Neutral Citation Number: [2022] EAT 130

Case No: EA-2020-000547-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 August 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MTN-1 LIMITED	**Appellant**
- and -	
MR DAVID ROSS O'DALY	**Respondent**

- -
- -

Jeremy Lewis QC (instructed by Harbottle & Lewis) for the **Appellant**

The **Respondent** appeared in person

Appeal Against Registrar's Order

Hearing dates: 29 July and 12 August 2022

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – time for appealing

The appellant was the respondent in the employment tribunal. By a notice of appeal emailed to the EAT after 4pm on the last day for appealing, it sought to appeal a rule 21 judgment given against it in the absence of any response having been entered to the claim.

The appellant correctly asserted that the rule 21 decision attached with the notice of appeal, contained the tribunal's reasons for granting the judgment, brief though they were, and whether or not they were sound or adequate. The notice of appeal was not accompanied by a copy of the claim form, but the appellant put forward an explanation for why not, which reflected its CEO's understanding at the time, of what had happened to the copy that had been sent out to it by the employment tribunal. It was not accompanied by a copy of any response form, because none had been entered. In those circumstances, the appeal was properly instituted by that email, but, as it was sent after 4pm, it was one day out of time.

The application for an extension of time relied upon what were said to be the effects of the appellant's CEO's mental impairments of ADHD and depression. Applying the guidance in **J v K** [2019] ICR 815 to the particular evidence presented at the hearing in the EAT, including medical evidence and the live evidence of the CEO on which he was cross-examined: (a) the CEO did have the mental impairments claimed; (b) on the balance of probabilities the impact of them was a material and substantial part of the explanation for why the appeal was instituted late; and (c) there were no compelling countervailing reason nevertheless not to extend time. Time was therefore extended.

HIS HONOUR JUDGE AUERBACH:

Foreword

1. As will appear, this decision arises from a hearing at which I considered matters arising from two related appeals. In relation to the first appeal, which was instituted out of time, I considered an application to extend time, by way of an appeal from Registrar's order (ARO), and an application to amend the grounds of appeal. In relation to the second appeal, which was instituted in time, I considered an application to amend the grounds of appeal, which had been listed in the context of a rule 3(10) application, but in relation to which, by agreement, both parties were heard.

2. I gave an oral decision in relation to all of those matters. The appellant's counsel then applied for a transcript of my decision in relation to the ARO, which I granted. What follows therefore omits passages of the decision which I gave orally which related solely to the applications to amend the grounds of the two appeals.

Introduction

3. I will refer to the parties as they were in the employment tribunal. The claimant was formerly employed by the respondent from 2012. He was its Operations Director. It is common ground that he was dismissed by a letter of 17 September 2019.

4. I will start by setting out in brief outline the events in the litigation in the employment tribunal and EAT giving rise to the matters for decision by me.

5. It is common ground that, following the claimant's dismissal, there were communications, including between respective solicitors, about claims which the claimant considered that he had, and the claimant also completed the ACAS early conciliation process. However, there was no resolution of the dispute.

6. In January 2020 solicitors presented a claim form on the claimant's behalf complaining of unfair dismissal and wrongful dismissal.

7. It is not in dispute, as such, that, as found by the employment judge in the second decision to which I will come, the notice of claim was sent by the employment tribunal to the address given by the claimant for the respondent in the claim form, on 6 February 2020. That is the registered office of the respondent, which, as is a common practice, is the office of the respondent's accountants. Any response was required to be entered by 5 March 2020. No response was entered within that time or subsequently until, as I will describe, a draft response was tabled in September 2020. In the meantime, as I will describe, judgment was entered for the claimant, as to liability and remedy, in April 2020.

8. It is the respondent's case that the envelope containing the notice of claim and claim form was given to Mr Michael Baxter, who left it in the respondent's office on the desk of Mr Mike Tims, and that Mr Tims was told that it had been left on his desk, but not what it contained. There is no dispute that Mr Tims is the CEO and majority shareholder of the respondent. It was he who dismissed the claimant, the respondent's case being that there had been a total breakdown of the working relationship between the two of them. It is common ground that Mr Baxter is a shareholder in the respondent and played some part in its activities, but there is a factual issue about his role and the extent of his involvement, particularly during the relevant period in 2020.

