claim (2303263/20218) was duly attached as part of Appendix 1 to the grounds filed in respect of the second 2018 claim; it was subsequently forwarded by the claimant as part of attachment (vii) to his first email to the EAT in the present appeal.

18. In the EAT Form 1, sent under cover of the second email, the claimant's appeal was stated to relate to the March 2023 judgment in respect of claims 2303263/2018, 3306927/2018, 2300054/2019 and 2205013/2019 (that is, the two 2018 claims and the two Niblock claims), and paragraphs 6-8 of the original grounds of appeal made clear that this appeal related solely to the costs awarded to SEH and the preparation time order in favour of Niblock. At paragraph 8 it was stated that the claimant would "*deal with the issues in the 5th, 6th and 7th St Edwards Claims separately*" (that is, that he would deal separately with the issues in claims 2301105/2021, 3301405/2021 and 3310936/2022). The grounds of appeal then went on to make various allegations against EJ George, including a number of allegations of "*racial bias*".

19. On 29 April 2023 at 09:34, the claimant again emailed the EAT, with the subject line "*Re: Notice of Appeal sent on the 26th of April 2023*", attaching: (i) medical evidence in the form of a letter from a consultant psychiatrist of 8 December 2021, and (ii) a Word document headed "*FALSE AND MISLEADING STATEMENTS BY EJ SARAH GEORGE*", with a number of appendices.

20. By letters of 10 May 2023 (to the respondents) and 15 May 2023 (to the claimant), the EAT administration wrote in the following terms:

> "Our preliminary checks indicate that this appeal has been lodged properly instituted. It will now be referred to your case manager who will ensure that it has been 69 lodged in accordance with Rule 3 of the Employment Appeal Tribunal Rules 1993 (as amended). This includes checking to ensure that all necessary supporting documents have been received and whether the appeal has been received within 42 days. You will be advised of the outcome of this stage in due course"

21. In the normal course, once the case manager checks are completed, an appeal is sent to a Judge for initial consideration on the papers ("the sift"). In the present case, without further communication to the parties, the appeal was referred to HHJ Auerbach, who took the view that the notice of appeal disclosed no reasonable grounds for bringing the appeal and that no further action should thus be taken. On 5 August 2023, the EAT wrote to the parties explaining the view formed by HHJ Auerbach pursuant to rule 3(7) **EAT Rules**. On the same day, the claimant applied for an oral hearing in accordance with rule 3(10). On 2 November 2023 the EAT listed the rule 3(10) hearing for 2pm on 31 January 2024.

22. At the rule 3(10) hearing, the claimant was represented by counsel, acting under the ELAAS, who lodged fresh grounds of appeal with the EAT (but not any of the respondents) the day before; by the proposed amended grounds, the appeal was further limited to the costs award made in favour of SEH and allegations of bias were no longer pursued. Representatives for SEH and Messrs Edgar and Allen were present at the hearing on 31 January 2024, but had no right to be heard on the rule 3(10) application itself and did not seek to make any representations on any other matter. In the event, having heard from counsel for the claimant at that hearing, I granted permission for the grounds of appeal to be amended, such that the new grounds replaced those previously filed by the claimant in their entirety; on the basis of the amended grounds of appeal, by my order seal dated 2 February 2024, I granted permission for this matter to proceed to a full hearing.

23. Paragraph 3 of the order of 2 February 2024 gave the respondents liberty to apply to vary or discharge the direction permitting the amended grounds of appeal; paragraph 9 gave all parties permission to apply to vary, supplement or revoke the order or any part of it, save for paragraph 1 (which allowed the application under rule 3(10)).

24. On 16 February 2024, those acting for SEH, Mr Edgar and Mr Allen wrote to the EAT applying for the order of 2 February 2014 to be revoked on the basis that the claimant's application under rule 3(10) should not have been granted, because it did not appear that the notice of appeal should have been accepted by the EAT in the first place. By further order, seal dated 7 March 2024, I ruled that this application should be listed for hearing, giving further directions in this regard, including that the claimant was to file with the EAT (within seven days) copies of all of the pleadings in the seven claims before the ET on 2 December 2022 or explanations as to why any such pleading was not filed.

25. On 14 March 2024, further to my order of 7 March 2024, the claimant emailed to the EAT the ET1s and ET3s, with attached particulars, in each of the seven claims.

26. At the oral hearing before me, on 19 June 2024, submissions in support of the application of 16 February 2024 were advanced by Mr Williams. Although not in attendance or separately represented, I understand that the application is supported by all respondents, adopting the submissions made on behalf of SEH and Messrs Edgar and Allen; for convenience, when referring to submissions made on the 16 February 2024 application, I will simply refer to these as either being those of "*the claimant*" or "*the respondents*". For his part, at the hearing on 19 June, the claimant was represented by Mr Fitt, acting under ELAAS, who had not previously acted in this matter. In subsequent correspondence with the EAT, the claimant has acted in person.

