Appeal No. UKEATPA/0203/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 January 2015
Judgment handed down on 9 February 2015

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MR R CARROLL APPELLANT

THE MAYOR'S OFFICE FOR POLICING AND CRIME RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL FROM REGISTRAR'S ORDER

Revised

APPEARANCES

For the Appellant	MR SHANE CRAWFORD (of Counsel) Instructed by: Quality Solicitors Moore & Tibbits 34 High Street Warwick CV34 4BE
For the Respondent	MS REBECCA TUCK (of Counsel) Instructed by: Metropolitan Police Directorate of Legal Services New Scotland Yard 10-12 Broadway London SW1H 0BG

SUMMARY

PRACTICE AND PROCEDURE - Time for appealing

Appeal from Registrar: the time limited by rule 3(3) of the **Employment Appeal Tribunal Rules 1993** ("the EAT Rules") for serving the documents necessary for the proper institution of an appeal, as provided for by rule 3(3)(1)(a)-(c) of the **EAT Rules**, started to run when an Employment Tribunal sent out a judgment and written reasons even though it had been wrongly addressed both in terms of the identity of the person to whom it had been addressed as well as the address itself. That was so even though under rule 86 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, the document had not been "delivered" - **Sian v Abbey National plc** [2004] ICR 55; [2004] IRLR 185 considered and applied.

Where two cases involving two different Claimants are heard together the two cases constitute the proceedings for the purposes of rule 3(1) of the **EAT Rules** and therefore even if only one Claimant proposes to appeal, rule 3(1)(b) requires the prospective Appellant to either serve the ET1 form and ET3 forms in the co-Claimant's case or give an explanation for not doing so and an appeal will not be properly instituted where neither step has been taken, notwithstanding the fact that the co-Claimant proves to have no interest in the appeal process.

Whilst the conduct of a legal adviser may be a factor to take account of in exercising the discretion to extend time it is likely to be difficult to investigate and unlikely to be a compelling factor - **Muschett v Hounslow London Borough Council** [2009] ICR 424 considered.

The very considerable delay in instituting the appeal was not excusable, "extreme diligence" had not been shown by the Appellant and his legal advisers and discretion was not exercised in favour of extending time.

HIS HONOUR JUDGE HAND QC

Introduction

1. On 8 September 2014 the Registrar of this Tribunal, pursuant to rule 37(1) and (3) and rule 20(2) of the **Employment Appeal Tribunal Rules 1993** ("the EAT Rules"), considered an application by Mr R Carroll, who I shall call the Appellant[1], for an extension of the time in which to present his Notice of Appeal. She refused the application (see pages 116 to 118 of the appeal bundle). By rule 21(1) of the **EAT Rules** the Appellant has the right to appeal to a Judge against that ruling and he, having exercised that right, the matter came before me on 16 January 2015. The Appellant has been represented by Mr Crawford of counsel and the Respondent by Ms Tuck of counsel. By the time evidence and submissions had been completed it was late in the afternoon and there was insufficient time for me both to give further thought to the difficult question raised by this appeal and then to deliver a judgment.

2. In **Muschett v Hounslow London Borough Council** [2009] ICR 424 HHJ McMullen said this:

> **"The practice adopted in the Employment Appeal Tribunal is that the Registrar decides whether an appeal is in time. She has discretion under rule 35(5) of the Employment Appeal Tribunal Rules 1993 to dispense with any aspect of the Rules relating to documents and, under rule 37(1), to hear and grant an extension of time for doing any act. An appeal lies under rule 21 from a decision of the Registrar not to register an appeal. In effect, it is a fresh hearing before a judge. Sometimes there is live evidence, for instance when a party wants to explain facts and it is only fair that he or she does so on oath and that the other side is offered the opportunity to cross-examine. …" (Paragraph 6)**

He was speaking there of the practice as it existed in 2007, when the **Muschett** appeal was heard, and as it had existed for some time before that. It was then an established practice and it

[1] Strictly speaking, at this stage this is a proposed appeal but it is cumbersome to refer to the parties as the proposed Appellant and the proposed Respondent.

has continued to be the practice ever since. I have followed it in this case and the Appellant gave evidence on oath and was cross-examined by Ms Tuck.

3. The appeal raises both an unusual, if not novel, point involving a question as to the interpretation of rule 3(3) of the **EAT Rules** and, certainly an unusual, but, in my experience, not novel, point as to the interpretation of rule 3(1) of the **EAT Rules**, as well as what I might call the more usual issues as to the exercise of the discretion to extend the time limit for properly instituting an appeal. Before considering the points themselves it is necessary to set out some of the factual background.

The Facts

4. The Appellant is a licensed helicopter engineer. From June 2004 until his dismissal on 20 July 2012 he worked in that capacity for the Metropolitan Police. On 29 March 2012 another licensed helicopter engineer employed by the Metropolitan Police, a Mr P Cook, was working on a police helicopter. He accepted subsequently that he had not tightened properly a bolt in the tail rotor mechanism and had not fitted a split pin. The Appellant should have carried out a "duplicate inspection" at a later date but did not do so.

5. On 2 April, 2012 during a ground test with the engines running and the aircraft secured to the ground, it started to behave in an abnormal fashion. Fortunately the pilot was able to bring it under control before there was significant damage or any injury. The cause was the inadequate maintenance carried out by Mr Cook, which had not been inspected properly, or at all, by the Appellant.

6. Both the Appellant and Mr Cook were subjected to disciplinary procedure as a result of which they were summarily dismissed for gross misconduct. Each commenced proceedings in the Employment Tribunal complaining of unfair dismissal. The Appellant's case was given the reference number 3203012/2012; Mr Cook's case was given the reference number 3203074/2012. In his ET1 form the Appellant completed paragraph 1, which requires personal details, with his address, complete with postcode, his landline telephone number, his mobile telephone number and his e-mail address. He told me both by his witness statement and in his oral evidence that before the Employment Tribunal hearing he had received communications from the Employment Tribunal at both his postal and e-mail address. This was not disputed by Ms Tuck and I accept his evidence on it.

7. The cases were heard together at the East London Hearing Centre on 30 and 31 July 2013 and 1 August 2013 by Employment Judge Goldman. The Appellant was represented by Mr Crawford of counsel. I understand him to have been instructed to appear at the Employment Tribunal by the solicitors, who have instructed him on this appeal. They were not however "on the record". On 1 August 2013 Employment Judge Goldman announced the decision and, according to the Appellant's evidence, which I accept on this issue, Mr Crawford then asked for written reasons, to which the Employment Judge replied that these may take some time to produce because there was a backlog of typing work at East London Hearing Centre.

8. The Appellant said in his witness statement that he understood the usual time taken to produce a written record of the judgment and written reasons was between four to six weeks and, coupled with the delay, he had in his mind that there might be something between ten to twelve

weeks before he would receive written reasons. As I understand it nobody had given him any such estimate; this was simply his own surmise but because he had been given no precise information by the Employment Judge I am rather cautious about accepting that evidence. Later the Appellant conducted a kind of survey, which involved him ringing various offices of Employment Tribunals up and down the country and asking for the average length of time that it took an Employment Judge to produce a judgment. He received information from only four Employment Tribunals and concluded that four to six weeks was the average time. I think it is possible that he may have conflated the product of this exercise with his memory as to his expectation as to the length of time it might take in the normal course of events before he received written reasons.

9. He told me that he made an enquiry of his solicitors before the end of August 2013 as to when a record of judgment and written reasons might be received. They told him that nothing had been heard. I accept this might not be inconsistent with what he told me had been his expectations immediately after the end of the hearing as to the length of time that might elapse before written reasons could be produced. I can quite understand that he might have been anxious about the matter and not able to contain himself even though his expectation was that the written reasons would not have arrived within that timescale. Nevertheless this is another factor which causes me to think the probable situation was that the Appellant had no clear idea as to when a written record of judgment and the written reasons might arrive.

