Appeal No. UKEAT/0244/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 31 July 2018

Before

HER HONOUR JUDGE EADY QC

MR C EDWARDS

MR B M WARMAN

MRS N THOMPSON — APPELLANT

ARK SCHOOLS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MITCHELL (of Counsel) Instructed by: Equality and Human Rights Commission 3rd Floor, Arndale House The Arndale Centre Manchester M4 3AQ
For the Respondent	MR JESSE CROZIER (of Counsel) Instructed by: Katten Muchin Rosenman UK LLP 65 St Paul's Churchyard London EC4M 8AB

SUMMARY

JURISDICTIONAL POINTS - Extension of time: just and equitable

The Claimant was seeking to pursue complaints of unlawful pregnancy and maternity discrimination in respect of the withdrawal of a job offer in February 2016, after she had informed the Respondent that she was pregnant. She had, however, only lodged her ET claim on 8 November 2016, several months out of time. The Claimant had given evidence to the ET of the physical and mental health issues she had suffered during the relevant period (her pregnancy had been high-risk and she had suffered depression and anxiety) and as to how she had only learned of her potential cause of action under English law (she had been living in Australia) sometime after the primary time limit had expired, initially thinking this meant she could no longer bring a claim. After emigrating to the UK with her husband and three young children, the Claimant suffered further ill-health but subsequently sought advice as to her rights from a CAB. Finding this unhelpful, she immediately undertook further research and spoke with a legal advisor, learning of the possibility of time being extended for a claim. This led the Claimant to enter the ACAS early conciliation procedure and to subsequently lodge her ET claim.

Although not rejecting the Claimant's evidence, the ET found she had not remained incapacitated throughout the period from February to November 2016. It further found that she had obtained advice as to the potential cause of action arising from the Respondent's withdrawal of the job offer and had been able to undertake her own researches at some stage during or after August 2016. It concluded that the Claimant could, and should, then have done more to progress the lodgement of her ET claim but had delayed until November 2016. In those circumstances, the ET did not consider it was just and equitable to extend time. The Claimant appealed.

Held: *allowing the appeal*.

The ET's reasoning demonstrated a confusion and misunderstanding of the relevant chronology. It had either made material errors of fact - such as to mean it had failed to take into account all

relevant matters and had had regard to that which was irrelevant - or it had failed to explain how it had reached its conclusions. Specifically, the ET had failed to make clear findings as to when the Claimant was incapacitated by ill-health (both when in Australia and after she had emigrated to the UK). Allowing that it could be inferred that the ET had found that she was not suffering a relevant impediment, at least from some period during or after a point in August 2016, it had apparently confused the order in which the Claimant undertook her own researches and then obtained some preliminary advice while she was still in Australia. The ET had further failed to have regard to the very short period of time between obtaining that advice (which was the product of her researches at the time and which had suggested that she was simply out of time to pursue a claim) and the Claimant's emigration to the UK. Once in the UK, the ET had then made further material errors in its recitation of the history, failing to appreciate the Claimant's immediate actions after her contact with the CAB, and suggesting she had then delayed when in fact she had immediately embarked upon further researches and had contacted a legal advisor and notified ACAS all within a day. These errors in reasoning and explanation rendered the decision unsafe and the appeal would accordingly be allowed.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter concerns the potential extension of time for bringing a claim on just and equitable grounds, raising questions as to whether the Employment Tribunal ("the ET") properly approached its task and gave adequate reasons for the conclusion it reached.

2. This is our unanimous Judgment, in which we refer to the parties as the Claimant and Respondent, as below. We are concerned with the Claimant's appeal against a Judgment of the London Central ET (Employment Judge Neal, sitting alone on 24 February 2017), by which the Claimant's claims of unfair dismissal and pregnancy and maternity discrimination were dismissed as out of time, the ET (relevantly) declining to extend time on a just and equitable basis. After an Appellant-only Preliminary Hearing, the Claimant's appeal was permitted to proceed on two bases: (1) whether the ET gave adequate reasons for its decision; and (2) whether the ET misdirected itself or misapplied the relevant facts. The Claimant appeared in person before the ET but is now represented by Mr Mitchell of counsel. The Respondent was represented by counsel below, but not by Mr Crozier who now appears.

Preliminary Application

3. Before proceeding further, we record that at the outset of the hearing before us the Claimant made a preliminary application to adduce new material in the form of two new documents, neither of which were before the ET. These were extracts from (1) "*Tommy's Report: Perinatal Mental Health, Experiences of Women and Professionals (2013)*", and (2) a report entitled "*Pregnancy and Maternity Related Discrimination Disadvantage Experiences of Mothers*," commissioned by the Department for Business, Innovation of Skills and the EHRC in

2016. The Claimant's application had initially been made by letter of 3 July 2018 (then including an application to adduce an expert report from a Consultant Psychiatrist as well). By letter of 17 July 2018, the EAT Registrar refused that application, on the basis that the documents were not before the ET and, as such, were not relevant for the determination of the appeal. On the renewed application before us - limited to the materials we have already identified - we accepted that this could be seen as background material rather than fresh evidence (it being accepted the material in question would not meet the conditions laid down for the admission of new evidence, as provided in **Ladd v Marshall** [1954] 1 WLR 1489) but considered we were faced with the same difficulty as a new evidence application: this was not material that was before the ET when making the decision under challenge and, as such, we considered it was neither necessary nor relevant for the determination of the appeal, which was concerned with the specific reasoning provided by the ET on the evidence and materials before it.