The legal framework

27. The application now before me is made under rule 33(1)(a) **EAT Rules**, which provides that:

> "(1) The Appeal Tribunal may, either of its own motion or on application, review any order made by it and may, on such review, revoke or vary that order on the grounds that— (a) the order was wrongly made as the result of an error on the part of the Tribunal or its staff;"

28. In considering whether the order of 2 February 2024 was "*wrongly made*" in this instance, it is necessary to have regard to the provisions of the **EAT Rules**, and relevant case-law, relating to the institution of appeals in this jurisdiction.

29. In April 2023, when the claimant sought to lodge his appeal, rule 3(1) **EAT Rules** provided (so far as material) that:

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

30. Similarly, at that time, paragraph 3.1 of the **EAT Practice Direction 2018**, stated that:

> "3.1 ... The Notice of Appeal must be, or be substantially, in accordance with Form 1 (in the amended form annexed to this Practice Direction) ... It must identify the date of the judgment, decision or order being appealed. Copies of the judgment, decision or order appealed against must be attached by the Appellant. In addition the Appellant must provide copies of the Employment Tribunal's written reasons, together with a

> copy of the claim (the form ET1 and any attached grounds) and the response (the form ET3 and any attached grounds), or if not, a written explanation for the omission of the reasons, ET1 and ET3 must be given… A Notice of Appeal without such documentation will not be validly presented."

31. With effect from 30 September 2023, rule 3(1) **EAT Rules** was amended by the deletion of sub-paragraph (b). On the same date, the **EAT Practice Direction 2023** came into effect, which similarly reflected this changed position.

32. Prior to the 30 September 2023 amendment, there was a difference in view in the authorities as to what was meant by the reference at sub-paragraph (b) to "*any claim and response in the proceedings before the employment tribunal*". In **Carroll v Mayor's Office for Policing and Crime** [2015] ICR 995, HHJ Hand QC had held that this required the would-be appellant to lodge not only the pleadings in his own claim but also those relating to the case of another claimant, which had been heard together with his and was addressed in the same decision. This approach was also adopted by the EAT in the Gullick judgment, in the earlier appeal involving the present parties.

33. In **Jasim v LHR Airports Ltd** [2024] EAT 59, however, HHJ Auerbach took a different view, rejecting the approach in **Carroll** as effectively requiring that "*every*" - rather than "*any*" - claim and response be filed. HHJ Auerbach noted that the EAT in **Carroll** had not referred to the decision of the Court of Appeal in **Sud v London Borough of Ealing** [2011] EWCA Civ 995, which had rejected a submission that, because they had been dealt with together and considered in a single decision of the ET, two separate claims were to be treated as one, so as to mean an appeal lodged in respect of one of those claims had to include the pleadings of both (see **Sud**, paragraphs 28-29). Acknowledging that the Court of Appeal in **Sud** had not expressly addressed the wording of rule 3(1) (it had treated this issue as relevant to the EAT's exercise of its discretion under rule 37(1) **EAT Rules**), HHJ Auerbach nevertheless considered this was consistent with the focus of the rule being on the relevant claim and response, such that "*any*" should be construed as meaning "*if any*" (see the analysis in **Jasim** at paragraphs 9-19). In reaching this view, HHJ Auerbach further rejected the distinction drawn in **Shah v The Home Office** [2024] EAT 21, between claims that have been formally consolidated by the ET and those that are simply combined for hearing (see paragraph 15 **Shah**).

34. Since 30 September 2023, there is no longer a requirement to include "*any claim and response*"

when lodging an appeal against an ET decision and in the present case, for the reasons provided below, it is unnecessary for me to seek to further address the competing views expressed in the authorities as to the construction of the word "*any*" in this context. In any event, however, a failure to include the claim and response need not have been fatal to the lodgement of an appeal where an explanation for that omission had been provided or, in circumstances in which the relevant default was subsequently rectified, where any necessary extension of time was then granted by the EAT.

35. Addressing the first of those possibilities, where a would-be appellant omits to provide copies of documents required to be lodged with the notice of appeal, rule 3(1) allows that they can, instead, provide an explanation as to why the document/s in question have not been included. Since 30 September 2023, this applies to the written reasons for an ET's decision (see rule 3(1)(c)); before that date it also applied to ET claim and response documents. In **MTN-1 Ltd v O'Daly** [2022] EAT 130, HHJ Auerbach considered the position where there was no response, expressing the view that no explanation would be required in such circumstances:

> "40. ... The requirement in the rules is to provide a copy of "any claim or response … or an explanation of why either is not included". I am inclined to think that that this means, strictly, that, where none exists, an explanation is not required, although obviously it would be sensible to explain to the EAT that that is the very reason why none has been provided."