10. In fact, the written record of judgment and written reasons had been signed by Employment Judge Goldman on 14 August 2013 (see page 59 of the appeal bundle). Below that

signature appears the information that "JUDGMENT, REASONS AND BOOKLET SENT TO THE PARTIES ON 15.8.2013" and that is initialled on behalf of the Tribunal Office. According to Mr Carroll no such documents ever arrived at the address he had given in his ET1 form. The letter of 14 May 2014 (see pages 103 to 106 of the appeal bundle) written on behalf of the Respondent to the Registrar of this Tribunal for the purpose of setting out the Respondent's views on the Appellant's application to extend time said (see page 105 of the appeal bundle) states:

> **"… The Respondent received its copy shortly thereafter on 19 August 2013. The Tribunal's covering letter to the Respondent of 15 August 2013 enclosing the Judgment (copy enclosed) stated that it was also sent to Mr M Sparham, Prospect, 8 Leake Street, London SE1 7NN. …"**

The covering letter referred to as being enclosed is at page 107 and 108 of the appeal bundle. Prospect is a trade union and had represented Mr Cook; it is possible that Prospect had instructed counsel because at the Employment Tribunal hearing he is recorded in the judgment and written reasons as having been represented by Ms Browne of counsel. The Appellant's ET1 appears at pages 75 to 81 of the appeal bundle. But it contains no direction that correspondence should go to Prospect or Mr Sparham, although it is, of course, always possible that he had given instructions to the Employment Tribunal at a later date authorising correspondence to be sent to Prospect. There is, however, no evidence to that effect. The Appellant told me that he had never been represented either by Prospect or by Mr Sparham and he had never suggested to the Employment Tribunal that either had ever been his representative or that documents should be sent to them. On a balance of probability I also accept the Appellant's evidence on this point and why the Employment Tribunal took this course must remain a mystery.

11. It was not until 1 October 2013 that an e-mail was sent by the Appellant's solicitors to the Employment Tribunal at East London stating that written reasons had not yet been received and asking to know when they might be (see page 22 of the appeal bundle). I have been given no explanation as to what had happened between the Appellant's enquiry in late August 2013 and the e-mail sent on 1 October 2013 to the Employment Tribunal. A computer-generated pro forma e-mail response was received from the Employment Tribunal probably by immediate return (see page 23 of the appeal bundle). On 9 October 2013 there was a telephone conversation between somebody identified only as Sunnai at the Employment Tribunal and a person at the Appellant's solicitors called Daffy; the attendance note of it is at page 24 of the appeal bundle. There is reference to a letter having been received by the Employment Tribunal in the attendance note. Whether that is a reference to the e-mail or whether a letter had also been sent remains unexplained but it is clear that the Appellant's solicitors were told that they were not "on record" and that the judgment had been sent out on 15 August, 2013 to "Mr M Sparham from Prospect, 8 Leake Street, London SE1 7NN". I find as a fact that is what had happened.

12. On the same day Debbie Frodsham of the Appellant's solicitors sent an e-mail to Mr Sparham at the enquiries e-mail address at Prospect (see page 25 of the appeal bundle). She received a reply from Sara Lever of Prospect 45 minutes later informing her that Mike Sparham had retired from Prospect six months earlier and, although his inbox was still live and could be accessed, there was no trace of any judgment in respect of Mr Carroll having been received (see page 26 of the appeal bundle). As Ms Frodsham observed, in her courtesy e-mail by way of reply, that might only mean that the written reasons had been sent in hardcopy but not in an e-mail.

13. On 12 October 2013 somebody with the initials TRO (very probably Mr Tim Ollerenshaw, who appears to have been Ms Frodsham's principal) made two telephone calls to the Employment Tribunal. As is recorded in the attendance note at page 28 of the appeal bundle on the first occasion he could not get an answer but at the second attempt he was able to speak to somebody called Zeesha or Zeshan, who said:

> **"… their records have not been updated about the change of reference. He had still got old details so he needed to confirm that to the generic e-mail and then they would send us the written reasons."**

14. On 21 October 2013 Ms Frodsham sent a further enquiry by e-mail to Ms Lever of Prospect asking if there had been any luck in tracking down the "Judgment in this matter" (see page 29 of the appeal bundle). A week later on 28 October 2013 she sent an e-mail to the Employment Tribunal at East London (see page 31 of the appeal bundle). She complained that the written reasons had still not been received and she informed the Employment Tribunal that enquiries had been made of "previous lawyers" and, likewise, they had received nothing. Within a minute this resulted in an automatic reply from the Employment Tribunal similar to that received after the first e-mail enquiry (see above at paragraph 11 of this judgment).

15. Ms Frodsham wrote again by e-mail on 13 November 2013 asking to know "by return" when a copy of the written reasons might be received (see page 33 of the appeal bundle); instantly she received another automatic pro forma e-mail response from the Employment Tribunal. It appears that her e-mail was not dealt with by human hand until 24 December 2013 because on that day a Breda Twomey replied by e-mail on behalf of the Employment Tribunal at East London (see page 35 of the appeal bundle).

16. The text of her e-mail reads as follows:

> **"Thank you for your email.**
>
> **Regional Employment Judge Taylor, to whom this case has been referred, has directed me to write you as follows;**
>
> **The Judgment was sent to the parties and/or their representatives on 15 August 2013. The Tribunal does not appear to have any record of you acting on behalf of the Respondent or the Claimants. If you approve, please send a copy of the notice of acting to the Tribunal."**

17. It is perhaps not surprising, even though the above email was sent relatively early on the morning of Christmas Eve 2013, that no reply was received from Ms Frodsham until 3 January 2014 (see page 37 of the appeal bundle). She enclosed the Notice of Acting, a copy of which is at page 38 of the appeal bundle, and she said that she "would be grateful if you could now send us the written reasons". This resulted in a yet further automated pro forma email response but under cover of a compliment slip marked as received on 22 January 2014 (see page 40 of the appeal bundle) the Employment Tribunal forwarded a copy of the judgment and written reasons of Employment Judge Goldman (see pages 41 to 59 of the appeal bundle).

18. As I understood his oral evidence the Appellant was working again at the time that he received a copy of the judgment and written reasons but, although he was working away from home, he did attempt to make himself available at the first opportunity. Nevertheless, it was not until 24 February 2014 that a conference could be arranged with counsel. A Notice of Appeal together with the Judgment and written reasons and the ET1 and ET3 forms in the case of the Appellant, together with an application to extend the time limited for appealing, were forwarded to this Tribunal under cover of a letter dated 3 March 2014 (see pages 60 to 62 of the appeal bundle) the application to extend time was described as "purely precautionary since the primary position of the Appellant is that this appeal is in time".

19. I am not clear as to the method of delivery of those documents but in a letter dated 6 March 2014 this Tribunal indicated that it had received the "potential Notice of Appeal" on 3 March 2014 (see pages 68 and 69 of the appeal bundle), so they were either delivered by email or, perhaps, by hand. History does not record when the judgment and written reasons were sent to the Appellant's solicitors, only that they were stamped as received on 22 January 2014. As Mr Crawford accepted during the course of the hearing of the appeal, the likelihood is that the written reasons were sent out on 20 January 2014 or 21 January 2014. Only if they were sent out on 22 January 2014 (i.e. by email, which having regard to the compliments slip, seems highly unlikely) would there be 42 days or less between the sending out of the judgment and written reasons by the Employment Tribunal and receipt of the Notice of Appeal by this Tribunal.