The Background Facts and ET's Judgment and Reasoning

4. The background to this case involved the recruitment of the Claimant to a position within the Respondent's organisation. In or about the autumn/winter of 2015, the Claimant had accepted a job offer from the Respondent, agreeing she would take up this position in February 2016, at a date to be agreed, initially on a three-day-week basis and moving to a full-time commitment from April 2016. On that basis the Claimant and her husband – who were based in Australia - had taken steps to move to the UK, with the Claimant's husband giving up his job and the couple entering into arrangements to sell their house and taking various other steps, preparatory to moving to the UK.

5. Shortly after accepting the position with the Respondent, however, the Claimant discovered she was pregnant with various medical complications. She duly notified the

Respondent of these circumstances on 27 January 2016, explaining that her condition might impact on her ability to take up the position in February and instead proposing she start later, potentially in September 2016, working on an indefinite part-time arrangement of three days a week. The Respondent's Head of Recruitment responded on 3 February 2016 congratulating the Claimant on her news but stating that the Respondent was unable to accommodate the proposed new arrangements and was therefore obliged to withdraw the job offer.

6. Subsequently, after going through the necessary ACAS early conciliation procedure, on 8 November 2016 the Claimant lodged her ET claim relating to the withdrawal of the job offer. She sought to bring claims of unlawful sex and maternity discrimination and automatic unfair dismissal. Those proceedings were, however, brought some months out of time and the preliminary issue the ET thus had to determine was whether time should be extended. In answering this question, the ET was concerned with the different tests applicable to the unfair dismissal and the discrimination claims. No issue is now taken with the ET's conclusion applying the "reasonably practicable" test, applicable to the unfair dismissal claim; at this stage, we are concerned only with the ET's finding on whether it was just and equitable to extend time for the discrimination claims.

7. In determining the question whether it was just and equitable to extended time, the ET recorded the evidence from the Claimant as to her health and wellbeing at the relevant time. Noting that there was limited medical evidence to authenticate the Claimant's account, the ET summarised her evidence as follows:

> **"9. To put it at its lowest, the picture painted by that evidence was most distressing. The Claimant described her physical circumstances, and explained that she had suffered from a number of severe medical conditions which made the pregnancy particularly uncomfortable. She explained that she had, as she put it, "lost all", "everything had been taken away", and, in her words, she felt "gobsmacked".**
>
> **…**

> **12. Essentially the Claimant was saying that, not only was she suffering from a number of uncomfortable physical circumstances during her pregnancy, but also that those circumstances, taken together with the shock, she claimed, of the withdrawal of the Respondent's job offer on 3 February 2016, put her in a state where "her mind was not with it".**

8. The ET also recorded the Claimant's evidence as to her family circumstances at this time:

> **"15. The Claimant was also asked about the circumstances that had led to her moving to the United Kingdom on the basis of having accepted the offer first put to her in the Autumn of 2015. In relation to these matters, it is common ground that the family home in Australia was put up for sale. When the property was placed on the market the Claimant's family moved into temporary hotel accommodation, which proved to be very expensive. There was then an offer made by a friend/neighbour for the family to use a caravan-based residence - which, however, suffered from a number of shortcomings described vividly in the Claimant's witness statement. There was no challenge to the proposition that such circumstances proved highly problematic for a lady with a progressing pregnancy - not to mention with a couple of small children. It is also clear that the situation had been reached whereby the Claimant and her husband felt that, for a number of financial and logistical reasons, they were no longer able to return to their original place of residence.**
>
> **16. The Tribunal was told, and for present purposes that evidence is accepted at face value, that there was eventually an offer by the former employer of the Claimant's husband to restore the job which he had given up. However, by this time, according to the evidence given by the Claimant, she was unable to cope with many of the caring demands being made upon her in relation to her two children and, at the same time, she was significantly incapacitated in the course of her pregnancy, being confined to bed for some substantial period and unable to get up during the day. In those circumstances, therefore, the Claimant's husband declined the offer from his former employer to take him back into employment. Instead, the couple decided that they would use their savings, together with the proceeds to come from the residual equity in their former property, to purchase another property - even though this new property was described as being significantly less attractive than the property which they had lived in previously. The Tribunal understands that the Claimant and her husband still retain the ownership of that newly-acquired property."**

9. Turning to the Claimant's awareness of her potential legal rights, the ET considered there was insufficient evidence that the Claimant possessed knowledge of any potential claim at the outset, i.e. when she received notification of the Respondent's withdrawal of the job offer. That said, the ET noted that the Claimant was "*a resourceful and erudite woman*", who "*knows how to look for information, and … is able to find what she is looking for, evaluate it and present it in a very clear way*" (paragraph 18). As to the steps taken by the Claimant at the time, the ET recorded the evidence as follows:

> **"19. The Claimant's version of events from February onwards was that there had been a significant impairment in her normal faculties, by reason both of the physical problems which she was suffering and her state of mind. As she put it in evidence, she had suffered the experience of seeing "everything taken away from her".**
>
> **20. Whatever the extent of any such impairment, however, the Tribunal finds that there was communication at the relevant time between the Claimant and a legal advisor. One outcome of that contact was contained in the contents of a brief communication in the Bundle, which clearly indicated that the Claimant was being advised that what she alleged to have happened**