9. It is the respondent's case that Mr Tims did not in fact know that a claim had been presented to the employment tribunal until the claimant's solicitors emailed the respondent's solicitors on 15 May 2020 referring to the April judgment. It says that during the relevant period the respondent's office closed on 17 March, in anticipation of the coming national lockdown; Mr Tims was immersed in dealing with a cash flow crisis and the implications of the unfolding pandemic for the business; and he was affected by other serious personal circumstances. The respondent also relies upon what it says was the impact on Mr Tims of mental impairments during this period.

10. On 8 April 2020 the employment tribunal wrote to the claimant's solicitors, a letter which, on its face, was copied to the respondent at the registered office address, indicating that no response had

been entered and that a rule 21 judgment could now be considered. However, further information about the remedies sought, and how these were calculated, was requested. On 9 April 2020 the claimant's solicitors emailed the employment tribunal providing information in response. On the face of it, that email was not copied to anyone associated with the respondent or to its solicitors.

11. On 27 April 2020 the employment tribunal at London Central promulgated a decision of EJ Snelson in chambers, headed "Judgment of the Employment Tribunal". This began:

> **"On reading the documents on the Tribunal file;**
>
> **And no response having been received by or on behalf of the Respondents;**
>
> **The Tribunal adjudges that:**
>
> **(1) The Claimant's complaint of wrongful dismissal is well-founded and the Respondents are ordered to pay him compensation in respect thereof in the sum of £3,075.58 (2.5 weeks' net notice pay underpaid).**
>
> **(2) The Claimant's complaint of unfair dismissal is well-founded and the Respondents are ordered to pay him in respect thereof compensation as follows:"**

12. It then set out a calculation of basic and compensatory awards in the respective amounts of £4,462.50 and £90,578.60. I will refer to that as the first decision.

13. On 8 September 2020 the respondent's solicitors wrote to the tribunal applying for a reconsideration and revocation of the first decision, including seeking an extension of time in respect of that application, and an extension of time to enter a response. A draft response was enclosed.

14. That led to a hearing on 16 July 2021 before EJ Snelson. He refused all of the respondent's applications. His written order was sent to the parties on 19 July 2021 and his written reasons on 28 August 2021. I will refer to that as the second decision.

15. The respondent instituted two appeals, the first being against the first decision, and the second being against the second decision.

16. By a decision sealed on 24 June 2022 Ms A Kerr on behalf of the EAT's Registrar decided that the first appeal had been properly instituted out of time and she declined to extend time.

17. The second appeal was properly instituted in time. There were three numbered grounds. HHJ Wayne Beard reviewed them on paper. He considered grounds 2 and 3 to be arguable and directed that they proceed to a full appeal hearing. That hearing is listed to take place on 11 October 2022. Judge Beard did not consider ground 1 to be arguable. His decisions were communicated to the parties in January 2022. On 11 February 2022 the claimant sent the EAT his Answer to the second appeal, in respect of the two grounds that had been permitted to proceed, with various attachments.

18. The following matters have come before me in this hearing, which opened on 29 July 2022. In respect of the first appeal against the first decision there is (a) an appeal against the Registrar's order, which is by way of a rehearing; and (b) an application to amend the grounds of appeal. The matter before me in respect of the second appeal against the second decision is a rule 3(10) hearing including, specifically, consideration of an application to amend the grounds of appeal. Evidence and argument were concluded on 29 July, but there was insufficient time for me to give a decision. So the hearing has been reconvened today for me to do so, being the first date convenient to both parties.

19. Before me the respondent has been represented by Mr Lewis QC. The claimant has been in person. I spent time at the start of the hearing discussing with the parties how the hearing would be conducted, including matters of practice and procedure, bearing in mind that the claimant was unrepresented. That discussion included the following matters in particular.

20. First, in relation to the appeal against Registrar's order, the respondent had tendered Mr Tims for cross-examination on his written evidence and the claimant confirmed that he did wish to cross-examine him.

21. Secondly, the evidence on which the respondent sought to rely for the purposes of that appeal included a report from a consultant psychiatrist, Dr Isaac, specifically commissioned by the

respondent's solicitors for that purpose. While the respondent's solicitors had written to the EAT acknowledging that permission was required to rely upon it, the EAT had not been asked to determine that question in advance, and so consideration had not been given, for example, to whether the claimant might wish to apply to put in his own report. Mr Lewis QC acknowledged that, but submitted that the evidence of Dr Isaac was, in any event, limited, and essentially corroborative of other witness and medical evidence. He invited me to attach such weight to it as I saw fit.

