Appeal No. UKEAT/0173/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 October 2014

Before

THE HONOURABLE MRS JUSTICE SIMLER

(SITTING ALONE)

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(1) MR C BOWERS
(2) MR M ATHERTON — APPELLANTS

NATIONAL INSTITUTE FOR HEALTH AND CLINICAL EXCELLENCE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the First Appellant	MR PETER LINSTEAD (of Counsel) Bar Pro Bono Scheme
For the Second Appellant	Written Submissions
For the Respondent	MISS SALLY COWEN (of Counsel) Instructed by: DAC Beachcroft LLP Solicitors 100 Fetter Lane London EC4A 1BN

SUMMARY

PRACTICE AND PROCEDURE

Appeal challenged the asserted failure of an Employment Judge to recognise or exercise a discretion to extend time for seeking Written Reasons for a Judgment delivered orally. The correspondence from the Employment Judge, viewed fairly, demonstrated that he had recognised that discretion to extend time existed, and exercised it against the Claimant.

Further challenges to the exercise of the discretion to extend time, on the basis of misdirection in law and **Wednesbury** unreasonableness, also failed.

THE HONOURABLE MRS JUSTICE SIMLER

1. This is an appeal from a Judgment of the Employment Tribunal sitting at Liverpool, with Employment Judge Robinson presiding. The appeal does not challenge the substantive Decision of the Employment Tribunal but rather the Employment Judge's failure to provide Written Reasons for the Judgment in the circumstances I shall describe in a moment. The appeal is principally pursued by Mr Bowers, but I understand that Mr Atherton supports it.

2. The two Claimants, as they then were and as I shall refer to them for convenience, claimed constructive unfair dismissal and, in Mr Atherton's case, unlawful disability discrimination was also alleged. They were represented at the Tribunal by EEI Solicitors and by Mr Younes Bakkali, who attended the hearing throughout. That hearing took place over nine days from 24 June to 4 July, and on 4 July, in their presence, in the presence of the Respondent and in the presence of the parties' legal representatives, the Tribunal gave its unanimous Decision rejecting all claims by both Claimants.

3. Oral Reasons were given for the Tribunal's Judgment on 4 July 2013 but these were not followed up by Written Reasons. It is common ground that no request for Written Reasons was made at the hearing. On the Claimant's case, this is because Employment Judge Robinson stated in terms that his Oral Reasons would be followed up by Written Reasons. Whereas the Respondent disputes that that is what was said, and the Employment Judge has confirmed in correspondence that "as far as he is aware no promise of full reasons was given at the hearing, but full oral reasons were ... given."

4. It is unnecessary to resolve that factual dispute at this stage, because at a Rule 3(10) hearing, Singh J in the EAT, directed that grounds 2 and 3 of the Grounds of Appeal only should proceed to a Full Hearing. Those grounds challenge, as I shall indicate in a moment in more detail, the Tribunal's failure to exercise a discretion to extend time for seeking Written Reasons and, to the extent that the discretion was exercised, they seek to challenge that exercise. That is ground 2. They further challenge the Tribunal's failure to treat a letter of 20 September as an application for reconsideration.

5. Ground 1 asserts a serious procedural error by the Tribunal in failing to give Written Reasons as promised or to tell the parties their rights. I have indicated, it would require or could potentially require a resolution of the factual conflict I have identified, and was accordingly stayed until the other grounds (not giving rise to any potential factual conflict) had been addressed.

6. The Claimants are represented on this appeal by Mr Peter Linstead, who acts pro bono, for which I am particularly grateful. The Respondent appeared by Ms Sally Cowen both at the Tribunal and on appeal.

7. The current position is that ground 3 is no longer pursued because recently disclosed correspondence between the Tribunal and the Claimants' former solicitors, EEI, and in particular a letter dated 4 October 2013, makes clear that the letter of 20 September to the Tribunal was treated as a review application. The central question on this appeal is accordingly whether the Tribunal misdirected itself in relation to the discretion it had under the Rules to extend time for a request for Written Reasons.