> **amounted to "unlawful discrimination". The Claimant was further informed that any claim would have to be made within three months.**
>
> **21. While that communication and the advice contained in it arrived well over three months after the withdrawal of the offer in February 2016, the advice included an offer by the professional in question to be available for contact when the Claimant eventually arrived in the United Kingdom, if she wished to instruct them.**
>
> **22. It was accepted that no more was done at that time by the Claimant in the light of that response.**
>
> **23. Eventually, however, the Claimant's mother visited the Claimant and her family in August 2016, whilst they were still in Australia. During the course of her visit, the Claimant's mother made it clear that she was of the view that what had happened was "not really right" and that something ought to be done about it. While this view was clearly expressed in non-technical legal terms, it nevertheless stimulated the Claimant to begin making enquiries and to do some initial research about "employment protection" as regards pregnancy."**

10. The ET found that the Claimant's researches led her to find information indicating that she had a potential cause of action relating to the Respondent's withdrawal of the job offer in February 2016. That finding, it appears, related to the advice from the English legal advisor referenced by the ET at paragraph 20. We have seen a copy of the email communicating that advice, which we understand to have been received by the Claimant late in the evening of 21 September 2016, and which was (relevantly) in the following terms.

> **"If the job offer has been withdrawn because you are pregnant this is an unlawful discrimination of the Equality Act. You will be able to pursue a claim in an Employment Tribunal. Steps must be taken within 3 months of them withdrawing the offer.**
>
> **Please contact me when you are in the country and we can discuss whether you wish to instruct us. …"**

11. In any event, the Claimant did nothing further until she arrived in the UK, which was about a matter of a week later. The ET refers to this as being at the end of the summer. We understand the Claimant and her family emigrated to the UK on 29 September 2016. The ET recorded what happened at that stage as follows:

> **"25. However, having discovered this to be the case, no more was done by the Claimant until she and her family arrived in the United Kingdom at the end of the Summer. By this time the Claimant and her family were staying with her mother, who, once again, made her view clear that "something should be done", that further information should be obtained, and that advice should be sought - this time from a Citizen's Advice Bureau.**
>
> **26. In consequence, a visit was eventually made to a Citizen's Advice Bureau, although the experience was described by the Claimant as being "less than helpful". Indeed she expressed some anger in hindsight at what had allegedly been said to her.**

27. While what the Claimant alleges may or may not give rise to a matter for concern, the CAB advisor in question - a copy of whose file note relating to the Claimant's visit was included in the Bundle - is not present at the hearing to explain his side of the story, and the Tribunal can only deal with what is contained in the evidence before us.

28. Whatever the situation, it is clear that no more followed from the visit to the Citizen's Advice Bureau.

29. However, there then came a point shortly after the CAB visit at which the Claimant, in the course of a "google" search, came across expressions such as "reasonably practicable" and "just and equitable". With these in mind, therefore, she went back to the legal professional with whom she had earlier had contact before returning to the United Kingdom, in order to check what the position might be. On doing so, she was informed that these were potentially relevant matters in the context of what she alleged had happened to her.

30. Some days passed after this advice was received, but eventually the Claimant made a formal approach to ACAS, as is required under the statutory pre-claim conciliation arrangements. Thereafter, an ACAS certificate was issued on 3 November 2016, which was a Thursday. The weekend then intervened and on the following Tuesday, 8 November 2016, the Claimant's claim form ET1 was eventually lodged."

12. On the basis of the evidence thus recorded, the ET concluded that it would not be just and equitable to extend time in this case, reasoning as follows:

"48. In this case it seems to the Tribunal that, whilst one might have the utmost sympathy for the Claimant - and her account of what happened during her pregnancy and the impact of the withdrawal of the employment offer are taken, for the purposes of this Preliminary Hearing, at face value - nevertheless, this is not a case where it would be just and equitable to extend time.

49. There was a significant delay between the date of the alleged act of discrimination and the Claimant eventually taking steps to present a claim to the Employment Tribunals. During that time there were a number of periods when the Claimant was sufficiently equipped and in a situation to deal with matters of a broadly "business" or "administrative" kind. While that may have been with great difficulty from time to time, the Tribunal does not accept that there was an unbroken period of "incapacity" between February 2016 and 8 November 2016 when the Claimant was not able to deal with the matter of preparing and issuing a claim to the Employment Tribunals. Once "the alarm bells had started ringing" in the late Summer, much more could and should have been done by the Claimant to follow up on that. Even when she was given legal professional advice that a potential cause of action was open to her, the Claimant did not act, even though she was already aware that there were time limits for making such a claim and that she was outside the normal period for claiming.

50. In consequence, therefore, looking at these matters in the round, the Tribunal is of the view that the Claimant would have had difficulty in satisfying the "just and equitable" approach to extending time even by the time she returned to the United Kingdom at the end of the Summer of 2016. Certainly, by the time the situation had dragged on into November, the Tribunal is satisfied that the Claimant had failed to act to such an extent as to render it not just and equitable that an extension of time should thereafter be granted."

The Relevant Legal Principles

13. Section 123(1)(b) of the **Equality Act 2010** ("the EqA") provides:

"(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of -

…

(b) such other period as the employment tribunal thinks just and equitable."