22. I had written skeleton arguments from both sides, a substantial bundle of documents, and a bundle of authorities. After opening discussions were completed, we proceeded after a break to the live evidence of Mr Tims, including cross-examination and re-examination. This included a short break for him to take medication and for comfort, after which he confirmed that he was content to continue. In the event that took us up to lunchtime. In the afternoon I heard oral submissions on both sides, initially on all matters apart from the application to amend the grounds of the first appeal.

23. By that point there was insufficient time for me to give an oral decision on matters argued thus far. However, there was time, and it was agreed, that I should hear oral argument on the application to amend the grounds of appeal in the first appeal, although I would only need to consider that application, were I to extend time in respect of that appeal. In the event, after Mr Lewis QC had made his further submissions on that, the claimant indicated that, were I to extend time in relation to that first appeal (which, as such, he opposed) he would not oppose me also then granting that amendment application.

24. Following the hearing the respondent's solicitors unbidden sent me a copy of their letter of instruction to Dr Isaac, which had not previously been disclosed, copying in the claimant.

25. The hearing has been reconvened today for me to give an oral decision.

26. Because the appeal against Registrar's order is by way of a fresh hearing, and with no disrespect to her, I do not need to refer particularly to the Registrar's reasons.

The chronology in the EAT in more detail

27. As to what was sent to the EAT, and when, the position is this.

28. On 8 June 2020 Mr Tims sent an email to the EAT, timed as received at 20.49. The attachments included the completed form 1 and the first decision. Within the form it was stated as follows:

> **"Attached is the ET Judgment. The Appellant does not have to hand the ET1 and Grounds of Complaint. It believes they may have been forwarded to its trading premises at 16 D'Arblay W1F 8EA, by its accountant (Pink Accounting Resources Ltd) whose address is the registered office of the Company.**
>
> **The Appellant, which is a small business, believes that the ET1 was sent to its office around the date it vacated the premises due to the COVID-19 pandemic and ET1 did not come to the attention of its Managing Director, Mike Tims, before he left the premises. Mr Tims has been suffering from the ongoing impact of a significant mental impairments ADHD, Complex PTSD and Depression, in respect of which due to the impact of the COVID-19 Pandemic, he has been unable to receive treatment. His therapist has been in a Coma for the past 6 weeks caused by COVID-19."**

29. In an email reply of 8 July 2020 the EAT's administration identified that written reasons and claim and response forms had not been provided. In a further letter of 21 August 2020 they indicated that in the absence of these documents the appeal was not properly instituted, while noting that if the respondent was unable to provide any of these documents then an explanation was required.

30. On 14 September 2020 the respondent's solicitors wrote to the EAT. They stated that it appeared to them that Mr Tims "did lodge with his original application the written reasons for the Judgment, which is attached again for your ease of reference." They attached a further copy of what I have called the first decision.

31. They also stated that Mr Tims "does not have to hand" the claim form or grounds of complaint "as they were he believes, they may have been left in his office at the time it was vacated due to Covid-19", and described their ongoing attempts to get copies from the claimant's solicitors or the employment tribunal. In a further email of 31 December 2020 they stated that they did not believe

that there was anything further by way of written reasons.

32. On 15 March 2021 the EAT wrote indicating that the appeal was considered to have been properly instituted on 31 December 2021 when written reasons for the judgment, or explanation for the lack thereof, was provided.

33. On 26 March 2021 the respondent's solicitors wrote submitting that this was wrong, because the first decision incorporated the tribunal's reasons. They submitted that the appeal was properly instituted one day out of time, on the basis that, because it had been sent after 4pm, the email of 8 June was deemed received on 9 June 2020; and they applied for an extension of time. They relied upon mental impairments of Mr Tims which were also relied upon in the application for reconsideration to the employment tribunal (ADHD, CPTSD, Dysthymic Depression), and they provided the EAT with copies of materials that had been sent to the employment tribunal in support of that application.

When Was the Appeal Properly Instituted?

34. Mr Lewis QC submits that the appeal was properly instituted by the email and attachments of 8 June 2020; therefore, because of the time of its sending, on 9 June. It was clear from the contents that there was no response form at that point: the appeal was about a decision to enter a judgment in the absence of one. An explanation was given as to why the respondent had not provided the claim form, which reflected Mr Tims' best understanding at the time, of what had become of it.

35. As to written reasons for the judgment, these were in fact contained in the first decision, and therefore they had been provided to the EAT with that email. That document set out that no response had been received, and that the judge had read the documents on the tribunal's file, and it set out how the amounts awarded had been arrived at. The judge observed in his second decision that at the time he had no reason to doubt that the respondent had been duly served, but had nevertheless simply failed to respond timeously or at all. It was no doubt because he was of that view in April, that he

did not see the need to say more by way of reasons for his liability judgment, than to refer to the absence of a response, and the fact that consideration had been given to the tribunal's file.