In that case, the point was moot as the ET's decision (which had been provided) had itself referred to the fact that no response had been entered (at least at the time when the judgment was given).

36. Where an explanation is provided, it has been held that it must be one that is, having regard to all the facts and circumstances of the case, "*both genuine and satisfactory*", see **Elhalabi v Avis Budget Rentacar Ltd** [2022] EAT 185 at paragraph 85. In **Richardson v Extreme Roofing Ltd** [2022] ICR 328, the requirement was expressed as follows:

> "19. ... any explanation for a failure to provide required documents, where permitted, must be a genuine explanation of why the documents cannot be provided. It could not be sufficient to comply with Rule 3.1 to state that the document has not been provided because an appellant could not be bothered to do so and/or considered that the EAT should obtain the documents itself, or some similar reason that would not prevent compliance. This construction fits with paragraph 3.4 of the **EAT Practice Direction** that is clearly written on the assumption that, where reasons for a judgment have not been provided, that is because the appellant does not have them and so must request that the EAT consider the appeal without the reasons or direct the

> employment tribunal to provide them."

37. Allowing a would-be appellant to provide an explanation for a missing document is a practical means of addressing potential problems arising from the requirements of rule 3(1), not least as it enables the EAT Registrar to understand the reason for an apparent omission and to take an informed view as to the case-management of the appeal. The case-law of the EAT demonstrates an appreciation of this purpose, adopting a flexible approach, consistent with the overriding objective at rule 2A **EAT Rules**, which 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."

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

38. By rule 3(3), it is provided that the period within which an appeal to the EAT is to be instituted is 42 days from the date when (relevantly) the ET's written reasons are sent out to the parties. As has been observed in a number of reported cases, this is a more generous period of time than is typically granted for the lodgement of an appeal (certainly in England and Wales). In any event, however, the EAT has a discretion to extend time, as provided by rule 37(1):

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

39. With effect from 30 September 2023, rule 37 was amended so as to include the following

provision:

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

40. The 2023 amendments to the **EAT Rules** were considered by the EAT (Mr Andrew Burns KC sitting as a Deputy High Court Judge) in **Melki v Bouygues E and S Contracting UK Ltd** [2024] EAT 36. In that case the claimant had appealed from the Registrar's order refusing an extension of time for the presentation of the appeal in circumstances in which the notice of appeal itself had been filed in time but the respondent's ET3 form was attached without the grounds of resistance which set out its substantive position, an omission that had been corrected six days out of time.

41. On the issue of the transitional application of the amended **EAT Rules**, DHCJ Burns KC held that the approach was different for the deletion of the old rule 3(1)(b) (which did not have retrospective effect) and for the addition of the new rule 37(5) (which did). He said this at paragraph 30:

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

42. Going on to consider whether the facts of **Melki** gave rise to a "*minor error*" for the purpose of rule 37(5), however, DHCJ Burns KC found against the appellant, holding:

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

43. An application for permission to appeal is currently outstanding before the Court of Appeal in **Melki**. The decision has, however, since been followed by other compositions of the EAT (see, e.g. **Jasim**) and it has not been suggested that I should adopt any different position on the present application.

44. In determining applications to extend time for the lodging of an appeal against a decision of the ET, and thus exercising the discretion afforded by rule 37(1), the approach that will be adopted by the EAT was set out by Mummery J (as he then was) in **United Arab Emirates v Abdelghafar** [1995] ICR 65, in which the following three questions were identified (see p 72C): (1) what is the explanation for the default?, (2) does that provide a good excuse?, (3) are there circumstances which justify the exceptional step of granting an extension of time? The approach laid down in **Abdelghafar** has been approved by the Court of Appeal on a number of occasions, as helpfully summarised by the most recent decision of that court in **Ridley v HB Kirtley and related appeals** [2024] EWCA Civ 875 (see the comprehensive summary of the relevant authorities at paragraphs 23-97 **Ridley**), where it was observed:

> "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."

45. In **Ridley**, however, the Court of Appeal considered there was a material distinction between the case of the would-be appellant who had lodged a notice of appeal and most of the documents required by rule 3(1) within the 42-day time limit, and that of the putative appellant who lodges nothing until after that period has passed:

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

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

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

Going on to hold:

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

46. The Court of Appeal in **Ridley** considered that recognition of this distinction gave rise to three further points relevant to the EAT's exercise of discretion under rule 3(1):

> "147. ... First, a case in which an appeal is lodged in time but a document or part of a document is missing is very likely to be a case in which the appellant has made a mistake. The mistake is the reason for invoking the discretion conferred by rule 37(1). The fact that a mistake has been made cannot, therefore, be used as a reason for barring the exercise of that discretion .... An understandable or reasonable mistake about the documents cannot necessarily be discounted simply on the basis that, had the litigant filed the papers earlier, the mistake might have been picked up and corrected before the expiry of the time limit. That would be to exercise the discretion in a 'programmed' way. Second, before it can lawfully consider the exercise of its discretion in such cases, the EAT must clearly understand the appellant's explanation for her mistake, because, unless it does so, it cannot properly consider whether that explanation is satisfactory or not. Third, while the EAT has no duty to correct an appellant's mistakes, when the EAT in due course tells the appellant that 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, ..."