14. The ET's ability to extend time for these purposes is not unconstrained. Indeed, in **Bexley Community Centre v Robertson** [2003] IRLR 434 CA, Auld LJ observed as follows:

> **"25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect."**

15. That said, the ET's discretion to extend time will always be case- and fact-sensitive; as Sedley LJ observed **Chief Constable of Lincolnshire Police v Caston** [2010] IRLR 327 CA:

> **"31. In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in *Robertson* that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them.**
>
> **32. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it. That, albeit discursively, is what the EJ did here, notwithstanding his passing distraction by a textbook comment of doubtful relevance or weight."**

16. Helpful guidance of a general nature is provided by the judgment of the EAT (Laing J presiding) in **Miller and Others v Ministry of Justice and Others** UKEAT/0003/15, as follows:

> **"10. There are five points which are relevant to the issues in these appeals.**
>
> **i. The discretion to extend time is a wide one: *Robertson v Bexley Community Centre* [2003] EWCA Civ 576; [2003] IRLR 434, paragraphs 23 and 24.**
>
> **ii. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, paragraph 25). In *Chief Constable of Lincolnshire v Caston* [2010] EWCA Civ 1298; [2010] IRLR 327 Wall LJ (with whom Longmore LJ agreed), at paragraph 25, put a gloss on that passage in *Robertson*, but did not, in my judgment, overrule it. It follows that I reject Mr Allen's submission that, in *Caston*, the Court of Appeal "corrected" paragraph 25 of *Robertson*. Be that as it may, the EJ in any event directed himself, in the first appeal, in accordance with Sedley**

LJ's gloss (at paragraph 31 of *Caston*), which is more favourable to the Claimants than the gloss by the majority.

iii. If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition.

iv. What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET (*DCA v Jones* [2007] EWCA Civ 894; [2007] IRLR 128). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases (ibid, paragraph 44).

v. The ET may find the checklist of factors in section 33 of the Limitation Act 1980 ("the 1980 Act") helpful (*British Coal Corporation v Keeble* [1997] IRLR 336 EAT; the EAT (presided over by Holland J) on an earlier appeal in that case had suggested this, and Smith J (as she then was) recorded, at paragraph 8 of her Judgment, that nobody had suggested that this was wrong. This is not a requirement, however, and an ET will only err in law if it omits something significant: *Afolabi v Southwark London Borough Council* [2003] ICR 800; [2003] EWCA Civ 15, at paragraph 33.

11. *DCA v Jones* was an unsuccessful appeal against a decision by an ET to extend time in a disability discrimination claim. The Claimant had not made such a claim during the limitation period as he did not want to admit to himself that he had a disability. At paragraph 50, Pill LJ said this:

"The guidelines expressed in *Keeble* are a valuable reminder of factors which may be taken into account. Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found. It is inconceivable in my judgment that when he used the word "pertinent" the Chairman, who had reasoned the whole issue very carefully, was saying that the state of mind of the respondent and the reason for the delay was not a relevant factor in the situation."

12. I should also say a little more about points 10(iii)-(v). There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses. As I understood their arguments, neither Mr Allen nor Mr Sugarman suggested that a lack of forensic prejudice to a Respondent was a decisive factor, by itself, in favour of an extension of time. But both argued, in slightly different ways, that the ET was bound in every case, in Mr Allen's phrase, "to balance off" the relative prejudice to the parties, and that, if the ET did not do so expressly, that was an error of law, even if there was, otherwise, no good reason to extend time."

17. Section 33(3) of the **Limitation Act 1980**, referenced by Laing J, provides:

"(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to -

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 11, by section 11A or (as the case may be) by section 12;

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

> **(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;**
>
> **(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;**
>
> **(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."**

18. Although section 33(3) of the **Limitation Act** provides a useful reference point, as the Court of Appeal observed in **Southwark London Borough Council v Afolabi** [2003] ICR 800, an ET is not required in each case to go through the list there set down. The requirement upon it is to have regard to those relevant factors that are significant in the particular case before it; failure to do so may amount to an error of law (see per the EAT, then addressing the equivalent provision under the **Sex Discrimination Act 1975**, in **Hutchison v Westward Television Ltd** [1977] ICR 279, and as acknowledged by Laing J in **Miller** (see above)).

19. As for what is or is not relevant in any particular case, that is for the ET, and it will not err in law if it does not consider a specific factor unless no reasonable ET, properly directing itself in law, could have left that factor out of account (see **Department of Constitutional Affairs v Jones** [2008] IRLR 128 CA per Pill LJ at paragraph 50, and **Edomobi v La Retraite Roman Catholic Girls School** UKEAT/0180/16 per Laing J at paragraph 21).

20. Having had regard to the relevant significant factors in the particular case, it is then for the ET to carry out the assessment as to whether it is just and equitable to extend time (see Wall LJ. at paragraphs 17 to 19 in **Caston**). Provided the ET has applied the correct test, and has had regard to that which is relevant and not taken into account irrelevant factors or reached a conclusion that can properly be characterised as perverse, it will not be open to the Employment Appeal Tribunal to interfere (see per Leggatt LJ in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640 at paragraph 20).

21. As for the requirement on the ET to set out its reasoning, by Rule 62(5) Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 201**3 ("the ET Rules"), it is provided that:

> **"(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons shall identify, by means of a table or otherwise, how the amount to be paid has been calculated."**

That said, the obligation upon an ET thus stated in the **ET Rules** is a guide and not a straight-jacket (see **Vairea v Reed Business Information Ltd** UKEAT/0177/15).

22. It is common ground that what is required of the ET's reasoning was as stated by Bingham LJ, in **Meek v City of Birmingham District Council** [1987] IRLR 250 CA:

> **"8. … it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and the statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court, to see whether any question of law arises …"**

See, further, **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409 CA.