36. Mr Lewis QC also submitted that there is no requirement in the **Employment Tribunals Rules of Procedure 2013** for reasons to be set out in a separate document from the judgment, or under a distinct heading or with any other particular formality. Whether the reasons were sufficient or sound is a different matter.

37. The claimant submitted that that document did not contain reasons. It was headed "Judgment", and that was all it was. There were no distinct or substantive reasons to be found in it.

38. I will set out my conclusions on each of these aspects.

39. First, I accept that the decision sent to the parties on 27 April 2020, though headed "Judgment", also contained the tribunal's reasons, such as they were. It recorded that no response had been received and that the judge had also considered the documents on the tribunal's file. The calculations effectively gave some reasons in respect of how the amounts of the awards were arrived at. There is, and has been, no sign that the tribunal was ever intending to give any further reasons in another document. Whether these very brief reasons are adequate, sufficient, or otherwise sound, is a different question, and not something I have to decide today. For better or for worse, they *are* the reasons that the tribunal gave for entering that judgment.

40. Secondly, the respondent plainly did not provide the EAT with a copy response form in this case, as, on 8 June, none existed or had been lodged. 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. But in any case the tribunal's decision itself also referred to the fact that no response had been entered, at least at the time when the judgment was given. In all the circumstances I do not think

that the appeal in this case can be said to have been not properly instituted in that respect.

41. I should make it clear that the administration of the EAT are not to be criticised for pursuing these aspects in the way that they did. Though I have concluded that, on examination, it contains the tribunal's reasons, the 27 April 2020 document is headed "judgment" and has no sub-heading of "reasons" and no conventional narrative reasons section. The respondent's solicitors' original response to the administration's enquiry about this was also somewhat opaque, and was only made more explicit in their follow-up letter. Similarly, the administration cannot be criticised for looking for a copy of the response, or an explanation for its absence, when the position had not been spelled out by the respondent, for example, in its covering email, which only referred to the absence of the claim form.

42. I turn to the matter of the claim form. That document did exist, but, as I have recorded, the respondent put forward an explanation for why it was not included.

43. That explanation was not, it would appear from the evidence later put forward, entirely factually correct, in particular as to the timing of when the envelope was delivered to the respondent's office. This is referred to by the tribunal in its second decision. It is not necessary for me, for the purposes of what I have to decide, to make any comment on what the tribunal made of it, based on the evidence that it had before it, for the purposes of what it had to decide. I will not do so.

44. On the evidence before me, including having heard Mr Tims give oral evidence, I accept that what was said on 9 June represented a statement of what Mr Tims believed to be the position at that time, both as to what had become of the envelope generally, and as to the timing of when it may have been delivered to the respondent's office. I do not find, based on the evidence before me, that he was knowingly deliberately misleading the EAT in what he submitted about that, nor reckless as to whether what he submitted was correct or not.

45. Pausing there, I conclude that the appeal was properly instituted by the sending of the 8 June

2020 email and attachments. But, as the respondent was bound to accept, because it was sent after 4pm, the appeal is deemed instituted on the next working day and is one day out of time.

Extension of Time

46. Mr Lewis QC submitted that this is a case where there is a good excuse or exceptional reason why time should be extended. I have noted that an area of overlap between the reconsideration application to the tribunal and the appeal against Registrar's order before me is that in both cases the respondent relied and relies upon what it says was the impact of what are said to be Mr Tims' mental impairments of ADHD, PTSD and Dysthymic Depression, in terms of his ability to deal with, and take action in respect of, aspects of this litigation at the relevant times.

47. This is contentious territory between the parties. EJ Snelson made findings about this, for the purposes of what he had to decide in his second decision, on the evidence before him. I am mindful that some of his findings and conclusions in this regard are under challenge in the ongoing appeal against the second decision. I shall confine myself to the findings that I need to make, in relation to the time window and matters of inaction and inaction that are relevant to what I have to decide.

48. I note also that the evidence before me overlaps with, but is not the same as, the evidence which EJ Snelson had before him. In particular, EJ Snelson had Mr Tims' first and second witness statements and a report of Dr Dimitriou of 10 July 2018. I also have Mr Tims' third and fourth statements, a further letter from Dr Dimitriou of 21 January 2021 and the report of Dr Isaac, though I have noted an issue (to which I will return) about what weight I could fairly attach to it, given that there was no consideration or determination prior to the hearing before me, of the question of permission for either party to adduce expert evidence. I also heard Mr Tims give live evidence and be cross-examined.