20. In any event, the appeal was not accepted as properly instituted on 3 March 2014 because the ET1 and ET3 forms relating to Mr Cook's case had not been included. These were forwarded on 10 March 2014 (see pages 73 to 81 of the appeal bundle) but deemed to have been received on 11 March, 2014 (see page 94 of the appeal bundle). As a result of this further complication, the Appellant submitted a supplemental application to extend the time limit for lodging the appeal. This too was based on the premise that the appeal had been lodged in time and further that it had been properly instituted on 3 March 2014, it being contended that there was no requirement to Lodge the ET1 and ET3 forms relating to Mr Cook's case (see pages 88 to 90 of the appeal bundle).

21. The appeal was deemed to have been properly instituted on 11 March 2014 but said by the Registrar of this Tribunal to be 166 days out of time (see the letter of 16 April 2014 at pages

94 and 95 of the appeal bundle). This resulted in a second supplemental application to extend the time limit for lodging the appeal. Like its predecessors it asserted as its primary position that the appeal had been lodged in time but in the alternative, in effect, it reiterated the previous submissions, albeit in more extensive form (see pages 98 to 100 of the appeal bundle). Mr Cook had been served as Second Respondent by this Tribunal and he communicated by e-mail to say that he did not oppose the Appellant's application to extend time. By a letter dated 29 May 2014 (see page 102 of the appeal bundle) from this Tribunal the Appellant was asked whether Mr Cook should be removed as a Respondent from these proceedings. In fact, he was not removed until 6 January 2015.

22. The matter proceeded by way of written submissions and was considered by the Registrar on paper on 8 September 2014. She refused to extend time (see pages 116 to 118 of the appeal bundle). Although, as I pointed out above at paragraph 2 of this judgment, this appeal is treated as being by way of rehearing, I will summarise the Registrar's reasoning. In her view the ET1 and ET3 in Mr Cook's case were "required documents under the rules" but, having stated that, she added, somewhat cryptically, "However nothing turns on their absence". She referred to rule 86(1) and (2) and 90 of the Employment Tribunals Rules of Procedure, which are to be found in Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"). Having done so and, having set out the factual matrix, she concluded that there had been "no exceptional reason … why an appeal could not have been presented within the time limit."

The Law

23. Whilst the problem in this appeal arises in a statutory context and in terms of the sending or delivery of a document, as a starting point, it may be useful to consider the position at common law relating to the formation of a contract by deemed receipt of an acceptance. As every law student learns, the general rule is that acceptance of an offer must be communicated by the offeree to the offeror. But where the use of the postal service is a reasonable method of communication the acceptance of an offer is deemed to take effect when the letter of acceptance is posted. This is a "rule" of commercial convenience, which was finalised by the majority judgments of Thesiger and Baggallay LJJ in the Court of Appeal's decision in **Household Fire and Carriage Accident Insurance Company Limited v Grant** (1879 4 Ex D 216) and, as the case illustrates, it will apply even though the letter of acceptance never reaches the offeror or the letter is delayed beyond the time when it might have been expected to arrive in the ordinary course of post.

24. Of course, the "rule" is one of a series of alternative solutions to the problem of whether and when a contract has been formed; the others that could have been adopted are that an acceptance sent by post only takes effect if and when it is actually communicated to the offeror - i.e. when he actually receives it (the position favoured by Bramwell LJ in his powerful dissenting judgment in **Grant**); or that it only takes effect when it arrives at the offeror's address, irrespective as to whether he receives it; or that it takes effect at the time it would have reached him in the ordinary course of post. As was recognised by all three Judges in **Grant** whatever solution is adopted there will be some hard cases and some odd outcomes.

25. The situation arising out of the facts of the instant appeal, where the written reasons appear to have been wrongly addressed, can also arise in respect of the acceptance of an offer sent by post and it might be thought an odd outcome if a party were to find that a contract had been created by a communication that had never reached him because it had been wrongly addressed. In fact, Bagalley LJ's statement of the rule at the start of his judgment in **Grant** at page 244 is:

> **"… if an offer is made … which expressly or impliedly authorizes the sending of an acceptance of such an offer by post, and a letter of acceptance *properly addressed* is posted in due time, a complete contract is made at the time when the letter of acceptance is posted." (my italics)**

Therefore, it has always been suggested, although never definitively decided, that if the letter is wrongly addressed and, thus, misdirected, the rule as to postal acceptance cannot apply.

26. Indeed, the topic of misdirected letters of acceptance is considered in the 31st Edition of *Chitty*, at paragraph 2-058, in these terms:

> **"Misdirected letter of acceptance. A letter of acceptance may be lost or delayed because it bears a wrong or an incomplete address, or because it is not properly stamped. Normally such defects would be due to the carelessness of the offeree; and, although there is no English authority precisely in point, it is submitted that the posting rule should not apply to such cases. Although an offeror may have to take the risk of accidents in the post, it would be unreasonable to impose on him the further risk of the acceptor's carelessness. These arguments do not apply where the misdirection is due to the fault of the offeror - e.g. where his own address is incompletely or illegibly given in the offer itself. In such a case, the offeror shall not be allowed to rely on the fact that the acceptance was misdirected (except perhaps where his error in stating his own address was obvious to the offeree; for in such a case the offeror's fault would not be the effective cause of the misdirection of the acceptance). It is submitted that a misdirected acceptance should take effect (if at all) at the time which is least favourable to the party responsible for the misdirection."**

The almost identical wording of this paragraph in a previous edition of Chitty was approved by Toulson J at paragraph 15 of his judgment in **Korvetis v Transgrain Shipping BV** [2005] EWHC 1345 where he said it seemed to him "to correspond with principle and justice".

27. But, of course, this appeal is not concerned with the formation of a contract and so the analogy with the "postal rule" is not a strong one. The appeal is about time limits and the service of documents and in any area of jurisprudence such topics are usually governed by explicit statutory provisions and rules of procedure. Not surprisingly, the position is no different in the context of the Employment Tribunal and of this Tribunal. Each has its own provisions bearing on the issues in this appeal and one of the questions that arises is to what extent they make a coherent whole and, indeed, whether it is necessary for them to do so? In order to consider that I need to set out the relevant provisions

28. By rule 3(1) of the **EAT Rules**:

> **"Every appeal to the Appeal Tribunal shall, subject to paragraphs (2) and (4), be instituted by serving on the Tribunal the following documents -**
> **(a) a notice of appeal in, or substantially in, accordance with Form 1, 1A or 2 in the Schedule to these rules;**
> **(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; and**
> **(c) in the case of an appeal from a judgment of an employment tribunal a copy of the written record of the judgment of the employment tribunal which is subject to appeal and the written reasons for the judgment, or an explanation as to why written reasons are not included; and**
> **…"**

and by rule 3(3) the **EAT Rules**:

> **"The period within which an appeal to the Appeal Tribunal may be instituted is -**
> **(a) in the case of an appeal from a judgment of the employment tribunal -**
> **(i) … 42 days from the date on which the written reasons were sent to the parties;**
> **…"**

29. The importance of serving the documents required to be served with the Notice of Appeal by rule 3(1) above was emphasised by the **Practise Statement** handed down on 3 February 2005. After that date the requirements to be fulfilled in order for an appeal to be properly instituted should have been clear to everybody; as paragraph 6 of the **Practice Statement** says:

"From the date of this Practice Statement, ignorance or misunderstanding of the requirements as to service of the documents required to make a Notice of Appeal within the 42 days valid will not be accepted by the Registrar as an excuse."