23. More generally, as has been stated in numerous cases (see for example per Mummery LJ at paragraph 29 of **Fuller v LB Brent** [2011] ICR 806 CA, and per Elias J (as he then was) at paragraph 3 of **ASLEF v Brady** [2006] IRLR 576 EAT), neither the EAT nor the parties should adopt an overly critical, strained or unrealistically detailed scrutiny of an ET's Judgment. An ET is entitled to expect its reasoning to be read holistically. The question for any appellate Tribunal is whether, taking the reasoning as a whole, it can understand why the ET reached the decision it did. In answering that question, the appellate Tribunal must bear in mind that the ET's reasons

A are directed towards the parties, who do not come to the Judgment as strangers (see **Derby Specialist Fabrication Ltd v Burton** [2001] ICR 833 EAT at paragraph 32).

B **The Parties' Submissions**

The Claimant's Case

24. The Claimant's appeal is pursued on two grounds which can be summarised under the following headings: (1) adequacy of reasons; (2) misapplication of law or fact.

C

25. In pursuing the adequacy of reasons challenge, the Claimant relies on what she contends were two errors by the ET. The first is that the reasoning omitted a series of important dates

D material to the fact-sensitive exercise the ET was required to undertake. Notably:

(1) The date of birth of the Claimant's son relevant to the calculation of the protected period at section 18 **EqA**.

E (2) The date of communication with the Claimant's legal advisor: had the ET had proper regard to the evidence, it would have recorded that the first communication was on 21 September 2016, before the Claimant arrived in the UK; the subsequent communication was on 12 October 2016, which was when the Claimant first learned

F of the extension of time jurisdiction.

(3) Relatedly, the date on which the Claimant learnt of the ability of the ET to extend time; the communication on 21 September having only informed her of the three-

G month time limit, not of any possibility of an extension to that.

(4) When the Claimant's own researches commenced, which had in fact been on 21 September 2016.

H (5) When the Claimant arrived in the UK; in fact, on 29 September 2016, not simply "the end of the summer", as the ET recorded.

(6) When the Claimant visited the CAB, which the Claimant says was on 12 October 2016.

(7) The date of the Claimant's further research and the further legal advice when she learned of the extension of time jurisdiction (see as above, on 12 October 2016).

(8) Finally, the date the Claimant entered early conciliation; also 12 October 2016.

These omissions, the Claimant submits, led the ET to make material errors in its reasoning. There was, for example, no factual basis for the ET's apparent criticism that the Claimant delayed in pursuing her claim (see the ET at paragraphs 28 to 30) when the visit to the CAB and her subsequent consultation with the legal advisor and her institution of early conciliation all took place on 12 October 2016. The same could be said in terms of when the Claimant first learned that the ET had jurisdiction to extend time. The ET had erred in thinking that the Claimant had delayed instituting early conciliation after learning of this; in fact those two things had occurred on the same day.

26. Secondly, the Claimant complains that the ET failed to make findings concerning her impairments; it had been provided with witness evidence detailing the physical and mental impairments she had suffered during what was a high-risk pregnancy and beyond - as summarised by the Claimant, at paragraph 40 of her skeleton argument, as follows:

> **"40. [The Claimant's] impairments included insulin dependent diabetes, idiopathic thrombocytopenic purpura (ITP), anxiety and depression, and a serious eye infection. She had received extensive medical treatment throughout the period up until presentation of her claim form and as recently as 30.11.16, had been referred by her GP to Ferryview mental health unit in respect of anxiety and depression."**

More than that, the Claimant's psychiatric health was considered in the witness statement of Ms Dunlop (a close personal friend) who testified as to the change in the Claimant's personality, apparently caused by her depression and anxiety (see Ms Dunlop's statement at paragraphs 5 to

10). That was further corroborated by medical records, in particular, a referral to a mental health team in November 2016. The ET's reasoning failed to refer to that evidence and it failed to determine whether the Claimant was suffering from any physical or mental impairments and, if so, what, when and with what effect on her ability to present the claim in time.

27. The Claimant's second ground of appeal overlapped with the first. She contends that the ET's application of the statutory test at section 123(1)(b) of the **EqA** was inevitably flawed in circumstances where the reasoning was inadequate. Moreover, she submits that a failure by an ET to take into account relevant facts in the exercise of its discretion to extend time amounted to an error of law (see **Hutchison v Westward Television**). The Claimant contends the ET erred in failing to consider the issue of delay against the background of the Claimant's mental and physical impairments, her capacity in more general terms, her status as a foreign national, and against the merits of her underlying claims and the lack of prejudice to the Respondent and also in relation to the ACAS conciliation period.

28. Taking the first of those points - the Claimant's mental and physical impairments - the Claimant contends the ET was required to consider these both as pregnancy-related conditions, arising in the course of her protected period and beyond, and, more generally, as potential disabilities. Although accepting there is no automatic rule that mental health problems warrant an extension of time (see **DCA v Jones** at paragraph 58), mental health issues and the difficulty that an individual might have in acknowledging that they have such a problem could be relevant factors (see **Jones** at paragraph 55). The Claimant contends that her psychiatric health was plainly relevant in this case. The ET had, however, wrongly suggested she was required to evidence an unbroken period of incapacity between February 2016 and 8 November 2016 and it was not apparent that the ET actually took into account her physical and mental impairments.