47. More generally, the Court of Appeal observed:

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

> who fails to file any of the appeal documents in time and a litigant who files the appeal notice in time but omits one of the accompanying documents, or a page of one of the documents. They are different circumstances, and the practice of adopting the same strict approach does not obviate the obligation to apply that practice in a principled manner in accordance with reason and justice."

The issues raised by the present application and the parties' submissions

48. In applying for revocation of my order seal dated 2 February 2024, the respondents contend that the claimant's appeal was not properly instituted as the documentation lodged on 26 April 2023 was incomplete and failed to comply with rule 3(1). The respondents' submissions can be summarised as follows:

(1) The claimant did not include "*a copy of any claim and response in the proceedings*" before the ET, as then required by rule 3(1)(b): although he had filed the ET1 and some of the ET3s in ET case number 2303263/2018, he had not filed the ET1 (and grounds) or any ET3 (and grounds) in ET case numbers 3306927/2018, 2300054/2019, or 2205013/2019 (in relation to which he was also seeking to appeal decisions made by the ET), or the ET1 (and grounds) or any ET3 (and grounds) in three further claims that were also the subject of the ET's decision sent out on 28 March 2023.

(2) No valid explanation for the missing documents was provided: even if the claimant had provided an explanation for not including the pleadings in the 2021 and 2022 claims, he had failed to do so in respect of the first 2018 claim (3306927/2018) (and it was wrong to say that the responses to those claims "*were all saying the same thing*"), or the two Niblock claims.

(3) To the extent that the claimant had sought relief from sanction (asking for "*leniency if I left anything out as I believe I have included the relevant materials and any other thing is mere technicalities*"), it was apparent that he was aware that documents might be missing but did not check the position or assumed it did not matter (notwithstanding that the EAT had already held (see the Gullick judgment) that the 2018 claims were closely connected and ought to have been provided in the earlier appeal against the February 2021 judgment).

(4) The default was not a "*minor error*" for the purposes of rule 37(5) **EAT Rules** (see **Melki**).

(5) This was not a case warranting an extension of time applying the guidance laid down in **Abdelghafar**. Even with the further clarification provided in **Ridley**: (i) this was not a case where the claimant had "*made a mistake*", rather he had taken a reasoned decision not to include documents which were required; (ii) even if that were to be treated as a mistake, it was not an "*understandable or reasonable*" error, which was to be discounted; (iii) moreover, the missing documents (at least those relating to the claims involving SEH) were relevant to the substance of the appeal: the claimant was appealing against the costs orders made in relation to the 2018 claims, where the ET's reasoning had also referred to the later three claims involving SEH and to the litigation more generally; (iv) to the extent that the claimant had now rectified the position (pursuant to the EAT's order seal dated 7 March 2024), that was some 322 days after the Notice of Appeal had been lodged and only in response to the EAT's order when it had been open to the claimant to do so earlier.

49. In response to the application, the claimant contends that he in fact complied with the **EAT Rules**: "*because he filed some pleadings and explained why he was not serving the others*" (claimant's skeleton argument, paragraph 2). More specifically, the claimant makes the following submissions:

(1) The ET decision under appeal covered several issues but those relevant to the appeal instituted by the claimant were (as the notice of appeal made clear) limited to SEH's application for a costs order in the 2018 claims and Niblock's application for a preparation time order in the 2019 claims. Following the rule 3(10) hearing, only the former remained relevant.

(2) Having provided the pleadings in the 2018 claims, the claimant provided an explanation for not including other pleadings: (i) the 2021 and 2022 claims were not relevant to his appeal (due to his mental health issues, he was intending to file a separate appeal in respect of the decision relating to those claims); (ii) he was only including one ET3 from SEH because "*they were all saying the same thing*"; (iii) he was not including the other ET1s and ET3s because his appeal was on grounds of "*racial bias*", an allegation that did not relate directly to the pleaded issues but to the hearing.

(3) When ordered to file all ET1s and ET3s in the seven claims, the claimant did so within the time required.

(4) Rule 3(1)(b) was clear: the claimant had to submit the pleadings or an explanation as to why they were not included; he had complied with that requirement. The respondents' application was put on the basis that the explanation required by rule 3(1)(b) had to be "*a good one which the EAT accepts*" (p 6 of the application letter of 16 February 2024); that, however, was not what the rule said, nor was it to be implied from the practical purpose of the rule - which was to enable the Registrar to take an informed view regarding the management of the appeal (see **Carroll** at paragraph 57).