30. Rule 86 of the **ET Rules**, which is entitled "Delivery to parties" provides as follows:

> **"(1) Documents may be delivered to a party (whether by the Tribunal or by another party) -**
> **(a) by post;**
> **(b) by direct delivery to that party's address (including delivery by courier or messenger service);**
> **(c) by electronic communications; or**
> **(d) by being handed personally to that party, if an individual and if no representative has been named in the claim form or response; or to any individual representative named in the claim form or response; or, on the occasion of the hearing, to any person identified by the party representing that party at that hearing.**
> **(2) For the purposes of sub-paragraphs (a) to (c) of paragraph (1), the document shall be delivered to the address given in the claim form or response (which shall be the address of the party's representative, if one is named) or to a different address is notified in writing by the party in question.**
> **(3) If a party has given both a postal address and one or more electronic addresses, any of them may be used unless the party has indicated in writing that a particular address should or should not be used."**

Rule 90 of the **ET Rules**, entitled "Date of Delivery", provides as follows:

> **"Where a document has been delivered in accordance with rule 85 or 86, it shall, unless the contrary is proved, be taken to have been received by the addressee -**
> **(a) if sent by post, on the day on which it would be delivered in the ordinary course of post;**
> **(b) if sent by means of electronic communication, on the day of transmission;**
> **(c) if delivered directly personally, on the day of delivery."**

Rule 91 of the **ET Rules**, which is entitled "Irregular service", provides as follows:

> **"A Tribunal may treat any document as delivered to a person, notwithstanding any non-compliance with rules 86 to 88, if satisfied that the document in question, or its substance, has in fact come to the attention of that person."**

31. In the case of **Sian v Abbey National plc** [2004] ICR 55; [2004] IRLR 185 an Appellant employee did not receive a copy of the written reasons, which had been sent out by the Employment Tribunal on 5 November 2002. The employer received its copy on 8 November 2002. On 19 November 2002 counsel who had appeared for the employee, telephoned his instructing solicitors enquiring as to whether the written reasons had been received. He was told

that they had not. On 20 December 2002 a letter was sent by the Appellant's solicitor to the Employment Tribunal enquiring when the decision might become available. In response the Employment Tribunal sent a copy of the written reasons to the Appellant's solicitors and these were received by them on 3 January 2003. A number of further steps were taken after receipt, including an application for an extension of time, which was wrongly directed to the Employment Tribunal. The Notice of Appeal was filed at this Tribunal on 7 February 2003, 91 days from 5 November 2002 but only 35 days from 3 January 2003. The Appellant argued that her appeal was not out of time or, if it was, that the discretion to extend it should be exercised in her favour. The Registrar rejected these arguments so the Appellant appealed and a division of this Tribunal presided over by the then President, Burton J, dismissed the appeal. Ms Tuck relies upon his judgment in **Sian**; Mr Crawford argues that **Sian** is distinguishable. Consequently it is necessary for me to consider the judgment in some detail.

32. The Appellant's argument in the case is summarised at paragraph 9 of the judgment as follows:

> **"9. Mr Panton has submitted, as I have indicated, that in fact because his client did not receive the notice of appeal at all, namely until she subsequently, through Simpson Millar, requested a replacement decision, as it turned out, and one was received on 3 January 2003, the 42 days did not start to run from 5 November 2002."**

Burton J was faced with apparently inconsistent authority in this Tribunal. At paragraph 10 he set out what he regarded as the orthodox position:

> **"10. The practice in the Employment Appeal Tribunal has been based upon two decisions of Morison P sitting in the Employment Appeal Tribunal. The first was called *Hammersmith and Fulham London Borough Council v Ladejobi* [1999] ICR 673, and the second *Mock v Commissioners of the Inland Revenue* [1999] IRLR 785. His reasoning in both those cases was identical. He concluded that the words of rule 3(2) [of the 1993 Rules] were clear and that they meant what they said, namely that time ran from the date when the decision was sent to the parties by the employment tribunal, the decision having been entered in the register. He concluded, in lucid terms, in both those decisions, that [section] 7 of the Interpretation Act 1978 had no applicability. Section 7 … reads as follows:**

> **"Where an Act authorises or requires any document to be served by post (whether the expression "served" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, preparing and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the normal course of post."**
>
> **He concluded that the provision, what was then rule 3(2), and is now rule 3(3), was not one which was dealing with service by post, but was one dealing with the calculation of the date for which time starts to run for the purposes of serving a notice of appeal - see paragr4aph 7 of his judgment in Mock v Commissioners of the Inland Revenue [[1999] IRLR 785]."**

33. An alternative view had been expressed in **Scotford v SmithKline Beecham** [2002] ICR 264 by, as he then was, Mr Recorder Langstaff QC, albeit in respect of somewhat different provisions in the **ET Rules**, namely the granting by the Employment Tribunal of an extension of time in respect of an application for the provision of extended reasons. But, in his judgment in that case, Mr Recorder Langstaff QC had regarded section 7 of the **Interpretation Act 1978** as applicable to the **ET Rules** and also to what is now rule 3 (3) of the **EAT Rules** and, in reaching that conclusion, he took the view that the two decisions referred to in the quotation from paragraph 10 of the judgment in **Sian** (see above) were wrongly decided. His analysis, which underpins the **Scotford** reasoning, was that the **ET Rules** relating to service and the EAT rule relating to the proper institution of appeals must be viewed as different parts of a coherent whole to which the same principles should apply. This was rejected by Burton J; he concluded that what I call above "the orthodox position" should be maintained and his reasoning appears at paragraphs 15, 16 and 17 of the **Sian** judgment in the following terms:

> **"15. I am entirely satisfied that the procedure adopted by the Employment Appeal Tribunal is right and fair and should be continued. Without repeating the conclusions of Morison J in either *Ladejobi* [[1999] ICR 673] or in *Mock* [[1999] IRLR 785], I adopt all the arguments that he there put forward and which have been followed since, save in the case of *Scotford* [[2002] ICR 264], as explaining both that it is appropriate to take the time for running of an appeal from the date when it is entered in the register and sent to the parties, and as to the non-applicability on [section] 7 of the 1978 Act. If necessary, I would agree with Mr Powell that, in any event, a contrary intention would be shown. Therefore:**
>
> **(1) It is essential, in my judgment, to have a firm date so that the appellant and, which is very important, the respondent, should have certainty.**
>
> **(2) The 42 days is a lengthy period, as has been commented upon in previous decisions both of the Employment Appeal Tribunal and the Court of Appeal. It is a very generous**

period and one which, in fact, is now three times as long[2] as that permitted by the Court of Appeal itself under the Civil Procedure Rules for appeals to the Court of Appeal. That allows for any risk of delay in the post.

(3) If the decision were otherwise, great uncertainty would arise because it could never be clear what the date was from which time for a notice of appeal ran. Without in any way saying that in any particular case an inadequate or inaccurate account will be given by a would-be appellant, the tribunal and the respondent will be left in the hands of the appellant to give evidence as to precisely when he received the extended reasons. It will very often be impossible to challenge statements that are made which may not necessarily be accurate. Even in this case, where the Registrar has accepted the fact that this decision was not received until 3 January [2003], the appellant's solicitors themselves inaccurately, and I am sure accidentally, represented to the tribunal that they had received the decision on 6 January. It is important that the courts and the parties have an exact date from which time, on the face of it, runs. Of course the onus would lie on the would-be appellant to establish that he did not receive the document, but that would nevertheless lead to uncertainties, to mini-trials, possibly even to disclosure of documents and cross-examination, and, in particular, it would leave the respondent totally uncertain. In an example which I put in the course of argument to Mr Panton, one could have the following situation. A decision is sent to the parties, say, on 5 November 2002. One party receives it, say, on 8 November 2002, and knows that 42 days, on the face of it, is the time limit in which he must decide whether to appeal, and decides not to, once he knows that a similar period has expired in respect of the other party, and from that time, unless there were an application for an extension, which he knows by virtue of authorities (to which I will be referring) are rarely entertained, proceedings will be at an end and he can act on the basis that the decision will no longer be challenged. The other party, however, has not received the decision and does (and that is not this case, I emphasise) nothing whatever about it, either because he or she is not represented, or, because he or she is represented and the representatives, consciously or unconsciously, take no further steps; 12 months later, either the would-be appellant or his advisers bethink themselves that it might be a good idea to consider whether a decision ever arrived in relation to the case about which they had lost interest or have had other matters to consider. Say some three or four weeks after that, they get round to asking the tribunal whether there ever was a decision and whether they could now please have a copy of it. That copy arrives and they then, if Mr Panton be right, have a further 42 days in which to put in a notice of appeal. In those circumstances, the proper understanding of the court and the respondent that proceedings were at an end becomes immediately and inevitably falsified and proceedings automatically restart. That, it seems to us, can neither be right nor desirable.