More generally, the Claimant contends the ET failed to take into account her incapacity, wrongly stating that the evidence available still left the issue of the Claimant's state of mental capacity at the relevant time unverified by anything that could be described as expert or informed evidence. In fact, the ET had been provided with referral from the Claimant's GP to the Ferryview Mental Health Unit on 30 November 2016, which diagnosed the Claimant as suffering anxiety and depression and recorded that this had started following the Respondent's withdrawal of its job offer. Yet further, given that the ET had stated it was accepting the Claimant's evidence at face value, it had failed to explain why that evidence was not to be accepted in respect of the impact on the Claimant of her physical and mental impairments.

29. In addition, the Claimant complains that the ET failed to have regard to her status as a foreign national. She had specifically attested, in her witness statement, that she was disadvantaged in this sense as she assumed that the Respondent knew English law better than her and would have acted within the law: something the Respondent had itself asserted.

30. As for the merits of her claims and the lack of prejudice to the Respondent, although factors considered relevant under section 33(3) of the **Limitation Act 1980**, there was no indication that the ET had made any findings in these respects or taken these matters into account, again, rendering its decision in error of law.

31. Finally, the Claimant observes that while the primary limitation period had expired, it was simply wrong of the ET to state that "*the situation had dragged on into November*", suggesting this was solely due to the Claimant. In fact, ACAS early conciliation had started on 12 October 2016 and the Claimant was pursuing conciliation with the Respondent until the point when her

claim was presented. That was a relevant consideration for this last part of the chronology and the ET should have taken this into account.

The Respondent's Case

32. The Respondent contends, in general terms, that instead of reading the ET's Judgment fairly, against the factual background known to the parties who did not come to the Judgment as strangers to the case (see **Derby Specialist Fabrication v Burton**), the Claimant has adopted a hyper-critical reading going well beyond the **Meek** requirements. Taking the Judgment as a whole, the Claimant and the EAT were able to understand the factual findings and conclusions reached and thus understand why she was not successful in persuading the ET to extend time. Although the ET may not have referred to each of the witnesses who gave evidence or each part of the evidence before it, it was apparent from its findings that it had regard to matters detailed in that evidence; it was equally apparent that the ET was well aware of the relevant chronology.

33. Reading the Judgment as a whole - as the EAT was required to do - it could be seen that the ET was well aware of the ACAS early conciliation period (see paragraph 30), of the date when the Claimant had obtained legal advice (referencing, specifically, the emailed advice she had received - see paragraph 21), and of the earlier period when she had begun to make enquiries (see paragraphs 23 and 39). The ET may have dealt in its reasoning with the lawyer's initial advice *prior* to the Claimant's researches, when her researches had, in fact, led to the obtaining of the advice, but the EAT should not infer that the ET lost sight of the relevant chronology. Specifically, the ET recorded the Claimant's own efforts to research her rights and rejected the suggestion, essentially at the heart of the Claimant's case, that there was an unbroken period of incapacity when she was unable to deal with the matter.

34. The ET permissibly concluded (see paragraph 49) that the Claimant became aware of her cause of action by the end of the summer of 2016, and could and should have done more at that stage. Thereafter, the ET could equally be taken to have been aware of the date when the Claimant visited the CAB, referring to the undisputed document in the hearing bundle (see paragraph 29). As for the reference to the Claimant arriving in the UK at the end of the summer, that was entirely consistent with her witness statement where she recorded her arrival as being on 29 September 2016.

35. Although the Claimant may have notified ACAS on 12 October 2016 (albeit her evidence before the ET was that it was in fact on 11 October), as time had already expired that did not serve to extend time and the ET was entitled to retain focus on the date on which the Claimant had actually lodged her ET claim. Although it might have been desirable for the ET to include specific dates in its reasoning, that could not be said to render the reasoning inadequate to its task, not least given that both parties were aware of the evidence before the ET as to the relevant dates.

36. Turning to the Claimant's alleged impairments, it was wrong to suggest the ET had failed to determine whether the Claimant was suffering from physical and mental impairments when it was apparent that it had given careful consideration to this question and to the possible impact of such impairments (see paragraphs 8 to 15 and 19 to 20), effectively assuming the Claimant's evidence to be correct in this regard and determining what this meant in terms of her ability to commence proceedings. Given the scant medical evidence adduced - and it should be noted that the psychiatric referral post-dated the relevant period and, to the extent that the records referred to the earlier history, they were dependent upon what the Claimant had reported, providing no independent verification - the ET was not required to go further in its reasoning and make precise

findings as to the medical nature of any impairment the Claimant was suffering. The reasoning was **Meek**-compliant, being adequate to the ET's task.

37. Turning then to the second ground of appeal, although the ET was afforded a broad discretion under section 123 **EqA**, it was still for the Claimant to explain why the primary time limit was missed and why the claim was not brought sooner than it was. In the present case, the Claimant's criticism of the language used by the ET - in support of her argument that it had applied the wrong test - was overly pernickety and selective. The focus on the ET's use of the word "*rescued*" failed to see this in context. The ET was using this merely as a shorthand, here summarising the legal issues before going on to address the evidence and legal principles. The Claimant failed to take into account the ET's careful self-direction later given in its reasoning. Similarly, with the reference to an unbroken period of incapacity between February and November 2016, the ET had not directed itself in these terms but, at paragraph 49, had plainly evaluated the Claimant's own explanation for her failure to bring her claim in time, finding that explanation unpersuasive.