(5) In any event, the EAT Registrar had not rejected the claimant's appeal, nor asked for further pleadings. At the time the appeal was lodged, it appeared that the claimant's explanation was accepted by the EAT. It would be wrong for this question to be re-visited at a later stage by a Judge: if that was allowed, an appellant who had genuinely sought to maintain a proportionate approach to the appeal, and had given an honest explanation in accordance with the unambiguous wording of the rule, might later be told that the explanation was not good enough and that the appeal had never been properly instituted.

(6) In the alternative, this was a case that called for the exercise of the EAT's discretion to extend time: (i) he had done what he genuinely and (given the scope of the appeal) reasonably thought necessary to comply with rule 3(1)(b); (ii) there was no previous authority that providing a genuine explanation was insufficient; (iii) he had appealed in good time and could have remedied the omission had his explanation not been accepted by the Registrar; (iv) no prejudice had been caused.

50. In his further communications with the EAT since the hearing on 19 June 2024, the claimant (acting in person) has: (1) applied for relief from sanction on the basis of his mental health condition, stating that he had attached all relevant medical evidence (the attachments to this application comprise a witness statement from the claimant and correspondence between the claimant and a cognitive behavioural psychotherapist relating to appointments dating from March 2024); (2) provided written

submissions in relation to the decision in **Ridley**, although these again focus on the mental health issues referenced in the application for relief from sanction; and (3) applied for an extension of time (in place of his earlier application for relief from sanction): "*to provide more detailed medical evidence if the EAT wants detailed evidence*", for an anonymity order, and for an oral hearing (on the basis that "*I had said one thing in the past, and now I have changed my mind, so my credibility is at stake*").

Analysis and conclusions

51. The first question I need to address is whether there was any error on the part of the EAT in accepting the claimant's appeal as having been properly instituted in time. That, in turn, requires me to determine whether the documents lodged by the claimant within the 42-day time limit were sufficient to comply with the pre-30 September 2023 requirements of rule 3(1) **EAT Rules**. If (adopting the approach laid down in **Carroll**) those requirements meant that the claimant had to file copies of all the pleadings in each of the seven claims considered within the March 2023 judgment then he plainly failed to comply with the rule within time. Even if, however, I adopt the approach of the EAT in **Jasim**, and consider the claimant was only required to filed copies of the pleadings for the claims in respect of which the ET made the decisions under appeal - that is: the costs award in favour of SEH, and the preparation time order in favour of Niblock - he would still have failed to comply: assuming (in the claimant's favour) that the 2021 and 2022 claims could be separated out from the earlier claims for these purposes (I return to this point below), the failure to include the pleadings in the Niblock claims could not be excused. The claimant was seeking to challenge the preparation time order that had been made in respect of the Niblock proceedings and - whichever approach is adopted - he was required to lodge the pleadings in respect of those claims within the 42-day time limit.

52. For the claimant, it is contended that he nevertheless complied with the requirements of rule 3(1) because he provided an explanation for his failure to provide the pleadings in all seven claims: pursuant to rule 3(1), he simply had to provide "*an explanation*", and there was no basis for adding a gloss to those words so as to require that the explanation must be "*a good one which the EAT accepts*".

53. The difficulty with that submission is, however, two-fold. First, rule 3(1) is to be construed in a way that is consistent with the overriding objective, which imposes an obligation on the parties to

assist the EAT in dealing with cases justly (rule 2A(3) **EAT Rules**): knowingly, or recklessly, providing a bad and/or misleading explanation for a failure to lodge required documents plainly would not do so (and see **Elhalabi**, **Richardson** and **MTN-1**). Second, the explanation that the claimant provided can be criticised as failing to fully address the omissions in this case.

54. Unpacking that second point, there were a number of difficulties with the explanation provided by the claimant, as follows:

54.1 It was not correct to say that the responses to the claims involving SEH were "*all saying the same thing*". That was certainly not true about the responses to the 2021 and 2022 claims, which had raised new complaints, arising from the litigation of the earlier claims (I appreciate it is the claimant's case that the pleadings in those claims did not have to be filed because the decisions under challenge were limited to the 2018 and 2019 claims, but he did not expressly state that in the explanation provided (although it could be implied from the notice and grounds of appeal)). More relevantly, it was not correct to say that SEH's responses (and, by implication, those of Messrs Edgar and Allen) to both of the 2018 claims were the same: as the response to the second of the 2018 claims made clear, although the claimant had repeated large parts of his first claim, the second 2018 claim raised some additional complaints, which were then addressed in that response. That said, by submitting the response to the second claim together with the attached Appendix 1, the claimant had in fact provided a copy of SEH's grounds of resistance to the first 2018 claim. The omission was, therefore, limited to the ET3 forms, in respect of which his explanation was rather more accurate: in all material respects, these were "s*aying the same thing*".