16. The proper answer is, in my judgment, that time runs from the sending of the decision, even if it is not delivered. …

17. The potential unfairness that would arise for time to run 42 days after sending of a decision against a party who has in fact not received that decision can be resolved by the application of the ordinary discretion, and should not, in my judgment, depend upon an absolute rule irrespective of the conduct, or lack of it, by the recipient, on the basis of jurisdiction, such as has been argued by Mr Panton. That enables the facts of each particular case to be looked at, and for an extension to be granted, if appropriate. In the hypothetical example that I gave, it is quite apparent that the recipient, or non-recipient, of the notice of appeal would not begin to obtain any relief from the court if discretion were the issue. Thus, the example of an appeal being put in 12 months or so after the sending of the decision, but by happenstance 42 days after the would-be appellant has got round to asking for a substitute copy to be sent, could not possibly prevail."

[2] Nowadays twice as long; the time limited for appealing to the Court of Appeal is 21 days.

The question in this appeal is whether that reasoning can be applied where the Employment Tribunal has incorrectly addressed the written reasons and, consequently, the Appellant has not received them.

34. Mr Crawford's fall-back position is that, in the circumstances of this case, discretion should have been exercised by the Registrar, and should be exercised by me, in the Appellant's favour by extending the time. Ms Tuck directed my attention to two further passages in the judgment in **Sian** as being relevant in that context, namely:

> **"19 I turn then to the exercise of the discretion. This discretion is to be exercised sparingly.**
>
> **…**
>
> **23. In any event the decision arrived on 3 January 2003. It appears clear to me that at that stage there must have been a duty on the appellant and her solicitors to act with extreme diligence. It was now apparent to them that the decision had been sent out on 5 November and that, on the face of it, the time limit (unless some argument or other would prevail) had already expired. …"**

35. The exercise of the discretion to extend time requires consideration of a number of authorities. The then leading authorities on the issue as to whether an appeal has been validly instituted were considered in the comprehensive judgment of HHJ McMullen QC in **Muschett**, which I referred to above. The cases referred to there were **Kanapathiar v Harrow London Borough Council** [2003] IRLR 571; **United Arab Emirates v Abdelghafar** [1995] ICR 65; **Aziz v Bethnal Green City Challenge Co Ltd** [2000] IRLR 111; **Woodward v Abbey National plc (No 2)** [2005] ICR 1702 and **Steeds v Peverel Management Services Ltd** [2001] EWCA Civ 419 (at paragraphs 38 to 40 - a personal injury case but applied to the context of an Employment Tribunal in **Chohan v Derby Law Centre** [2004] IRLR 685). To these can now be added **Muschett** itself and the judgments of the Court of Appeal in **Jurowksa v Hmlad**

Limited [2008] ICR 841, which was decided after **Muschett** but, for some reason, reported before it, and in **O'Cathail v Transport for London** [2012] IRLR 1011.

36. The following principles emerge from these cases (most of these principles are set out by HHJ McMullen at paragraph 5 of the judgment in **Muschett** (see pages 427 and 428)):

(i) both the public interest and the interests of the parties are best served by there being certainty as to, and finality of, legal proceedings;

(ii) generally speaking no distinction is to be drawn between the unrepresented litigant and those who enjoy representation;

(iii) this Tribunal is stricter in the approach to time limits relating to an appeal, where there has already been a hearing of an issue than in relation to time limits at first instance where there is yet to be a hearing of it;

(iv) consequently the adherence to the 42-day time limit is fundamental and compliance with it essential (**Woodward** paragraphs 3 and 4) and

(v) it will only be relaxed in rare and exceptional cases, for there is no excuse, even in the case of an unrepresented party, for ignorance of the time limits (**Abdelghafar**, at p 71) and litigants, whether represented or not, must not expect the procedure to be re-written so as to accommodate their own negligence, incompetence or idleness (**Jurowska** paragraph 19);

(vi) nor, since the **Practise Statement of 2005** made the position abundantly clear, is it likely there will be any acceptable excuse for failure within the time limit to assemble and submit the stipulated suite of documents, which should accompany an appeal, or for failure to explain their absence;

(vii) any application for an extension of time is an indulgence requested from this Tribunal and it is unlikely to be granted because of ignorance of the need to comply with time limits or of the need to submit the stipulated documents;

(viii) consequently before extending time this Tribunal must be satisfied that it has received a full, honest and acceptable explanation of the reasons for the delay (**Abdelghafar**, pp 70, 71);

(ix) this Tribunal will have regard to the length of delay, although the crucial issue is the excuse for delay, not whether the delay is long or short (**O'Cathail** paragraph 36), and any evidence of procedural abuse or intentional default is likely to result in the indulgence being refused (**Abdelghafar**, at p 71);

(x) an excuse may not be sufficient unless it explains why a notice of appeal and the requisite accompanying documents were not lodged during the entirety of the period of the time limited for appealing because those who submit or attempt to submit appeals towards or at the end of the 42 day period run the risk that something may be wrong and there may not be time to correct it (**O'Cathail** paragraph 26);

(xi) consequently, the whole period will need to be examined before any indulgence can be granted;

(xii) this does not mean the ability to lodge the correct documents at any time during the 42 days will necessarily be fatal to granting the indulgence because an analytic approach should be taken to that period and the questions to be asked are (**Abdelghafar** at p. 72)

(1) what is the explanation for the default?

(2) does it provide a good excuse for the default?

(3) are there circumstances which justify the exceptional step of granting an extension of time?

(xiii) prejudice may be a factor, to be considered along with other factors;

(xiv) the merit of the proposed appeal may be a consideration; in **Aziz** Butler-Sloss said this at paragraph 17

> **"17. … Merits may be relevant and there will be cases where it would be right to extend time because the merits of the case require it. That is well within the general propositions expressed by Mummery J that the merits of the appeal may be relevant. Morison J did look at the merits and I have myself looked at the notice of appeal which does not disclose on the face of it, I have to say, any clear propositions of law in which it is suggested that the employment tribunal erred. There are a number of criticisms of their approach to the evidence and I would, for my part, find it very difficult to say that those can be translated into points of law. I do not myself think, therefore that there are strong merits in this case, but in any event I see no fault in the way in which this case was dealt with."**

and Sir Christopher Staughton added at paragraph 23:

> **"23. I would only add this in relation to the merits. Mummery J said at p.246 of the *United Arab Emirates* case, in a passage which my Lady has read, that the merits are usually of little weight and they should not be investigated in detail. I agree with that. But I would however say that, if it is *plain* that the appeal has no prospect of success, that must be a matter which should be taken into account. There can be no point in giving an extension of time for an appeal which is bound to fail. I have had great difficulty in seeing any point of law in this proposed appeal and the jurisdiction of the Employment Appeal Tribunal is confined to hearing appeals on points of law. So that too would, in my judgment, very probably have been a proper ground for refusing the application for leave to appeal to the Employment Appeal Tribunal."**

(xv) if a legal adviser has been at fault that might be a consideration to be considered along with others (**Chohan** paragraph 16).