38. As for the criticism that the ET gave only brief consideration to the issues, that wholly ignored and implicitly invited the EAT to disregard the ET's detailed consideration of the facts and her evidence for her delay. It was wrong to read paragraphs 48 to 51 in isolation but that was what the Claimant was doing. Considering the ET's Reasons, as a whole, it was apparent it had due regard for the reasons for delay. Specifically, it had considered the Claimant's mental and physical health, at paragraphs 9 to 14, 16 and 19, but it also made findings as to the Claimant's resourcefulness and ability to pursue her claim notwithstanding her health issues. The finding that the Claimant was equipped to pursue her claim during this period was one that was open to the ET on the evidence. Further, section 123(3) did not require the ET to place specific reliance

A on the Claimant's medical condition in the context of pregnancy- or maternity-related discrimination, nor was the ET required to determine whether she was disabled. The ET had not failed to make a relevant finding on capacity but was left in the position of doing the best it could, given the paucity of the Claimant's evidence in this regard. Doing so, the ET concluded the Claimant had the capacity and had undertaken Internet research and sought legal advice.

B

C 39. As to the Claimant's residence, links to the UK and time spent in the UK, these were all matters to which the ET had appropriate regard and took into account. There was no separate test for foreign nationals and, in any event, although the Claimant referred to having been based in Australia, she had not put her case on the basis of being a foreign national and thus suffering some specific disadvantage as such.

D

40. As to the issue of the potential merits of the Claimant's claim, it was unnecessary to take account of the merits of a claim, and sometimes not possible to do so. At the time of the ET hearing, the Respondent had only put in holding grounds of resistance and had not pleaded to the substance of the Claimant's case. The ET did, however, refer to the possible relevance of prejudice (see the discussion of the factors identified by Laing J in **Miller**; paragraphs 44 to 46 of the ET's reasoning) and could thus be taken to have had that issue in mind. The Respondent had in any event submitted a witness statement attesting to the forensic prejudice it would suffer and it was not correct to suggest that it had suffered no prejudice.

E

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G

41. Finally, the ET was plainly aware of, and specifically referred to, the period of early conciliation:

> **"30. Some days passed after this advice was received, but eventually the Claimant made a formal approach to ACAS, as is required under the statutory pre-claim conciliation arrangements. Thereafter, an ACAS certificate was issued on 3 November 2016, which was a Thursday. The weekend then intervened and on the following Tuesday, 8 November 2016, the Claimant's claim form ET1 was eventually lodged."**

H

Discussion and Conclusions

42. Whether it is appropriate to extend time on just and equitable grounds is a matter of assessment for the ET; it is not for the EAT to substitute its view. Where an ET has expressly directed itself as to the relevant legal principles, the EAT should be slow to infer that it has then failed to apply those principles. Moreover, the EAT should not finely comb through the ET's reasoning to find fault or omissions, and should not pick out particular infelicities of expression, or focus on those, when the reasoning as a whole demonstrates that the ET applied the correct legal test. That said, where an ET has materially misdirected itself on the facts, that will render the decision unsafe: it will have failed to take into account that which is relevant (the actual facts of the case relevant to the ET's assessment) or it will have had regard to something that is irrelevant (a mistaken view of the facts).

43. In the present case, as Mr Mitchell has observed in argument, the ET did not reject the Claimant's evidence; on the contrary, it expressly recorded that it accepted that evidence at face value (see paragraphs 16 and 45 of the ET's reasoning). Insofar as that evidence addressed the Claimant's mental impairments, the ET was placed in a difficult position as a result of the limited medical evidence available. Whilst it might have more fully recorded the evidence relating to the Claimant's mental health over the relevant timeframe, we could not say it was impermissible for the ET to conclude that there were times during the period in question when the Claimant was "*sufficiently equipped and in a situation to deal with matters of a broadly "business" or "administrative" kind*" (see the ET at paragraph 49). Although there was evidence of a subsequent referral to a mental health team, that post-dated the relevant period and the reference within that documentation to the earlier history was dependent upon the Claimant's account and, so far as the ET was concerned, thus took matters no further forward.

44. Where we consider there is greater scope for criticism is in relation to the lack of clear explanation as to *when* the ET found the Claimant was so equipped; that is, when she was sufficiently able to deal with matters in terms of her mental health. From the reasoning provided, the best we can infer is that the ET considered this was so by sometime during August 2016, when it records that the Claimant's mother-in-law (wrongly referred to as her mother) visited (see the ET at paragraph 23). Even after that time, however, the ET needed to be clear as to what it found in respect of the Claimant's ability to deal with matters from a health point of view. Assuming, against the Claimant, that the ET had indeed found that, from sometime in August 2016, her mental health was not such as to amount to an impediment to prevent her taking steps to obtain information as to her rights under English law, there was also then evidence regarding the serious eye infection the Claimant had suffered at around the time of her emigration to the UK, a further significant period in the chronology.

45. The evidence regarding the Claimant's health also needed to be assessed alongside that relating to her awareness of her possible rights, expressly seen by the ET as a potentially relevant factor (see paragraph 17 and following of its Judgment). The Claimant's evidence in that regard was that she only started to undertake any research regarding her rights after her mother-in-law's visit to Australia in August 2016. Those researches led her to make contact with an English employment law advisor. The advice she then received was, however, limited to telling her that there was a three-month time limit; it gave no indication of there being any possibility of an extension of time and the Claimant took the matter no further at that stage. The ET's reasoning - whilst not saying that the Claimant's evidence was in any way rejected - suggests that the contact with the English legal advisor came before the Claimant's own researches (see paragraphs 20 to 23); if that was its understanding of the relevant chronology, that would be a material error.