49. I note also that I am deciding the matter on the basis of different material than was before Ms Kerr, when she reached the decision she did on behalf of the Registrar, both in terms of documentary

evidence, and because she decided the matter on paper.

50. The particular time window with which I am concerned is 27 April 2020, when the tribunal promulgated its first decision, to 8 June 2020, when the email instituting the appeal (with effect on 9 June) was sent.

51. As I have already noted, it is the respondent's case that Mr Tims did not know of the existence of the tribunal claim at all, or the first decision, prior to 15 May 2020. Although he was aware that there had been communications following the claimant's dismissal, and that an employment tribunal claim was on the cards, he was not aware that an employment tribunal claim had in fact been presented, or seen a copy. His evidence is that he was not told what was in the envelope left on his desk on 3 March 2020. He was preoccupied with other matters, relating to the business, and personally and domestically, throughout the period from that date, and, because of the impact of his ADHD, simply did not apply his mind, or give any thought, to this matter.

52. As to the tribunal's first decision, that was sent to the registered office, being the office of the accountants. That office was at that time closed on account of the lockdown. Mr Tims says he does not know what became of it. If it was delivered to the respondent's offices, which were also closed, and, although he did visit them two or three times in May, he did not see it or know of it.

53. There is no dispute that on 15 May 2020 the claimant's solicitors emailed the respondent's solicitors referring to the judgment, and the awards that had been made, and inviting proposals for payment. On 7 June they emailed all the shareholders threatening enforcement action. On 8 June Mr Tims emailed the EAT in the manner that I have described. The contemporary documents also show that the respondent's solicitors were, during this period, trying to get hold of a copy of the claim form, and indicating that there was an intention to make a reconsideration application.

54. Mr Tims' evidence was that, after 15 May, on account of a particularly bad patch in relation to his mental health, he was "in a very dark place" and not fit to engage with the matter, despite being

chased a number of times by the respondent's solicitors to do so. He refers to a number of particular domestic and personal issues said to have been affecting him during this period. He was preoccupied at that time particularly with the fact that someone who he was very close to, and regarded as a personal counsellor and a mentor, was dangerously ill with Covid, in a coma and deteriorating. He exhibits screen shots of newspaper reports about his friend's desperate condition which he had taken on his phone on the very day that was the last day to submit his appeal. He also exhibits a message he sent to another friend during this period, which he says bespeaks his extreme mental state.

55. The claimant's solicitor's email of 7 June was sent to a number of recipients, including Mr Tims and Mr Baxter. It referred to the fact that the time to appeal expired the next day and attached a copy of the judgment. Even upon initial receipt of that email Mr Tims was not immediately prompted to turn his attention to this matter. But, he says, he was finally prompted to take action by a WhatsApp message from Mr Baxter referring to this email, sent to him early on 8 June, although he only read it late in the afternoon. He then contacted his solicitors, and the response form that he presented that day was prepared with their help. But by the time he did so, the 4pm deadline had passed.

56. The claimant, in his cross-examination of Mr Tims, and then in submissions, focussed on the following principal points. First, the respondent was well aware of the existence of the dispute, and that, as it had not been resolved, he intended to present a tribunal claim, in the period between the date of dismissal and when it actually was presented. Secondly, the claimant did not dispute that Mr Tims has ADHD, and the ways in which this generally affects him, nor that there were many other things affecting and preoccupying him personally during the relevant period. But the respondent is a highly profitable business, it had solicitors, and, even if Mr Tims was incapable of dealing with these matters, either Mr Baxter, or other members of the team, could have been asked to deal with the solicitors to do the necessary to ensure the timely submission of the appeal. The claimant put it to Mr Tims, and submitted to me, that it was striking that Mr Tims was able to deal with many other

matters during this period. It was only the claimant's claim that apparently he could not deal with, or give any attention to. There was no sufficient excuse or exceptional reason to extend time.