The submissions

37. Mr Crawford's main point was that, in accordance with the **ET Rules** on document delivery, the judgment and written reasons had not been delivered to his client until 22 January 2014, at the latest. Rule 86(2) of the **ET Rules** (see above) is both mandatory in its terms and in

its effect. I should conclude as a matter of fact that probably the judgment and written reasons had not been properly addressed to the proposed Appellant. Therefore the judgment and written reasons could not have been "delivered" in accordance with the **ET Rules**. After his instructing solicitors had gone on the record, Mr Carroll accepted that the copy received by them on 22 January 2014 had been properly delivered in accordance with rule 86(2) and by rule 90 it must be deemed to have been delivered either on 22 January 2014 or, possibly, on 21 January 2014 if that was the day that should have been delivered in the ordinary course of post. If the document has not been properly delivered in accordance with the **ET Rules** then it cannot be regarded as having been "sent" for the purposes of rule 3(3) of the **EAT Rules**. If it was irregular for one purpose, then it must be irregular for the other and justice required that the reasoning in **Sian** could not apply when the documents had been incorrectly addressed. The issue was when had the judgment and written reasons been "sent"? The case of **Sian** was not about a document which was incorrectly addressed. So that authority simply did not cover the present situation.

38. The fact that a litigant might have knowledge that a judgment and written reasons have been sent out cannot be made into the equivalent of the judgment and written reasons having been "sent" to that litigant. Nor can there have been "irregular service" because even though the existence of a judgment and written reasons had been known to the proposed Appellant's solicitors since 9 October 2013, knowledge of the "substance" of the written reasons, which is required by rule 91 of the **ET Rules** before irregular service can be deemed to have taken place, cannot be said to have existed so far as the proposed Appellant and/or his solicitors were concerned, until they had seen the written reasons. Knowing that there had been an adverse

result coupled with the knowledge that there was a judgment and written reasons could not amount to knowing the substance of the judgment and written reasons.

39. Subsidiary to his main point was a secondary point of principle relating to the decision that the appeal had not been properly instituted on 6 March 2014 because the ET1 and ET3 forms in the case of Mr Cook had not been submitted. The words "any claim and response in the proceedings before the Employment Tribunal" in rule 3(1)(b) of the **EAT Rules** should not be read literally, so as to include the situation that had applied in this case where there were separate proceedings, which had been heard together. Mr Cook was not an Appellant and there was no useful purpose in the forms in his case being included with the Notice of Appeal and other documents. The draftsman had chosen the word "any" as opposed to the word "every" and, consistent with that paragraph 3.1 of the **Practice Direction of 2013** does not refer to a co-Claimant. Fact Sheet 2 (see pages 71 to 72 of the appeal bundle) does but that is not available on the website and is only sent out after the documents have been served. Also Mr Crawford submitted that rule 5 of the **EAT Rules**, which reads (omitting words not relevant to the present case):

> **"The respondents to an appeal shall be -**
> **(a) in the case of an appeal from an employment tribunal … the parties (other than the appellant) to the proceedings before the … tribunal …"**

was not an aid to construction of the word "any" in rule 3(1)(b). It was a tangential matter and the requirement in the Answer to state the name and address of any other party to the proceedings would disclose sufficient information so as to enable this Tribunal to contact other parties and ascertain whether they wish to remain a respondent, as had happened in the case of

Mr Cook. The ET1 and ET3 forms would only be required for ascertaining whether the cases were identical or substantially different.

40. If I was not attracted by either of those points of principle then Mr Carroll submitted that I should exercise my discretion in a different way to the Registrar. The fundamental reason for delay in this case had been the failure of the Employment Tribunal to deliver the judgment and written reasons in accordance with its own rules. The fact that his instructing solicitors were not on the record at the time of the Employment Tribunal hearing does not exonerate the Employment Tribunal. Had the judgment and written reasons been sent to the only address, which had been notified to the Employment Tribunal, namely the Appellant's home address, all would have been well.

41. The Appellant's behaviour and that of his solicitors had been perfectly reasonable in the weeks immediately after the hearing had ended. An outline oral judgment is no basis for drafting a notice of appeal, for which written reasons are a prerequisite. There had been a lack of accurate information about when the judgment and written reasons might be expected to be sent to the parties and, although the Appellant had been led to believe in might be some weeks before a judgment and written reasons became available, he had taken the precaution of enquiring of his solicitors as to whether anything had been received within a short period of time after the hearing had ended. Moreover, the Employment Tribunal had added to the delay after 9 October 2013 by not providing adequate responses or clear instructions. It was not clearly stated and not even inferred that going on the record was a necessary step to the transmission of the judgment and written reasons. By the time this was articulated Christmas 2013 was upon the Appellant and his

solicitors and it was not surprising the matters remain in abeyance until the early New Year. Thereafter the Appellant and his legal team had acted with all reasonable despatch. It had been necessary to forward the judgment and written reasons to the Appellant, take the Appellant's instructions and to consult with counsel. Arguably the papers had been lodged within 42 days of actual receipt of the judgment and written reasons but if not the time should be extended. So far as the ET1 and ET3 forms in Mr Cook's case were concerned, his was a separate case, he had not appealed and the presence or absence of those forms made no material difference to the substance of this appeal. Those forms had been submitted as soon as requested and if it were necessary to extend the time to 11 March 2014 a proper exercise of discretion would be to grant such an extension.

42. If, contrary to Mr Crawford's submissions, this Tribunal took the view that any blame attached to the Appellant's solicitors, then he ought not to be penalised for their default. In **Muschett** HHJ McMullen had recognised that fault on the part of an adviser could be a factor to be taken into account in favour of an applicant for the exercise of a discretion to extend the time. The instant appeal was a case where that factor should be given considerable weight.

43. Ms Tuck submitted that the Registrar been quite correct to find that the appeal had only been properly instituted on 11 March 2014. It had not been properly instituted on 6 March 2014 because rule 3(1)(b) of the **EAT Rules** requires the pleadings to be filed and "any" comprises not simply the proposed Appellant and the proposed Respondent but any other party. Once the two claims were consolidated in the sense that they were heard together, then the "proceedings" comprised both claims.

44. Consequently, the appeal had been properly instituted 48 days after the judgment and written reasons had been received by the Appellant's solicitors. Even if it had been properly instituted on 6 March 2014 it was debatable as to whether that had been done within 42 days of the judgment and written reasons having been sent to the Appellant's solicitors because, if it had arrived on 22 January 2014 it followed that it been sent on either 20 January 2014 or 21 January 2014, which were either 43 days or 44 days before the papers were filed on 6 March 2014.

45. In any event, these computations were being made on the basis most favourable to the Appellant. In fact the period which this Tribunal should look at was from 15 August 2013 to 11 March 2014, a period of 209 days. Ms Tuck's submission was that irrespective as to whether the judgment and written reasons were received by the Appellant time had started to run against him when they were sent out on 15 August 2013. As the **Sian** case makes clear, the law requires certainty and the only certain is that inscribed on the judgment and written reasons itself. This is so even if that document is misdirected through being wrongly addressed. The right approach for this Tribunal would not be to carve out an exception in such a case but to deal with any unfairness through the exercise of its discretion to extend time. Otherwise the example given in **Sian** of a litigant, who knows there is a judgment and written reasons but who has not received them, being able literally to sit and wait, as she picturesquely put it "sit there and put his feet up for a year", confident in the knowledge that he need do nothing until a properly addressed judgment and written reasons was sent out by the Employment Tribunal because only from that date would time start to run against him.

46. In some circumstances it might be possible for a Respondent to rely upon rule 91 of the **ET Rules**. If necessary, she would argue that the Appellant in the instant appeal did know the "substance" because there had been an oral judgment given. But her primary position was that "sent" in rule 3(3) only describe the physical act of the judgment being sent out and I should find, on the balance of probability that the judgment had been sent out to the Appellant, albeit misdirected, on 15 August 2013.