8. The underlying facts are, in short compass. On 4 July 2013 the Tribunal gave a unanimous Judgment, with Reasons for that Judgment given orally in the presence of the parties and their representatives. Following that, on 16 July 2013, a short Judgment was sent to the parties. The Judgment stated that the claims failed and were dismissed but that the Respondent's application for a wasted costs order against EEI Solicitors was dismissed. There were no Written Reasons attached to that short Judgment. By a letter dated 14 August 2013 and sent by email at 13:34 that day, EEI Solicitors wrote on behalf of the Claimants in the following terms:

> **"We write in relation to the above, and following our communication with the Employment Tribunal we have now ascertained that there is no detailed judgement forthcoming as was indicated by the Honourable Judge Robinson at the start of giving his oral judgement.**
>
> **We therefore respectfully request written reasons for the judgement for the above joined cases."**

9. By an email dated 15 August 2013 timed at 15:32 Mr Bowers contacted the Tribunal directly, indicating that he was doing so:

> **"… with regards to two requests my solicitor, Younes Bakkali has recently made on my behalf. The first being a request for a written response regarding the judgement dated [16] July. The second being an application for a review of the case which I understand was emailed to you yesterday, 14th August 2013.**
>
> **I have spoken with a clerk in your office today who explained that no request was showing up and advised me to put my enquiry to you by email. As time is of importance, may I kindly ask that you check for me if these requests have been received and are being dealt with."**

10. The Tribunal Service responded to that letter by email dated 21 August 2013 confirming that Mr Bowers' email had been received and confirming that that was a request for Written Reasons / a request for a review.

11. The Tribunal Service wrote to both EEI Solicitors and to Mr Bowers at his home address in a letter dated 17 September 2013, at page 70 of the Employment Appeal Tribunal's bundle.

The letter explains that Employment Judge Robinson had asked the member of Tribunal staff to respond both to the solicitor and to the Claimant in terms as follows:

> **"… that the application for reasons and for a reconsideration are both refused. The request for full reasons is refused as it is made out of time. Full reasons were given orally at the Hearing."**

12. The letter goes on to deal with the question of whether a reconsideration would be in the interests of justice or not and explains:

> **"In relation to reconsideration, it is not in the interests of justice to have the matters reconsidered. All issues were fully aired at the nine day Hearing."**

13. Mr Bowers was not content with that response and wrote to the Regional Employment Judge, Brian Doyle, by a letter dated 20 September 2013, as follows:

> **"I wish to contest the part of this letter that states that, "The request for full written reasons is refused as it is out of time". This is with regards to a judgement made by Employment Judge Robinson on 4th July 2013 at the Liverpool ET.**
>
> **Firstly, my solicitor and I are aware of the ET procedures for requesting written reasons. In this case however, a written request was not required. On the 4th July 2013, before delivering his oral judgement, Employment Judge Robinson had told the court that detailed written reasons would follow.**
>
> **My solicitor asked the ET in July for the written reasons that were promised us and I myself contacted the ET clerks by telephone and email throughout the summer reminding them of the delay. There was no explanation for the delay, either from the ET or Judge Robinson. Finally, I sent another reminder on 12th September 2013 before receiving the above letter.**
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> **I feel it is important to point out that my email of 15th August 2013, which Employment Judge Robinson refers to, is not my request for written reasons, but a follow up email regarding my solicitor's earlier enquiries with the ET when he again requested the reasons, which had not yet materialised.**
>
> **I would like to add that if a court recording or transcript of the judgement can be made available, that this would help clarify the matter.**
>
> **I respectfully request that in the interests of justice, that this matter be investigated and reconsidered to allow for full written reasons to be provided together with the 42 day right of appeal period."**

14. The letter makes clear that Mr Bowers is aware of the need to request Written Reasons in the **Employment Tribunal Rules**, but states that on 4 July 2013 Employment Judge Robinson told those present that detailed Written Reasons would follow. In the next paragraph the letter creates some confusion because it appears to indicate Mr Bowers' understanding that his

solicitors had made a request for Written Reasons in July and that the delay, such as there was, was a delay on the part of the Tribunal Service in responding to that request. To some extent, that is consistent with Mr Bowers' email of 15 August, which appears to suggest that a request had been made earlier for Written Reasons regarding the Judgment of 16 July and that the solicitors' request dated 14 August was a request for a review or reconsideration. Indeed that is further confirmed by the paragraph (at page 71) of the 20 September letter, where Mr Bowers says that the email of 15 August is not a request for Written Reasons, but is a follow-up to an email regarding his solicitors' earlier enquiries with the Employment Tribunal when he again requested Reasons which had not materialised. So there appears to be a clear inference from that letter that, whatever was said on 4 July to Mr Bowers and the other parties present at the hearing, a request for Written Reasons had been made, on his understanding, by his solicitors some time thereafter during the course of July.