57. Mr Lewis QC's principal points were, it appears to me, the following. First, while he was bound to accept that the appeal was out of time, and that the approach taken by the EAT to extension of time is a strict one, nevertheless, it was, in real time, only a few hours late. Secondly, he invited me to accept from the evidence I had that, as a matter of fact, Mr Tims was not aware of the existence of the tribunal claim until 15 May 2020. Thirdly, he invited me to accept the witness and medical evidence that had been presented to me, as to the particularly severe impact of Mr Tims' impairments, interacting with various events and circumstances, and his particularly bad mental state, in the period from 15 May to 8 June, and the phenomenon of "hyperfocus" – that is, a tendency or ability only to focus intensively on a particular matter to the exclusion of all other others, no matter how urgent or important – such that he was simply unable to give his attention to this matter during that period, despite the efforts of his solicitors to get him to do so

58. Mr Lewis QC also submitted that there is room, and it would be right, to allow more latitude to extend time in a case where the claims have not, in fact, been adjudicated on their merits at a trial in the tribunal below, the appeal being against a rule 21 judgment.

59. In my judgement, absent the claimant's impairments, none of the features or circumstances relied upon by the respondent could, together or separately, possibly justify an extension of time. I accept, based on the evidence presented to me, including having heard Mr Tims cross-examined, that he did not actually know of the existence of the tribunal claim before 15 May. But, absent the impact of his impairments, there would be no sufficient excuse or exceptional reason why not. It is axiomatic that a limited company may be sent important documents to its registered office, and has a responsibility for ensuring that they come to its attention. Mr Tims knew that there was a dispute with the claimant which had not been resolved, and an employment tribunal claim had been intimated. He knew that an envelope had been left for him, at his office. Leaving aside the position once the

first lockdown came into force, that envelope was delivered, and he was told of its existence, almost three weeks before that. It would not have been physically impossible for him to go into his office, find it, and open it.

60. After 15 May 2020, again absent Mr Tims' impairments, none of the matters relied upon by the respondent would afford sufficient excuse or exceptional circumstance supporting the failure to put the appeal in, in time. Leaving aside whether Mr Baxter or other colleagues could have helped, and however preoccupied Mr Tims was with the cash flow crisis, the impact of the pandemic, and personal and domestic matters, he could have given sufficient instructions and information to his solicitors to authorise and enable them to put together, and indeed submit, a notice of appeal by the deadline, which did not fall until some three weeks later.

61. Nor would I have been persuaded on the facts of this case, to take a more generous approach to extending time because this is a proposed appeal against a rule 21 judgment, where there had been no trial, even if, as a matter of law, it would have been open to me to do so, as to which I am doubtful, though that is not a point I have to decide today.

62. Whether I should extend time therefore comes down to whether the impact of Mr Tims' impairments, in particular, his ADHD and depression, make all the difference. In **J v K** [2019] ICR 815 Underhill LJ (for the Court) gave the following general guidance at [39] (omitting a footnote):

> **"I am hesitant about prescribing any kind of detailed guidance for the Registrar and Judges of the EAT about the exercise of what is inevitably a broad discretion which will fall to be exercised in a wide variety of circumstances. But I am persuaded that there may be some value in making the following few, very general, points:**
>
> **(1) The starting-point in a case where an applicant claims that they failed to institute their appeal in time because of mental ill-health must be to decide whether the available evidence shows that he or she was indeed suffering from mental ill-health at the time in question. Such a conclusion cannot usually be safely reached simply on their say-so and will require independent support of some kind. That will preferably be in the form of a medical report directly addressing the question; but in a particular case it may be sufficiently established by less direct forms of evidence, e.g. that the**

> **applicant was receiving treatment at the appropriate time or medical reports produced for other purposes.**
>
> **(2) If that question is answered in the applicant's favour the next question is whether the condition in question explains or excuses (possibly in combination with other good reasons) the failure to institute the appeal in time. Mental ill-health is of many different kinds and degrees, and the fact that a person is suffering from a particular condition – say, stress or anxiety – does not necessarily mean that their ability to take and implement the relevant decisions is seriously impaired. The EAT in such cases often takes into account evidence that the applicant was able to take other effective action and decisions during the relevant period. That is in principle entirely acceptable, and was indeed the basis on which the applicant failed in *O'Cathail* (though it should always be borne in mind that an ability to function effectively in some areas does not necessarily demonstrate an ability to take and implement a decision to appeal). Medical evidence specifically addressing whether the condition in question impaired the applicant's ability to take and implement a decision of the kind in question will of course be helpful, but it is not essential. It is important, so far as possible, to prevent applications for an extension themselves becoming elaborate forensic exercises, and the EAT is well capable of assessing questions of this kind on the basis of the available material.**
>
> **(3) If the Tribunal finds that the failure to institute the appeal in time was indeed the result (wholly or in substantial part) of the applicant's mental ill-health, justice will usually require the grant of an extension. But there may be particular cases, especially where the delay has been long, where it does not: although applicants suffering from mental ill-health must be given all reasonable accommodations, they are not the only party whose interests have to be considered.**

63. I turn then, to the evidence that was before me, and the conclusions that I draw from it, applying that guidance. What I give is only a summary of the main features of that evidence.