47. If I accepted that analysis, Ms Tuck submitted that the Appellant's position was hopeless. There was no proper explanation as to why the Appellant or the Appellant's solicitors had not acted with greater urgency at least from 9 October 2013 onwards. Eventually the difficulties and problems of communicating with the Employment Tribunal were overcome. They could have been overcome much sooner and the progress was far too leisurely to merit the exercise of discretion in favour of the Appellant.

Discussion and Conclusion

48. I have found above at paragraph 11 of this judgment that the judgment and written reasons of the Employment Tribunal were misdirected and not properly addressed. The argument on the main point in this appeal is that such a document cannot have been "sent" if it was not properly addressed. Such an argument derives support from the general jurisprudence relating to the postal rule and the reasoning that it would not be "just" to apply the rule to a postal communication not properly addressed. Moreover, if, as I think it must be, the judgment and written reasons is a document for the purposes of the **ET Rules**, it is a powerful, and probably conclusive, argument that to send it by post to an address, which neither appears in the

claim form nor has been notified in writing by a party, cannot be delivery within the meaning of rule 86(1) and (2) of the **ET Rules**. If "delivery" and "send" must mean the same thing then a failure to deliver must also be a failure to send.

49. Notwithstanding the logical symmetry of Mr Crawford's argument, however, I cannot accept it for the following reasons. Firstly, it does not seem to me that the case of **Sian** is in any way distinguishable. I do not see any significant distinction between a document, which is sent but does not arrive and one, which is wrongly addressed, is sent and does not arrive. The only difference between the two cases is that there is no obvious explanation for the former and a likely explanation for the latter. But this does not seem to me to be a factual difference that provides a jurisprudential basis for distinguishing **Sian**.

50. Secondly, **Sian** is the third of three cases, all decided by Presidents of this Tribunal, which together amount to a body of authority, which has been in place for about twenty years now, as to when time starts to run in respect of the proper institution of an appeal.

51. Thirdly, not only is this an established practise but also it is underpinned by the reasoning of Morison J, approved and adopted by Burton J, that the rules of the ET and of this Tribunal are not a coherent whole and that there need be no "crossover" or correspondence between them. In other words, rule 3(3) of the **EAT Rules** is not the other side of the coin to rule 86 of the **ET Rules**; each has a different function and the fact that a document might not have been delivered for the purposes of rule 86 does not require me to conclude that it cannot have been sent for the purposes of rule 3(3).

52. Fourthly, as matter of statutory interpretation, on Mr Crawford's argument the words "properly addressed" have to be implied in order to justify the conclusion that the judgment and written reasons have not been sent. Putting it another way, words have to be introduced to qualify the verb "sent". But, if what matters, for the purposes of rule 3(3), is the physical sending out of the judgment and written reasons to the parties, no other words need be added to the text. A judgment and written reasons is still sent to a party even though it is sent to an incorrect address or to somebody incorrectly believed to be an agent for that party.

53. Fifthly, Mr Crawford's argument provides no answer to the problem identified by Burton J at paragraph 15 of the judgment in **Sian** (set out above at paragraph 33 of this judgment) as to how uncertainty is to be resolved or to the other problem of the unfairness to the other party to the prospective appeal identified at paragraph 17. There is a bilateral aspect to the instant problem because, as Burton J explained in **Sian**, both the need for certainty and the requirement of fairness apply to both prospective Appellant and prospective Respondent alike. Because it might be unjust in terms of the postal rule, a rule of deemed acceptance, where the state of mind and actions of the prospective contracting parties are critical, to deem a contract to have been formed even though the letter has gone astray, the parties here are not making a contract but are concerned with an appeal procedure. Different questions of fairness apply to a procedure relating to the administration of justice, where the issue is what is fair to both parties.

54. Sixthly, as an adjunct to the fifth point, the need for certainty, so far as the prospective Respondent is concerned, and the need for fairness, so far as the prospective Appellant is concerned, can be balanced out by the exercise of judicial discretion to extend the time, where

the need for certainty might work unfairness and all other factors can be considered. This was the solution proposed by Burton J in **Sian**, where the judgment and written reasons never arrived for an unexplained reason, and, in my judgment, it is also the solution where the judgment and written reasons never arrived, probably for the reason that they were misdirected.

55. Having rejected Mr Crawford's primary point of principle, I turn now to consider his secondary point of principle, namely that the appeal was properly instituted on 6 March 2014, notwithstanding that the ET1 and ET3 forms in the case of Mr Cook had not been served together with the requisite documents relating to the Appellant's prospective appeal. I see considerable force in the argument that because the former documents have ultimately proved to be of very little significance in relation to this appeal, given that Mr Cook has no wish to appeal and has asked to be removed (and has been removed) as a prospective Respondent, common sense dictates that they were never required in the first place. I think, however, that this may often prove to be the case where the cases of two Claimants have been heard together and only one wishes to appeal.

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

Appellant and Mr Cook and "any claim and response" in my judgment clearly means both sets of pleadings in both cases.

57. If a prospective Appellant wishes to make an editorial decision then the rule caters for that by the alternative "or an explanation as to why either is not included". All that the Appellant needed to do in this case was to explain why Mr Cook's pleadings had not been included. Reasons for not including a co-Claimant's pleadings might be many and various; I am not entirely clear as to what they were in the instant case but it is not difficult to imagine that they might have encompassed that the cases were factually different and/or that Mr Cook did not intend to appeal. The need for such an explanation is to my mind quite obvious. It is to enable this Tribunal to decide what steps to take in relation to a co-Claimant. Mr Crawford's submission that the co-Claimant's identity and contact details are disclosed in the Notice of Appeal underestimates the amount of thought given to prospective appeals by the Registrar and her staff. The reason why the pleadings are required is to better inform them as to how to proceed in relation to the co-Claimant (or, for that matter, co-respondent); likewise, the giving of an explanation is information as to how the proposed appeal should be progressed.

58. Consequently, I have reached the conclusion that without either the pleadings or an explanation for their absence, the appeal cannot have been properly instituted. Nevertheless, the significance of the default falls to be considered as one of a number of factors in deciding whether or not discretion should be exercised to extend the time and regularise the prospective appeal. It is to the exercise of discretion that I now turn.

59. Consistent with the perspective adopted by HHJ McMullen in **Muschett**, as referred to above at paragraph 2 of this judgment, on a rehearing I must consider afresh whether discretion should be exercised to extend time. I should not, however, completely ignore the judgment of the Registrar. She said of the ET1 and ET3 forms in Mr Cook's case that "nothing turns on their absence". If she meant by that, other things being equal the failure to Lodge the ET1 and ET3 in Mr Cook's case would not have prevented the exercise of discretion to extend the time limited until 11 March 2014, then that would also be my approach.

60. I fear, however, that other things are not equal. What the Appellant has to explain are the steps taken or not taken in the period between 15 August 2013 and 6 March 2014. Neither the Appellant nor his solicitors should be criticised in respect of the period up until the end of August 2013, when the Appellant told me, and I accept, that he had telephoned his solicitors to find out whether a judgment and written reasons had been received. The next step seems to have been for his solicitors to write to the Employment Tribunal around the end of September or on 1 October 2013. I am at a loss to understand why enquiries as to the time when the judgment and written reasons might be expected were not made of the Employment Tribunal before 1 October 2013. Moreover, I find it difficult to understand why the Appellant and/or his solicitors appear to have made no attempt to contact Mr Cook or Ms Browne, counsel representing Mr Cook (see page 41 of the appeal bundle) or the entity instructing Ms Browne. If any attempts were made to establish such contact I have heard no evidence about them. I am cautious, however, about placing too much weight on what may be speculation.