15. Regional Judge Brian Doyle responded to that letter by a letter dated 27 September stating that the file had been sent to Employment Judge Robinson for his attention. The Regional Judge says that the decision whether or not provide Written Reasons is one for the Judge to make having considered the Rules of Procedure and the case file, thus emphasising that it was a matter for the Employment Judge and not a matter for the Regional Judge to address.

16. It is clear that the instruction of the Regional Judge was made because, on 4 October 2013, further correspondence was sent to EEI Solicitors, not addressed personally to Mr Bowers but copied to the Respondent's solicitors, dated 4 October 2013, in which Employment Judge Robinson said he had reconsidered the two applications made, firstly the request for

Written Reasons and secondly the application for a reconsideration, and he refused those applications and set out his reasons for doing so. The letter reads as follows:

> **"The Judge has considered the contents of that letter but again refuses your two applications for the following reasons.**
>
> **With regard to your application for a Review (Reconsideration) all matters were extensively aired at a 9 day hearing. Every consideration was given to you and your co-claimant and to all other witnesses and you were given every opportunity to state your case which you did. Although applications were made to postpone it was considered by the Tribunal that the matter should proceed. That was in every bodies interest, not least there would be an end to the uncertainties of litigation. Furthermore all was in place, in terms of preparation, for the matter to be completed. If there had been a postponement a new date for the hearing would have been well into the future and all parties recognised that memories fade. Moreover the application to postpone was made on the basis that Mr Atherton was not fit to attend yet he did so and when giving evidence acquitted himself well. Overall, and on balance, it was therefore in the interests of justice to proceed.**
>
> **Written reasons will not be sent out. Full reasons were given orally at the hearing at dictation pace. No request was made at the hearing for full reasons. You were represented and no doubt Mr Bakkali took a full note. There could be no doubt in the parties minds following the judgment being given why each party had won or lost and why costs were not awarded against your representative.**
>
> **Finally both applications by your representative were made well out of time. He had had the short judgment for 28 days before he made his applications. That is 14 days out of time and your representative gave no reason for the delay. All parties interests have been recognised and protected during the communication of the decision and it is not in the interests of justice at this late stage to retract the judges' original refusal."**

17. A further letter dated 15 October 2013 from Employment Judge Robinson followed shortly afterwards. This set out the fact that the Judge had asked further to his letter of 4 October 2013 for confirmation to be given to the parties that "as far as he is aware no promise of full reasons was given at the hearing but full oral reasons were, of course, given." That letter, unlike the previous letter, was sent both to Mr Bowers and to EEI Solicitors.

18. There was thereafter correspondence between the Regional Judge and Mr Bowers' MP, but neither side has (quite properly) placed reliance on the letters that followed. The four critical documents for the purpose of this appeal are accordingly the application dated 4 August for Written Reasons; the Decision dated 17 September containing the first refusal; the letter dated 20 September; the application for a further consideration; and the final Decision dated 4

October, setting out the Reasons for the second refusal, supplemented by the letter setting out what the Judge had to say about the promise.

19. The Notice of Appeal completed by Mr Bowers, then acting in person and without legal advice, identified as the only ground that, under the Tribunal Rules of Procedure, by promising to provide full Written Reasons and then not providing them, the Tribunal erred in law in failing to fulfil its judicial duties and denied the Claimants the right to appeal. The factual basis set out is that on 4 July 2013, before delivering his oral Judgment, Employment Judge Robinson told the court that detailed Reasons would follow. For this reason no formal written request for the Reasons were made by the Claimants' solicitors. Enquiries were made to the Tribunal in July and August 2013 by the Claimants' solicitor and Mr Bowers. Judge Robinson responded to a further email enquiry on 17 September 2013 refusing Written Reasons on the grounds that a request was made out of time.

20. That single ground of appeal was considered on the sift in accordance with Rule 3(7) of the **EAT Rules** by Mitting J. He concluded that the Notice of Appeal disclosed no reasonable grounds for bringing the appeal. Subsequently, a differently constituted Employment Appeal Tribunal (at an oral hearing under Rule 3(10)) granted permission to amend the Grounds of Appeal to amplify what was originally said in order to make it clearer what the alleged errors of law were in relation to the exercise of discretion and to add Ground 3, which is now no longer pursued.