46. For the Respondent, it is urged that we can infer that the ET made no such mistake; it was just an unfortunate statement of the reasoning and, read as a whole, it was apparent that no material error was made. In any event, the Respondent stresses that the ET's finding was that the Claimant could and should have done more in the late summer of 2016, *after* she had received advice from the English legal advisor that she had a cause of action.

47. Allowing that the ET's ultimate conclusion (at paragraph 49) does indeed include this general finding, the difficulty is that we are unable to understand how the ET came to that conclusion. The end point of the Claimant's researches while she was in Australia informed her that she might have had a cause of action but she was out of time to pursue it. Although the email providing that advice went on to provide contact details, it spoke only of the Claimant making contact when she got to the UK. On that evidence, we do not know why the ET concluded that the Claimant *could and should* have done much more between receiving this email advice - late in the evening on 21 September - and her arrival in the UK with her husband and three young children on 29 September. Thereafter, between 29 September and 11 October, the evidence was that the Claimant suffered a serious eye infection. When that had cleared, on either 11 or 12 October, the Claimant made contact with the CAB and, not finding that advice satisfactory, then immediately sought further advice from the English employment lawyer she had contacted previously. It might have been open to the ET to reject the Claimant's evidence as to these various steps but it did not. On the basis of that evidence, we are left with a finding that the Claimant could and should have done more to follow up on the legal advice she received in the evening of 21 September, notwithstanding that appeared to have closed the door on the possibility of bringing any claim at that stage. Even if we allow that that might have been a permissible finding, given the Claimant's evidence as to the relevant chronology - not least that she, her husband, and their three young children were leaving to start their new life in the UK the

following week and the English legal advisor had suggested she contact him once she arrived - it requires an explanation that is simply not provided by the ET. The impression given from the ET's findings is that it confused the order of events. It certainly appears to have lost sight of the precise chronology and the very short timeframe involved.

48. As for what occurred once the Claimant had arrived in the UK, the confusion in the ET's reasoning continues. Having recorded that the Claimant initially approached the CAB for advice, the ET failed to record the precise date on which this occurred. The Respondent says that the evidence before the ET from the Claimant was that this visit had taken place on 11 October (when it may in fact have been on 12 October) and it could be taken that ET had this in mind; any confusion was not fatal to its reasoning – the ET was not telling the parties something of which they were not already aware. That may be so but, if the ET did have the relevant date in mind, it makes no sense that it should then go on to find (as it did at paragraph 28) that "*no more followed from the visit to the Citizen's Advice Bureau*". On the evidence, much more followed: the Claimant immediately following up that visit, on either the same or the next day, by contacting the legal advisor with whom she had been in contact earlier in September. Similarly, it was wrong for the ET to then say that some days passed after the Claimant received advice from the English legal advisor regarding a possible extension of time before she approached ACAS (see paragraph 30); this all happened on the same day.

49. The Respondent says any slips in these respects were ultimately not material to the ET's conclusion, which was focused on the period before the Claimant came to the UK. If that is so, then for the reasons we have already explained, we are unable to understand how the ET reached its conclusion on the evidence before it. In any event, however, we note that the ET does not itself limit its conclusion to that period - referring at paragraph 50 to events having "*dragged on*

into November". On our reading of the Judgment, the ET found events post-dating the Claimant's arrival in the UK to be relevant to its assessment as to whether it would be just and equitable to extend time but then demonstrated a complete failure to get to grips with the chronology that followed, apparently misunderstanding the history of the events with which it was concerned.

50. In our judgement, these matters render the ET's decision unsafe. They demonstrate errors in the factual findings made by the ET on matters which it expressly identified as being relevant to its determination. Those misunderstandings meant that the ET failed to take into account that which was relevant and had regard to that which was not. In those circumstances, it is right that we allow the challenge to this ET's decision. In reaching this conclusion, we note that this was an unusual case with an unusual factual matrix. It required careful attention to the relevant dates and a clear explanation of its findings and conclusions. Unfortunately, the ET's Judgment does not demonstrate the necessary engagement with the facts or clarity of explanation required.

51. In the circumstances, we have not considered it necessary to go on to address whether the ET failed to have regard to other factors, such as the potential merits of the case (although in that regard it seems to us that the ET was unlikely to have been in any position to form a view on that question and we do not consider that a failure to address that point would have been fatal). Similarly, we do not fully engage with the Claimant's criticism of the ET's treatment of the period between the notification to ACAS, under the early conciliation procedure, and the actual lodgement of the ET claim. We see the point that this is a further period on which it is not possible to see that the ET has made relevant findings, but we do not conclude that the ET was bound to stop its consideration of the history as at the date of the early conciliation notification.

Disposal

52. Having allowed the appeal, we turn to the question of disposal. The Claimant says the matter should be remitted to a different ET; the Respondent says it should be to the same Employment Judge.

53. Having had regard to the factors set out in **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763, we consider it is appropriate in this case to remit to a different ET. Even allowing for the professionalism of the learned Employment Judge (which we do not doubt), there were fatal flaws in the reasoning in this case and it would be difficult for the parties to have full confidence should this matter be referred back to the same Employment Judge. It is also, we consider, proportionate to adopt this course. It should be possible to deal with the remitted hearing quite shortly and it is likely to be speedier to re-list if it is remitted to a different Employment Judge rather than limiting remission to a particular Judge.

54. We therefore order that the appeal is allowed and that the matter is remitted to a differently constituted ET.