64. First, there is the report of Dr Dimitriou, consultant psychiatrist, of 10 July 2018. This includes a comprehensive history, ADHD tests assessment, and mental state assessment. It includes the following passage:

> **"Mike indeed presents with a clinical picture consistent with what is seen in the context of attention deficit hyperactivity disorder (ADHD) that persists into adulthood. The pattern of having a 'baseline' of chronically low mood coupled with a degree of anxiety is not uncommon in individuals presented in this way, particularly when it is driven by a sense of discontent about their lives they feel they cannot control or get a sense of fulfilment from. Equally, a degree of poor emotional regulation is another common feature of ADHD and, in Mike's case, it was not difficult to see how this is closely linked to the constant need for novelty/stimulation and the consequent sense of deflation**

> **once the novelty is gone and he loses interest in what is in front of him."**

65. The diagnosis is as follows:

> **"In summary therefore, from a diagnostic point of view, I believe there is enough evidence to confirm a diagnosis of ADHD of the combined type, in addition to which a secondary diagnosis of complex post-traumatic stress disorder (CPTSD) would be appropriate, given what has been described above."**

66. There is then a second report of Dr Dimitriou, following a review by telephone consultation on 21 January 2022. This followed a consultation about a month before at which Mr Tims' mix of medication had been reviewed and changed. He reported that this had been helpful in enabling him to focus more effectively and be more productive at the start of the day. Dr Dimitriou confirmed his previous diagnosis.

67. I also had four witness statements from Mr Tims. These referred to difficulties obtaining his medication during the period with which I was concerned. They give an account of his depression and how it affects him, and an account of his ADHD and how it affects him, including a discussion of his tendency to hyperfocus – the phenomenon to which I have earlier referred. Mr Tims says that his hyperfocus was on dealing with the respondent's cash flow crisis during this period, and that he was unable to prioritise or focus on anything else.

68. He says that, even on being made aware of the claim after 15 May his legal representatives were unable, despite their strenuous efforts, to get him to focus on it, and, even on 8 June, he was only able briefly to engage with his lawyer. In one of his witness statements he refers to being "in a very dark place" during this period, continuing as follows:

> **"Despite [the solicitor] chasing me a few times by text and by phone I simply never provided him with any instructions as to what I wished him to do in relation to the Claimant's claim and applying to have it set aside. Although I did confirm (on 16 May and again on 1 June 2020) that I would provide instructions and bullet points as to what to do I was never able to actually do so, because my mental health problems were so acute that they were also impacting on my ability at that time to manage key aspects of the business' operations, such as fighting to retain a key member of the editorial team who**

> **had been offered an alternative position and sadly left and I was unable to provide internal guidance and replies for information requested by employees in the business. The difficulties I faced renewing my ADHD medication every 28 days throughout lockdown resulted in my having to manage not just without the support they provided but the impact of severe withdrawal side effects for days at a time. This further prevented a timely response to the now litany of urgent and overwhelming challenges and now the subject of a formal Care Commission complaint and investigation in themselves."**

69. In the course of his oral evidence before me Mr Tims was questioned by the claimant about why, if he was preoccupied with other matters, he blocked other colleagues from dealing with this matter for him. He replied that he was not blocking anything but was simply unable to focus on this matter at all. He said that his solicitor did all he could to try to get him to focus, being quite rude on occasions, with the best of motives, but he simply could not change his focus at this time. He said at one point "I ask myself today how I managed to be late. There is no rational explanation. It is part of my condition." He referred to being incapacitated with grief about his friend's condition and battling to get his proper medication. But, he said, being in an absolute emergency situation triggers a response, which is what finally happened on 8 June.

70. The report of Dr Isaac says that he has no reason to doubt the diagnosis of ADHD, and refers to hyperfocus as a well-recognised occurrence in such cases, although he doubts that Mr Tims also has cPTSD. He says that it is impossible to know for certain if his psychological problems paralysed him into inaction on this matter, but he would, on account of them, be at significantly higher risk than others of that happening. It would also be in keeping with his reported psychological state that he could eventually avoid the matter no more and had to deal with it.