21. Against that factual background I turn to consider the principles of law that apply. Both parties agree that the applicable Rules of Procedure are the **2004 Rules**. I agree with that approach. The new Rules, the **Employment Tribunal (Constitution and Rules of Procedure)**

Regulations 2013, came into force on 29 July 2013 for most aspects of the Rules. There are transitional provisions at Regulation 15, but these are not relevant for my purposes.

22. Since the Rules that were in force on 4 July when the Tribunal announced its Decision were the 2004 Rules, it seems to me that those rules governed both what happened at that point in time, and the seeking of Written Reasons given that the Judgment was sent to the parties on 16 July. The practical effect of the change in the Rules is limited in any event. The 2013 Rules, if they had applied on 4 July, might have had a significant impact on the question at stake here, because the new Rules would have required the Employment Judge to announce then and there whether or not Written Reasons would follow. However, that stage having passed, the new Rules in relation to the requirement to request Written Reasons where no Written Reasons are given at the oral stage is the same requirement to request such Reasons within 14 days. New Rule 62 prescribes the same 14-day time limit as old Rule 30 in the 2004 Rules, albeit that there is no express power to extend time outside the 14-day time limit in the new Rules in contrast to Rule 30 in the old Rules. It is common ground, however, that Rule 5 in the new Rules provides an overarching and unfettered power to extend or shorten any time limit in the Rules even where the period has expired.

23. It is also a matter of common ground, and now conceded by Mr Linstead, that the power to extend time under the new Rules in order to deal with cases fairly and justly in accordance with the overriding objective (see Rule 2) is not qualitatively different to the discretion available to a Judge under the 2004 Rules to extend time on a just and equitable basis. Whichever Rules applied accordingly and whichever basis the Tribunal was operating under when it dealt with the question of providing Written Reasons, the exercise of discretion would have been or should have been carried out on the same basis.

24. Rule 30(1) of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004** requires a Judge to give Reasons, either oral or in writing, for any Judgment. At paragraph 2 it permits Reasons to be given orally at the time of issuing the Judgment. Critically, for current purposes, Rule 30(3) provides that, where oral Reasons have been provided, Written Reasons shall only be provided (a) in relation to Judgments if requested by one of the parties within the time limit set out in paragraph (5) or (b) in relation to any Judgment or order if requested by the EAT at any time.

25. Rule 30(5) makes clear that a request for Written Reasons for a Judgment must be made by a party either orally at the hearing if the Judgment is issued at a hearing or in writing within 14 days of the date upon which the Judgment was sent to the parties. The time limit is expressly capable of being extended under paragraph 30(5) of the 2004 Rules, which provides:

> **"This time limit may be extended by an employment judge where he considers it just and equitable to do so."**

26. The Claimants contend that there is nothing in the Rules that requires a party to make an application for an extension of time where the time limit has expired for seeking Written Reasons. Mr Linstead makes that submission on the basis that there is nothing express in the Rule that sets out a procedure for applying to extend time and there is no express requirement on a party seeking an extension to give reasons why an extension is sought. I do not accept those submissions. Whilst it is true that the Rules do not set out any express procedure for applying, the Rules make clear that the normal and universally applicable position is that a written request within 14 days must be made if oral Reasons have been given at a hearing or at the time of issuing the Judgment.

27. The fact that a written request is required within 14 days carries with it a necessary implication that, if an exception is to be applied from the normal position, in favour of the party seeking an extension of time, an application must be made, and it must be made on the basis that time should be extended for some good reason. I agree with Miss Cowen that in an adversarial system it is not for an Employment Judge to investigate or enquire into what it is a claimant seeks and is asking a Tribunal to do. To place such a burden on the Tribunal would be liable to wreak havoc in the system. The Tribunal is entitled to expect an applicant seeking an extension of time once the relevant time limit has expired to do so by application giving reasons. Moreover I agree with Miss Cowen that the fact that the time limit is capable of being extended makes clear that there is no obligation on a Tribunal to extend time. There is simply a power to do so where an application is made with justification and accepted.