54.2 It failed to explain why the claimant had not provided copies of the pleadings in the Niblock claims. Although he said that he was not including the "*ET1s and ET3s of the other cases*" because he was "*appealing the Cost Application on the grounds of Apparent Bias (Racial Bias)*", that did not explain why he had included the pleadings in respect of one of the SEH claims but none of those relating to the Niblock claims.

54.3 More generally, it failed to acknowledge the ET's reasoning underpinning the making of

the costs and preparation time orders. That reasoning related to the claimant's conduct of the litigation across the claims, and the allegations of bias would thus have to be adjudged in the context of the parties' respective positions in those claims.

55. For the reasons provided, I would not, therefore, agree that the claimant's written explanation, lodged alongside this appeal, fully complied with the requirements of rule 3(1) **EAT Rules**, although I would accept: (i) that he had in fact lodged the response to the first 2018 claim (although the claimant did not include the ET3 form for the first 2018 claim, he had lodged the grounds of resistance in the first claim as this document formed part of Appendix I to the grounds of resistance to the second 2018 claim, which was lodged with the appeal); (ii) that the particulars of claim for the second 2018 claim substantively repeated the particulars attached to the first 2018 claim (albeit with some changes to the paragraph numbering and some additions); and (iii) an explanation for the failure to provide the pleadings in the 2021 and 2022 claims could be implied from the notice and grounds of appeal. Even accepting these points, however, the claimant had still failed to file the ET1 for the first 2018 claim, and had failed to file the pleadings in the two Niblock claims. These documents were plainly relevant to the appeal the claimant was seeking to pursue, and he had provided no sensible explanation for these omissions. Whether adopting the approach laid down in **Carroll** or that of the EAT in **Jasim**, the claimant had thus failed to comply with the requirements of rule 3(1), and the EAT fell into error in treating the appeal as having been properly instituted: this matter should not have been referred to a Judge under the initial sift and should not have come before me at a subsequent hearing under rule 3(10) **EAT Rules**.

56. That, however, does not mean that I am bound to revoke the order that I made on the rule 3(10) hearing in this case. The claimant ultimately did file all the pleadings to all seven of the claims that were considered by the ET in the March 2023 judgment and, in the alternative, asks that time duly be extended pursuant to the EAT's discretionary power under rule 37(1). Although this application for an extension of time has not followed the standard course (whereby it is first considered by the EAT Registrar), it is not suggested that it would be wrong for me to determine this question as part of the review hearing, and both sides have addressed me on this point.

57. In considering whether I should extend time in this instance, I bear in mind that - as the respondents point out - there was a lengthy delay in lodging all the pleadings in the claims being considered in the ET decision under appeal. On the other hand, I also note that, when directed by the EAT to lodge the pleadings in each of the seven claims in issue, the claimant immediately did so. Noting the observation made at paragraph 147 of **Ridley**, and given that the claimant had understood his appeal to have been accepted by the EAT as having been properly instituted, I cannot see that he acted unreasonably in not sending in the further documents until such time as he was directed to do so by the EAT.

58. Turning then to the questions posed by **Abdelghafar**, I first consider the reason for the claimant's default. At this stage, it is necessary to refer back to the further applications made by the claimant subsequent to the hearing on 19 June 2024, first put as a request for relief from sanction and then as an application for an extension of time. As I have already observed, the submissions made on the claimant's behalf at the oral hearing had already included, in the alternative, a request for time to be extended pursuant to rule 37(1) **EAT Rules**. The claimant's subsequent application would appear to be an attempt to put that request on additional grounds, relating to what are said to have been difficulties in dealing with this litigation due to his mental health issues. Although the initial application stated that all relevant medical evidence has been provided, other than the claimant's own statement, the material produced does not in fact address the question whether the claimant might have been disadvantaged in dealing with the appeal process at the relevant time. In his later application, the claimant asked for additional time to provide more detailed medical evidence "*if the EAT wants detailed evidence*". I am, however, unable to see that there is any justification for seeking to re-open this issue. As was observed at paragraph 70 of the Gullick judgment, the claimant's arguments based on the impact of his mental health condition do not assist in demonstrating a reason for his default. As the explanation he provided when lodging this appeal makes clear, the omission of the missing documents was not due to some oversight on the claimant's part (whether or not related to any mental health difficulty), but resulted from a conscious decision as to whether the pleadings were required for the determination of his appeal. That, I am satisfied, was the reason why the claimant failed to file all the documents required under rule 3(1) **EAT Rules**; additional medical evidence (which the claimant did

not seek to adduce prior to the hearing on 19 June 2024) will not take matters any further in this regard. In the circumstances, I refuse the claimant's application to rely on this additional medical evidence (or to be given more time to obtain further reports), and, in these circumstances, am unable to see that it is necessary for me to deal with his related application for a restricted reporting order.