61. By 1 October 2013 the time limited for appealing had in fact expired but given that neither the Appellant nor his solicitors knew that and, although there are some unanswered questions as to why a chain of communication was not opened with the Employment Tribunal (or for that matter anybody else) until then, given that there is no other information about this period, I am prepared to assume that it was reasonable for enquiries only to have started on 1 October 2013. I have already expressed my caution about accepting the Appellant's recollection that he had in mind a ten to twelve week delay but 1 October 2013 would have been around eight weeks after the hearing had ended. It seems to me just about reasonable, having regard to the remark made by the Employment Judge about administrative difficulties at the East London Hearing Centre, for the Appellant and his legal advisers to believe that a judgment would not necessarily be available until then.

62. Moreover, whilst it might be accounted a little leisurely to postpone making a telephone call to the Employment Tribunal until 9 October 2013, that period of delay might be capable of being regarded as reasonable. But thereafter I simply fail to comprehend why the Appellant and his legal advisers did not progress the matter with much greater urgency. Like the legal team representing the prospective Appellant in **Sian**, to adopt the words used by Burton J at paragraph 23 of the judgment in that case (set out above at paragraph 34 of this judgment), the Appellant and his legal team in the instant case were required after 9 October 2013 "to act with extreme diligence".

63. I accept, and take into account, that the evidence appears to be that such contact as there was thereafter either with Prospect or with the Employment Tribunal did not appear to have

produced very satisfactory answers. Nevertheless after the telephone conversation on 9 October 2013 the Appellant and his legal advisers knew that there was in existence a written judgment and reasons. In my view they should have done far more to obtain it. The Appellant appears to have busied himself towards the end of the year with a telephone survey of the average time taken to deliver a written judgment by Employment Tribunals up and down the country. I understand that he had to face an investigation by his professional body that would have occupied some of his time, although I did not any evidence about this. Nevertheless it does not seem to me a very good use of such spare time as he had to have conducted such a survey. Given that he must have known since 9 October 2013 that there was a judgment and written reasons in existence, I simply fail to understand how he thought this kind of information would help him.

64. So far as his legal advisers were concerned they must have appreciated after 9 October 2013 or, at the latest, 12 October 2013 (see page 28 of the bundle) there was no record of them representing the Appellant. It was incumbent upon them, in my view, to enquire what steps needed to be taken in order for the Employment Tribunal to be able to send them the judgment and written reasons. According to page 28 of the bundle the Employment Tribunal was going to take a step and forward a judgment and written reasons to the Appellant's solicitors. Why it did not occur to them that they needed to submit written confirmation that they were acting on behalf of the Appellant before being told so by the Employment Tribunal on 24 December 2013 (see page 35 of the bundle) eludes me. But not pressing the matter for 16 days between 12 October 2013 and 28 October 2013 and for another 16 days until 13 November 2013 (see page 35 of the bundle) does not, in my view, amount to pursuing it with "extreme diligence".

65. As I have already indicated above at paragraph 62 of this judgment, I have not overlooked the fact that the response of the Employment Tribunal in this matter might be described as undistinguished. Whilst I do not accept Mr Crawford's submission that this matter has all been caused by the Employment Tribunal, I do accept that I should take into account what appears to have been difficulties of communication and the lack of response. I should make it clear, however, that I am not conducting an investigation into the role of the Employment Tribunal; were I to do so there may be, of course, a different complexion to be put on matters from the point of view of the Employment Tribunal. It is, however, a factor that I bear in mind in deciding how to exercise my discretion in this matter. Nevertheless, in my judgment the onus remains on the Appellant and his legal advisers to have pursued this matter with much more vigour and enthusiasm than is apparent from the evidential material placed before me. I am bound to reach the conclusion that from 9 October 2013 securing a copy of the judgment and written reasons was not approached with anything like the degree of diligence required in the circumstances.

66. Even if I thought the delay could be explained satisfactorily up until 22 January 2014, which I certainly do not, I am at a loss to understand why it appears to have been thought that the Appellant could have the luxury of taking a further 42 or more days (depending on how one does the calculation) before serving the documents necessary to institute an appeal. I bear in mind that the legal analysis, upon which the Appellant's legal advisers were operating, might well have been that time had not been running against the Appellant until 22 January 2014. But it is often prudent to try to cater for the fact that a legal analysis may be proved wrong and, in any event, even if supremely confident, there was no reason to delay further. Mr Crawford

emphasised the need to take instructions from the Appellant, the need to send instructions to counsel and the need for drafting. I accept that none of these can be neglected or omitted but the process can be, and in this case should have been, abbreviated. The authorities emphasise both the relatively generous time limit and the need to serve the papers at this Tribunal sufficiently in advance of the deadline to allow a margin for error. But here the Appellant took the whole six weeks (and, arguably, a day or two more). For all the reasons explained in the authorities set out above, time limits are to be strictly adhered to and indulgence can only be granted in clear and obviously deserving cases. In the last six weeks or so of this long period from 15 August 2013 to 6 March 2014 it does not seem to me that any more diligence was applied than in the earlier period.

67. Finally I need to consider whether the conduct of the Appellant and his legal adviser should be separated out and considered separately. In **Muschett** HHJ McMullen referred to the case of **Chohan** (see above at paragraphs 34 and 35 (xv) of this judgment) as providing a basis in paragraph 16 of that judgment for the fault of the legal adviser being a consideration in the exercise of the discretion to extend time. I think it worth pointing out that the **Chohan** case was concerned with an extension of time for submitting a complaint in a discrimination case under the statutory formulation of it being " just and equitable" to grant an extension. Clearly those concepts are considerations that any Judge or Tribunal would wish to bear in mind in the exercise of any discretion but I think it should also be recognised that the exercise of discretion in respect of the commencement of proceedings at first instance might be somewhat different to the exercise of discretion in relation to extending the time limited for appealing and, apart from

the learned Judge having identified it as a factor, so far as I am aware there is no further authority on the point in the present context.

68. I agree with HHJ McMullen that it can be considered as a factor but much may depend on the nature and degree of responsibility and I think it would be unwise for this Tribunal to attempt to investigate these matters in cases where allocation of responsibility is not immediately obvious; the intervention of legal professional privilege, even though I recognise it can be waived by the client, might make that very difficult and, in any event, my instinct is that it should not be undertaken, unless absolutely necessary. Consequently, I do not think that, generally speaking, very much weight should be given to such a factor in the exercise of discretion in the present context unless it can be clearly seen that the entire responsibility lies with the legal advisers. Even then I find it difficult to think of circumstances where legal advisers were at fault should tip the balance in favour of an extension.

69. I think considerations as to whether the Appellant might have a remedy against his legal advisers in separate proceedings are of very marginal significance and I give no weight to that in this case, although I do not exclude the possibility that in some cases it might be a relevant consideration, although I suspect such cases will be few and far between. Also I am unable to accept Mr Crawford's proposition that the Appellant should not suffer any disadvantage if the error might be thought to lie with his legal advisers. It does not strike me as a sound proposition that an Appellant whose legal advisers may be thought to be at fault could be in a better position than a litigant in person who has made the mistakes himself, herself or itself.

70. In short it would take a very clear case before fault on the part of the legal adviser could be regarded as a factor and in my judgment this is by no means a clear case on the evidence. I think, whilst I can say, in general terms, that some of the responsibility for the delay lies with the Appellant's legal advisers and, accordingly, that is a factor that I should bear in mind, I have very little information upon which to judge how responsibility might be allocated. Therefore I think that the answer in the instant case is there is simply insufficient evidential material for me to reach any conclusions about the matter (something that I think may well prove to be a common feature of many other cases).

71. Having considered all of the factors discussed above, I have reached the same conclusion as did the Registrar, namely that this appeal has not been properly instituted within the time limited for doing so and that I should not exercise my discretion in favour of the Appellant by extending the time limited by rule 3(3)(a)(i) of the **EAT Rules** so that the institution of this appeal on 11 March 2014 was in time. Therefore the appeal against the Registrar's order must be dismissed.