28. Whatever was said at the hearing, there is no dispute that Employment Judge Robinson gave Oral Reasons at the hearing on 4 July for the Tribunal's Judgment. Following that a Judgment dated 16 July was sent to the parties. That Judgment did not attach Written Reasons, as would have been clear to the recipient of it and of the letter enclosing it. The letter that enclosed the Judgment dated 16 July 2013 referred to a booklet, providing what was described at important information, accessible on the Employment Tribunal website, explaining procedures for requesting a review or for appealing. The letter also stated:

> **"The booklet also explains about asking for written reasons for the judgment (if they are not included with the judgment). These will almost always be necessary if you wish to appeal. You must apply for reasons (if not included with the judgment) within 14 days of the date on which the judgment was sent. …"**

29. That letter was addressed to EEI Solicitors, and was received by them some days later. There is a witness statement that forms part of the bundle of documents available to this Tribunal from Mr Bakkali. He states that the Judgment letter was dated 11 July 2013. That, of

course, is incorrect. The Judgment letter is dated 16 July 2013. He goes on to state that the Judgment letter was received on 25 July. Miss Cowen submitted that there is a doubt as to the accuracy of that statement raised by the inaccuracy in relation to his statement about the date of the Judgment letter. But, on any view, even if it was only received on 25 July, that was within the time limit for making a request for Written Reasons, which expired on 30 July 2013. It is common ground, whatever the correspondence suggests, that at no time did either the Claimants or EEI Solicitors make an in-time request for Written Reasons.

30. On the Claimants' behalf Mr Linstead contends that the correspondence from the Employment Tribunal contains no indication or acknowledgment of a discretion to extend time for the request for Written Reasons, nor any reference to the basis on which such a discretion was to be exercised. The failure to recognise that there was a discretion at all, it is submitted, amounts to a material misdirection of law. Alternatively, to the extent that there was an attempt to exercise the discretion, Mr Linstead contends that there were serious errors of law in the Tribunal Judge's approach. Firstly, he misdirected himself in relation to the exercise of that discretion in three important respects and, in the alternative, he reached a conclusion that was either **Wednesbury** unreasonable or fell well outside the generous ambit of discretion open to him in accordance with the Decision in **Noorani v Merseyside Tec Ltd** [1999] IRLR 184.

31. The first question is whether or not the Tribunal Judge recognised that he had a discretion to extend time for making a request for Written Reasons. The answer to that question depends on a consideration of the two letters sent on the Employment Judge's behalf together with the supplemental letter of 15 October. Having considered those decisions carefully, I am satisfied that this Employment Judge both knew and recognised that there was a discretion under the Rules that could be exercised to extend time. That, in my judgment, appears from the letter of

17 September, but even if I am wrong about that, that letter, taken together with the letter of 4 October, takes the position beyond doubt.

32. First of all, so far as the heading "Acknowledgement of Correspondence Employment Tribunals of Procedure 2013" is concerned, I am not persuaded that this is a cause for alarm. Mr Linstead concedes that, whether under the original Rules of 2004 or the 2013 Rules, there was a power to extend time. The time limits were the same 14-day time limits, and the basis on which that discretion could be extended was the same whether under the old Rules or under the new.

33. I accept that there is no express reference to the existence of a discretion, but in my judgment no express reference is necessary provided it is clear from the terms in which the decision is made that the existence of a discretion is recognised, that is sufficient.

34. The letter of 17 September refuses the request for Written Reasons on the basis that the request is out of time. The Rules that make clear what the time limits are the same Rules as indicate the availability of discretion. It would be surprising if a Tribunal knew and understood one part of the Rules and not another. But more significantly, so far as the 17 September letter is concerned, having stated that the request for full Reasons was made out of time, the Tribunal Judge states, "Full reasons were given orally at the hearing". The only relevance that that sentence can have had, once the Tribunal Judge had decided that the application was being made out of time, was to the question whether the discretion to extend time should be exercised. I cannot see what other relevance it might have.

35. In the subsequent letter dated 4 October the position is made clearer. Paragraph 4 makes clear that the Judge considered the fact that full Reasons were given orally at the hearing at dictation pace as a relevant consideration. This reflected his understanding that the parties knew which side had won or lost and the Reasons for that Decision. That would enable the parties to consider the merits of the Decision and to decide whether there was a basis for advancing any sort of appeal. This was a factor that the Judge regarded as relevant as is made clear by the balance of that paragraph. The Judge recorded the fact that the Claimants were represented and that their representative took a full note of what was being said at dictation pace. He recognised that this was a case where no request was made at the hearing for full Reasons. That is something that is expressly referred to in Rule 30(3) and is a strong indication that the Judge had knowledge of and recognised that this was the Rule he was considering.