71. I have not attached any weight to the report of Dr Isaac for the following reasons. First, while the respondent's solicitors sent it to the EAT some time ago and acknowledged that they would require permission to rely upon it, nothing else was done to seek to have that question addressed in advance of the hearing before me. So the claimant, a litigant in person, had not had a fair opportunity in advance to signal any objection or, if he wished, make his own application in response.

72. Secondly, Dr Isaac had among the papers he was given three of Mr Tims' witness statements, and the two reports of Dr Dimitriou. But he did not interview Mr Tims and did not have his full clinical records. Thirdly, though his report contains nothing to undermine the respondent's case, as to the general nature of ADHD, the phenomenon of hyperfocus, and Mr Tims' account of the reasons for his inaction until it was too late, and effectively opines that that account is entirely plausible, perhaps unsurprisingly the report does not state any positive conclusion about that.

73. Putting aside, then, Dr Isaac's report, I turn to my conclusions on this aspect, drawing on the other documentary and oral evidence presented to me, and following the guidance in **J v K**.

74. First, as did the claimant, I entirely accept that Mr Tims has ADHD and depression and the evidence before me as to their general effects, from both Dr Dimitriou's reports and the evidence of Mr Tims himself. Secondly, I am satisfied, on the balance of probabilities, that Mr Tims' impairments, interacting with the various unfolding business and personal circumstances, are a material and substantial part of the explanation for why this notice of appeal was not instituted in time. In particular I accept that the phenomenon referred to before me as hyperfocus was at work. It explains why Mr Tims did not look for, and open, the envelope which Mr Baxter told him had been delivered and left on his desk, and never thought to consider that it might have something to do with the dispute with the claimant. It also explains his failure to engage after 15 May despite learning of the claim and the judgment, and the efforts of his solicitor to persuade him to do so.

75. In **J v K** Underhill LJ recognises that it is in principle legitimate to have regard to the evidence about other things that an individual was capable of doing during a particular period when assessing whether they were, or should have been, capable of doing what they needed to get their appeal in on time. Mr Tims does not, for example, claim to have been so stricken by depression as to have been wholly inactive during this period. On the contrary, his case was that he was active in dealing with the crisis affecting the business. But I accept, on the evidence presented to me that, unusually in this case, affected by his particular mental impairments of ADHD and depression, Mr Tims was hyper-

focussed on that aspect of the business, and preoccupied also with distressing personal matters, and could not be distracted away from these matters, despite his solicitor's best efforts during that period.

76. Indeed it is a particularly striking feature of this case, that Mr Tims has never made any bones, either in his written or his oral evidence, about the fact that he knew about the claim and the judgment from 15 May, and he had a solicitor involved who was chasing him to do what was necessary to get a notice of appeal in; and yet until late in the day on 8 June he still did not do what he needed to do. There was a hint, in the claimant's submissions, that he feels that this was a form of deliberate snub or put down of him and his claims. But I do not find it credible that this was the product of a deliberate voluntary decision on Mr Tims' part, given not least the size of the award that had been made by the tribunal. Given that his solicitor was chasing him, nor can it be attributed to simple carelessness or oversight. Rather, this striking feature of the particular evidence before me in this case supports the contention that this behaviour was materially and substantially influenced by the impairments.

77. I have reached this conclusion on the basis of my assessment of all the evidence available to me, as I have said, putting to one side the report of Dr Isaac. That includes the oral evidence which Mr Tims gave in the witness box. For sound reasons modern judges are very cautious and sceptical about what can be learned from a witness' demeanour. Evidence that might be said to be conveniently self-serving may also need to be approached with particular care. But in this case the manner, content, and style of Mr Tims' live evidence appeared to me to be strikingly corroborative of what the written evidence conveyed about the nature of his condition, which I have judged to be genuine. There was also some contemporary corroborative material as to his mental state during this period, in the chain of WhatsApp exchanges with another friend of Mr Tims on 19 May, and the screenshots of the reports relating to the friend struck down by Covid that he made on the morning of 8 June.

78. Standing back, I am therefore persuaded, on the balance of probabilities, by the particular evidence that I read and heard in this case, that Mr Tims' impairments, specifically the ADHD, but also the associated depression, materially and substantially influenced and explain why this appeal

was put in late.

79. As to the third stage of the **J v K** guidance, this appeal was not, in real time, so late, nor are there any other circumstances, which indicate that, despite that conclusion, time should not be extended.

80. I will therefore grant the extension of time.