59. Having thus identified the reason for the claimant's default, the next question is whether that provides a good explanation. I have already set out the difficulties that arise from the explanation provided by the claimant when submitting his appeal (see paragraph 54 above). As I have already said, however, notwithstanding those criticisms, I would be prepared to accept that there was a good reason for the claimant's belief that he did not need to provide copies of the pleadings in the 2021 and 2022 claims: he had made clear that his appeal was limited to the costs and preparation time orders relating to the 2018 and 2019 claims, and the content of his notice and grounds of appeal (if not the separate document in which he set out his explanation for any omissions) had reiterated that point. Although it might be considered that the other pleadings would in fact be required to determine any allegations of bias - the point made at sub-paragraph 54.3 above - it was not wholly unreasonable for the claimant to focus on the claims to which the orders under challenge related, and to take the view that pleadings that related to entirely separate claims were not required at that stage. Certainly, an explanation for why the claimant had not included the pleadings in the 2021 and 2022 claims could be discerned from his notice and grounds of appeal, even if that was not stated as clearly as it might have been in the separate document he had created for that purpose.

60. Even allowing that the claimant had a good reason for not providing copies of the pleadings in the 2021 and 2022 claims, the focus of his appeal plainly meant that he needed to include those relating to the 2018 and 2019 claims.

60.1 In respect of the former, the claimant had filed the pleadings for the second 2018 claim with his appeal, but had decided not to submit the pleadings for the first 2018 claim, although those were plainly relevant to his challenge to the costs order made in respect of those proceedings. The claimant's default in this regard was, however, partial: by lodging the grounds of resistance to the second 2018 claim, the claimant had, as a matter of fact,

also filed a copy of the grounds of resistance in the first 2018 claim. It is also right to note that the particulars of claim in the second 2018 claim substantively incorporated the particulars he had attached to his ET1 in the first. The claimant had, however, not provided copies of the ET1 and ET3 in the first 2018 claim, and, although he might have been entitled to consider that the ET3s "*were all saying the same thing*", he gave no explanation for omitting the ET1, which was not "*saying the same thing*"; in this respect, the claimant had thus failed to lodge a required document, or to provide an explanation for this omission.

60.2 As for the 2019, claims, the claimant had failed to lodge the pleadings in relation to either of the two Niblock claims. Those were plainly relevant to the claimant's challenge to the preparation time order made against him in those proceedings and I am unable to see that any good reason has ever been demonstrated for the omission in this respect.

61. This was not a case where the claimant's omission was due to oversight or some other unwitting mistake; rather, he made a conscious decision as to which pleadings he considered he would file when lodging his appeal. It was, however, not for the claimant to decide whether or not to comply with the **EAT Rules**, and there was no good reason for failing to ensure the EAT had copies of the pleadings for the first 2018 claim, which was relevant to the costs award he was seeking to challenge, or for the 2019 Niblock claims, relevant to the PTO against which he was appealing.

62. Having thus focused on the reasons for the claimant's default, I then turn to the more general question whether there are circumstances in this case that would justify the exceptional step of granting an extension of time. In this regard, it is right that I keep in mind the interests of all parties: although refusing an extension of time would prevent the claimant from pursuing an appeal that I have found to be arguable (the decision reached on the rule 3(10) hearing), the respondents are entitled to expect the time limits within the EAT to be enforced and for respect to be given to the principle that there is finality in litigation. Moreover, whilst it might be said that the respondents could have raised their objection earlier than 6 February 2024, I bear in mind that those instructed for SEH had not received the first of the claimant's emails lodging his appeal (the email with the ten attachments, including the pleadings for the second 2018 claim and the document providing the claimant's explanation for any

omissions), and appear to have taken the view that their clients were not required to expend costs in these proceedings until such time as directed by the EAT, or the appeal had been permitted to proceed.

63. In determining whether this is a case that would warrant the exceptional exercise of the EAT's discretion to extend time, I bear in mind that, as the Court of Appeal has made clear in **Ridley**, it is relevant that the claimant lodged his notice and grounds of appeal within the 42-day time limit; his default related to the additional documents he was required to file at that time, not to a failure to respect the limitation period. The respondents were thus on notice of the proposed appeal, and were aware of the focus of the grounds the claimant was seeking to pursue.

64. Considering first the position in relation to the omission of the pleadings in the 2021 and 2022 claims, even if - contrary to the view I have formed above - it was to be said that the claimant had failed to demonstrate a good reason for not including those pleadings, I would be satisfied that the particular circumstances of this appeal (specifically, the very clear focus in the grounds on the orders made in respect of the 2018 and 2019 claims) would warrant extending time until the stage when the claimant was subsequently directed to file those documents.