36. The Judge went on to deal with the question of delay at paragraph 5. He expressed the view that the application was made well out of time, that the solicitors had had the short Judgment for 28 days before making the application, which amounted to a 14 day delay, and he stated that the solicitors had given no reason for the delay. It is clear that the Judge was well aware of the time limit, and his reference to unexplained delay is a strong indication of his awareness of the existence of a discretion to extend time, because one of the factors that features strongly in the exercise of a "just and equitable" discretion to extend time is the question of the extent of any delay and the reasons or explanation for such delay.

37. The Judge goes on to say: "All parties interests have been recognised and protected during the communication of the decision". Miss Cowen suggests (and she is probably right) that the Judge meant by that, all parties had had oral Reasons, the ability to take notes, and were in a position to know why they had won or lost and therefore to protect their positions. She

submits what the Judge was doing there effectively was balancing the prejudice on either side. That is consistent with the Employment Judge having recognised that he had a discretion and having identified those features that he regarded as relevant to the exercise of that discretion. I agree with that submission and I am quite satisfied that this is a case where there was proper recognition of the existence of a discretion, and the first part of ground 2 accordingly fails.

38. I turn to consider the second part of ground 2, which concerns the exercise of the discretion itself and whether there was a material misdirection by the Employment Judge in his approach to and his exercise of that discretion. This is a wide discretion as Mr Linstead himself acknowledged, but there are limits. By reference to **Robertson v Bexley Community Centre** [2003] IRLR 434 (where the Court of Appeal considered the exercise of a just and equitable discretion to extend time in the context of limitation periods for discrimination claims) the following general propositions apply:

(i) time limits are exercised strictly in Tribunal cases, in the interests of promoting finality and disposing of cases effectively and in accordance with the overriding objective;

(ii) there is no presumption that a discretion will be exercised in the requesting party's favour;

(iii) the onus is on the party seeking an extension of time to persuade a Tribunal to do so. That is the case because an extension of time is an indulgence. It is the exception and not the rule. It is not an entitlement nor even an expectation;

(iv) at best a party seeking the exercise of discretion in his favour can expect that the discretion will be exercised judicially in accordance with established principles, but it is incumbent upon the party seeking that exercise in his favour to provide a full and acceptable explanation for his delay;

(v) in the ordinary case a failure to provide a good explanation for delay may well lead to the discretion being exercised against him, absent compelling reasons why that should not be the case;

(vi) whether the discretion will be exercised and in what way it will be exercised is a question of fact and judgment in each case;

(vii) this Appeal Tribunal cannot allow an appeal against a Tribunal's refusal to exercise its discretion in a particular way merely because it would have taken a different view. Different Tribunal Judges may make different decisions in the exercise of a discretion without either of them being wrong. An appeal can only succeed where the Appeal Tribunal can identify an error of law or principle in the making of the Decision or where irrelevant considerations were taken into account or there was a failure to take relevant considerations into account or, finally, where the conclusion reached outside the generous ambit within which a reasonable disagreement is possible.

39. Mr Linstead makes four points in relation to the misdirection ground. First, an explanation for the delay was given in this case, namely the belief, whether it was well-founded or not, that Written Reasons would be given when the Judgment was sent to the parties. Mr Linstead points, in particular, to the letters referred to above as demonstrating that there was an explanation for the delay afforded by that misapprehension, as he described it.

40. I am unpersuaded by that point. The delay that required explanation is the delay in seeking Written Reasons between 17 July and 30 July. Whatever the understanding or impression the parties had on 4 July 2013, it must have been clear to them on 16 July 2013 that no Written Reasons accompanied the short Judgment. On the date they received that letter, whether it was before 25 July or not, the solicitors knew that there was at least a serious

question mark as to the need for Written Reasons and that time would start running from the following day. The only positive evidence before the Appeal Tribunal as to why Written Reasons were not sought immediately on receipt of the Judgment that was sent without Reasons is provided by paragraph 6 of Mr Bakkali's witness statement:

> **"… When the judgment came, full reasons were not included. My senior partner did not want us to take further action until we had seen the clients, partly because we were undertaking the case on a conditional fee and were not being paid, and further and in particular we could not take any steps without clients giving us their instructions. There was some delay getting the clients into the office, due in part to Mr Atherton's illness. I telephoned the Tribunal to ask if written reasons were forthcoming and was told that they were not. However, this was more than 14 days after the judgment had been sent to us. I did then write to the Tribunal on 14th August 2013 requesting written reasons on the basis of the honourable Judge's promise and asking for a review of the decision."**

41. Although Mr Linstead urges me to read that paragraph as indicating that the solicitor was misled and that the misleading was still having an impact on him up to and including 14 August, I do not read that paragraph in the way he suggests. Even if there were commercial reasons why further instructions would be necessary before any question of appeal could be considered, there is no explanation why the solicitor did not write a short letter saying "Please provide Written Reasons". That would cost little and require no input from the client. I cannot accept, without it expressly being said there, that the solicitor dealing with the matter was so misled by what was said on 4 July as to feel confident in disregarding the letter of 16 July and the accompanying guidance and instructions making clear that there was a strict time limit and that time for requesting Written Reasons would have started running and was due to expire imminently. Neither the commercial considerations referred to nor Mr Atherton's illness nor indeed the existence of a statement by the Judge that Written Reasons would be forthcoming affords a satisfactory reason why the Tribunal was not immediately asked to provide Written Reasons for the Judgment.

42. It follows that the Judge was entitled, to consider that no explanation for the delay had been given. Nor does the second point raised by Mr Linstead afford a basis for concluding that

the exercise of discretion is to be regarded as vitiated by a misdirection. The second point raised by Mr Linstead is that, by simply saying that no reason for the delay or no explanation for the delay had been provided, the Judge failed to engage with the factual basis for the delay that was being advanced. Again, on the limited information that was given to the Judge, he could not have been expected to infer that there was a misunderstanding and that the misunderstanding itself was a proper and reasonable explanation for the delay. Even if there was a misunderstanding on 4 July, there is no explanation given as to why the Claimants and the solicitors waited until after the expiry of the time limit to do anything about the situation.

43. The third point made by Mr Linstead is that the fact that the Judge said in the supplemental letter of 15 October that no promise had been made as far as he was aware gives rise to further misdirection because what the Judge did not do was to engage with the possibility that the Claimants and the solicitors had laboured under an incorrect belief or misapprehension and that that afforded a reason to extend time. But, for the reasons I have given in relation to the first and second point, that point goes nowhere and the Judge was entitled not to engage with it in the circumstances.

44. The fourth point made under this heading by Mr Linstead is that the Judge set out a number of factors in reaching his refusal decision, which are or should have been irrelevant to the exercise of the discretion. The first being that the application was made 14 days out of time. Mr Linstead says this is the reason why the discretion is being invoked and not a reason not to exercise it. The second is the fact that the parties could tell why they had won or lost as a result of the Oral Reasons and could take notes is no more than a reiteration of the facts and again, not a reason for refusing to exercise the discretion here.

45. In the context of a short time limit identified by the rules, a delay that is equivalent to the time limit allowed is an obviously relevant factor. These are strict time limits that are intended to be obeyed in order to achieve finality, and the Tribunal is entitled to have regard to the period of delay.

46. So far as the fact that Reasons were given and notes were taken enabling the parties to understand why they had won or lost in my judgment, that is relevant, as Miss Cowen submitted, to the balance of prejudice. This is not a case where the Claimants said they were seeking to invoke the exercise of discretion, because they had a positive ground of appeal they were contemplating advancing but could not. Mr Bowers was simply asking for a better version of the Reasons than the one he had. In the circumstances the potential prejudice did not encompass not knowing why one side had won and the other side had lost. That was not a relevant prejudice to be weighed in the balance in favour of the Claimants as the Judge found, because they had been given those full Reasons. The position might well have been different had there been a positive assertion that there was a ground of appeal that might be advanced and that the Claimants would not be able to advance absent Written Reasons (but even now that is not what is being said). That might have changed the nature of the prejudice but, given the way in which the application was framed and what Mr Bowers was seeking, in my judgment, this was not a relevant factor to weigh in the balance.

47. For all those reasons I am satisfied that none of the points, whether taken individually or cumulatively, leads to the conclusion that the Judge misdirected himself in law in the exercise of his discretion in this case.

48. That leads to the final point that Mr Linstead makes in relation to ground 2, and that is that the Judge exceeded the generous ambit of discretion open to him in this particular case. Mr Linstead recognised that this was an ambitious ground to advance and that there was a high hurdle to cross. He submits, nevertheless, that it is crossed because the Judge ignored factors relevant to the exercise of discretion. He should have recognised that the parties had not been properly protected because the Claimants suffered a considerable disadvantage in not having Written Reasons that would enable them properly to assess whether there was an error of law. Their solicitors had ceased to act around this time, and the handwritten note of the Judgment would be unlikely to provide an adequate basis for an appeal. The ability to obtain independent advice on appeal is, he submits, a fundamental aspect of procedural fairness in the Tribunal.