65. As for the pleadings in the 2019 Niblock claims, I note that the challenge to the preparation time order is no longer pursued: at the rule 3(10) hearing, the focus of the appeal was narrowed yet further, to the costs order made in relation to the 2018 claims involving SEH. By his amended grounds of appeal, the claimant thus withdrew any challenge to the Niblock preparation order; that, in my judgement, would provide an exceptional circumstance justifying the grant of relief from the sanction that would otherwise follow from the claimant's failure to file the pleadings in the 2019 Niblock claims.

66. This reasoning cannot, however, extend to the claimant's default in respect of the 2018 claims, which remain the subject of challenge in this appeal. In this regard, I take into account the substantial degree of overlap between the two 2018 claims but, having regard to that which was omitted by the claimant, I am unable to find that this was an insubstantial matter.

67. At the heart of the appeal is the claimant's contention that the ET was wrong to make a costs award against him. Looking at the ET's reasons for making that award (which requires consideration

of both the decision under appeal and the earlier February 2021 decision, by which the two 2018 claims were struck out) it is apparent that the nature of the allegations made in the two claims – in particular, whether they each repeated claims that had previously been struck out in earlier proceedings – informed its analysis. In saying this, I appreciate that the ET also took into account the manner in which the claimant had conducted the proceedings, but it is apparent that the repetitive nature of the claims was seen as a relevant factor (see paragraph 51 of the March 2023 judgment).

68. Although the claimant characterises the material in box 8.2 of the first claim as "*procedural background*", given that the ET struck out the two 2018 claims as being (in part) out of time, and (more generally) as being "*res judicata, an abuse of process*" and/or as having no reasonable prospect of success, how the claimant described that "*background*" in each of those claims is not something that can simply be ignored. In his original appeal, the claimant sought to contend that the award of costs was not made on proper grounds but was the result of racial bias; in the amended grounds of appeal, the challenge is put on the basis that there was a lack of clarity in the ET's reasoning. Without descending into the merits of the appeal, it is, however, apparent that, although the claimant would have been aware of the criticisms the ET had made of his bringing numerous repetitive claims, making the same allegations in different ways, in then seeking to appeal against the costs award made in this context, he made a conscious decision to only provide a selection of the relevant pleadings.

69. I acknowledge that the EAT initially accepted the claimant's appeal, apparently treating the explanation provided for the missing pleadings as sufficient to mean that the appeal was "*properly instituted*". That, however, was an error on the part of the EAT administration: the explanation provided by the claimant was incomplete. At that time, it was more difficult for the EAT to itself obtain documents from the ET (this required a request to be made to the ET, which would introduce a lengthy delay into the proceedings; the later ability of the EAT to itself obtain the pleadings from the ET digital case system was part of the reason why rule 3(1) **EAT Rules** was subsequently amended), and it was dependent upon an appellant to ensure that the necessary materials (or a proper explanation for their omission) were provided. As the present case illustrates, appeals to the EAT are often made in the context of a complex procedural history, involving numerous claims. When determining whether an appeal has been properly instituted, it is unlikely that the EAT will have the same

knowledge or understanding of that context as the parties. Acknowledging the need for a flexible approach, and taking into account the challenges that might be faced by litigants acting in person, the primary obligation to ensure that the correct documentation is filed must thus be on the would-be appellant. In the present case, the claimant made a conscious decision not to file all the pleadings and failed to provide an explanation for his omission in respect of an essential document relating to his appeal; the EAT's failure to identify the default did not change this position.

70. For the reasons provided, I am unable to find that these are circumstances that would warrant the exceptional exercise of the discretion to extend time pursuant to rule 37(1) **EAT Rules**.

71. For completeness, in reaching this decision, I have also considered whether the omission to file the ET1 in the first 2018 claim might, in any event, be characterised as a "*minor error*" for the purposes of rule 37(5) **EAT Rules**. In this regard, I have taken into account that the particulars of claim filed with the second 2018 claim substantially reproduced the particulars for the first; the failure to file the ET1 form might, therefore be seen as a failure to file part of the claim (so, in contrast to **Melki**, not the entirety of the document). Set, however, in the context of the decision under challenge, I am unable to see that this was a "*minor*" omission. These matters will always be fact specific, and, in this case, scrutinising the reasons provided for the ET's decision is likely to require consideration of the particular nature of the claims made, set against the history of the earlier litigation. The descriptions given at box 8.2 of the two ET1s will thus be potentially relevant to that exercise; in the circumstances, the omission was not a minor error. Even if I was wrong in my approach to the characterisation of a "*minor error*", however, given the deliberate nature of the default in this case, I would not consider it would be just to extend time under rule 37(5) in any event.

72. For all the reasons provided, I therefore refuse the claimant's application for an extension of time in this matter and allow the respondents' application to revoke my order seal dated 2 February 2024.