49. As already indicated, the Claimants did not at any stage positively assert that there was a ground of appeal they were minded to advance. At best, Mr Bowers was seeking Written Reasons so that he could consider whether or not the matter should be investigated for the purposes of pursuing any appeal. There is no fundamental right to appeal. What a party has is a qualified right to appeal within the time limits and subject to the conditions imposed on any such appeal under the Rules. The Tribunal Judge could only deal with the application that had been made. There is nothing in the letters that suggests any of the points that Mr Linstead has now adumbrated. The nature of the Reasons given by a Judge will vary with the nature of the application and the issue at stake. The Employment Judge addressed the two principal factors he regarded as relevant: firstly, the length of and reasons for delay, and was entitled to conclude that no reason for the delay had been given. Secondly, the balance of prejudice in the context of what was sought and in the absence of any indication that a positive ground of appeal had been identified or that there would be prejudice flowing from an inability to advance an appeal, and was entitled to identify the factors he did. The onus was on the Claimants to advance their

application by explaining the delay and identifying clearly why an exception should be made for them. The Employment Judge was entitled to conclude that they did not do so. This was a question of fact and judgment for the Employment Judge and there was no error of law in his approach.

50. It follows that I am satisfied that the Judge made no error of law in refusing to provide Written Reasons. He recognised that he had a discretion. He exercised that discretion appropriately and he reached a decision that he was entitled to reach and that fell within the ambit of the generous discretion available to him under the Rules.

51. The order made by Singh J at the Rule 3(10) hearing directed that, following a Full Hearing in relation to grounds 2 and 3, consideration should be given to how, if at all, ground 1 should be advanced. Singh J did not give permission for ground 1 to proceed at that stage in circumstances where, if it were to be pursued, a potentially complicated process would be necessary involving additional time and expense.

52. Mr Linstead submits that ground 1 should now proceed to a Full Hearing. He submits that there was a serious procedural error when the Judge stated that he would supply Written Reasons but failed to do so. The Judge gave a Decision orally but promised a detailed written Decision, which caused injustice because the Claimants were misled into believing they did not need to apply within the time limit and have been deprived of a right of appeal and to apply for Written Reasons at the oral hearing.

53. I have reached the conclusion that this ground of appeal discloses no arguable error of law that justifies a Full Hearing. Whatever the Judge said on 4 July, and even taking it at its

highest, the position was clear on receipt of the Judgment under cover of the letter dated 16 July, which set out in the clearest terms possible that the Judgment contained with it no Written Reasons and that, in circumstances where no Written Reasons were attached to the Judgment, a request for Written Reasons would have to be made within 14 days starting from the day on which the Judgment was sent. The letter made clear also the fact that if an application for Written Reasons was made within that time, the 42-day time limit for appealing would run from when the Reasons were sent. Otherwise it would run from the date the Judgment was sent to the Claimants or the representatives.

54. Mr Linstead relies on the fact that the letter was sent not to the Claimants but to the solicitors. But, in my judgment, that makes no difference. Mr Bowers is fixed with the knowledge and understanding of his solicitors and with any failings on their part. The solicitors were on the record and were acting as his agents in this litigation. From the date on which the Judgment dated 16 July was received, the solicitors can have been in no doubt that this was a case where Written Reasons ought to be sought if any question of appeal was to be considered. It was not a difficult step to take. Indeed, Mr Bakkali indicates that he telephoned the Tribunal to ask whether Written Reasons would be forthcoming. It would have been just as easy to send an email requesting Written Reasons, and there is no satisfactory explanation for the failure to do so upon receipt of the letter of 16 July. Mr Linstead urges me to accept that the Claimant was personally prejudiced by what the Judge said on 4 July because he was left in a position where he felt that no application was required. But that ignores the 16 July letter making clear what was required and that a written application was necessary. Nor is there anything to explain the delay between 16 July or the date soon thereafter when the letter and Judgment were received, and 14 August. I am unpersuaded that the failure to take action until 14 August in this case can even arguably be attributed to what the Judge said on 4 July, and accordingly I am not

satisfied that there is an arguable error of law that would have made any difference even if the Judge is subsequently found to have said what the Claimants say he said.

55. In those circumstances I am not persuaded that there is justification for this ground to go forward to a Full Hearing despite the able and cogent submissions made by Mr Linstead. The application is therefore refused and the appeal, on all grounds, is dismissed.