Appeal No. UKEAT/0211/20/LA (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On Thursday, 28 January 2021

Before

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

(SITTING ALONE)

LEEDS & YORKSHIRE HOUSING ASSOCIATION LTD — APPELLANT

MR I FOTHERGILL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS K MOSS (of Counsel) Instructed by: Gordons LLP 1 New Augustus Street Bradford BD1 5LL
For the Respondent	MR I FOTHERGILL (The Respondent in Person)

SUMMARY

TOPIC NUMBERS: 13, 30

RACE DISCRIMINATION and JURISDICTIONALPOINTS

An appeal from the Employment Tribunal's judgment, which significantly extended time for the presentation of the claim form, would be allowed and the matter remitted to a differently constituted tribunal for determination of all aspects of the question of whether it is just and equitable to extend time for the presentation of the Claimant's claims of race discrimination until the date on which he presented his claim form.

The events giving rise to the Claimant's claims had taken place, respectively, in January 2018 (at the latest) and in February 2018. His claim form was presented in June 2019. The EAT held that, having found that the Claimant had been genuinely ignorant of his legal rights, the Tribunal had erred in failing to have: (1) considered whether such ignorance had been reasonable at all material times and, if so, to have identified the facts and matters which informed that conclusion; and (2) assessed the relative weight to be given to all relevant factors, including the prejudice sustained by the Respondent, arising from its destruction (prior to the presentation of the claim form) of relevant documentation in accordance with its policy. The omission of one significant consideration (the reasonableness of the Claimant's ignorance) from the balance inevitably rendered the Tribunal's overarching conclusion perverse. In any event, the Tribunal's analysis of the prejudice sustained by the Respondent had been flawed and its conclusions on that issue were not **Meek**-compliant.

THE HONOURABLE MRS JUSTICE ELLENBOGEN

Introduction

1. I refer to the parties by their respective statuses before the Leeds Employment Tribunal. This judgment follows the full hearing, last week, of the Respondent's appeal from the judgment, following a preliminary hearing, of Employment Judge Shulman (sitting alone), sent to the parties on 24 October 2019 ('the Judgment'). By the Judgment, so far as material to this appeal, the Tribunal extended the primary time limit applicable to two claims for race discrimination, under section 123(1)(b) of the **Equality Act 2010** (EqA). Before me, but not below, the Respondent was represented by Ms Karen Moss of Counsel. The Claimant represented himself, both here and below.

The Material Facts

2. Between 16 November 2017 and 3 May 2019, the Claimant, who describes himself in his claim form as "a BME worker", was engaged to work for the Respondent as a temporary technical officer. There is a dispute over his employment status, which is not material to this appeal. In that capacity, he was required to undertake surveys of the Respondent's properties and to investigate tenants' claims of disrepair, defending such claims as appropriate. In late November 2017, one of the Respondent's property surveyors resigned. The Claimant was shortlisted and interviewed for that role, on 21 December 2017. On 17 January 2018, the Respondent decided to appoint a Mr Beavers to the role and the Claimant was informed that his application had been unsuccessful.

3. On 23 January 2018, a second property surveyor resigned. The Claimant's earlier application was reconsidered on 14 February 2018. On 19 February 2018, the Respondent decided to appoint a Mr Bennett to the vacant role and the Claimant was informed that his application had been unsuccessful. His temporary contract was extended on 21 February 2018

and, on the same date, all changes were announced in a bulletin to all staff. Further extensions to the Claimant's temporary contract were made in the course of 2018. On 3 April 2019, the Respondent gave notice to terminate his contract. The termination date was 3 May 2019. The Claimant contacted ACAS on 25 June 2019 and presented his claim form on 27 June 2019, asserting that each rejection of his application for the role of property surveyor had constituted an act of race discrimination. The claim form was presented over 17 months after the first, and over 16 months after the second, act of alleged discrimination.

The Tribunal's Findings

4. At paragraph 3.1 of the Judgment, the Tribunal stated:

> **"With regard to the question of time limits there was a substantial part of the Claimant's argument that time should be extended relating to his ignorance of his rights. Regard must be had to *Perth & Kinross Council v Townsley* UKEATS/0100/10 which decided that such ignorance of rights must be genuine and reasonable."**

No challenge is made to that correct direction of law.

5. Thereafter, the Tribunal's findings and reasons were briefly stated and are set out in full below:

> **"4. Facts /arguments**
>
> **Time**
>
> **…**
>
> **4.2. The Tribunal had to investigate the reason for and the length of delay. This the Claimant said in evidence was because he was not aware that he had any rights. He said that shortly after the incidents which are the subject of the claims, he was being considered by the Respondent for the job of a contracts manager. He had no knowledge of discrimination laws in this country. Then he qualified this "to some degree" but not to do with employment. In general terms he said as a member of an ethnic minority he was aware of these things. But his real awareness did not come until after the termination of the arrangement with the Respondent, which took place on 3 May 2019 when, in early to mid-May, a friend told him about such things, as that friend had experience of employment discrimination. It also appears that he did after speaking to the friend – look at the internet.**

4.3. In relation to the cogency of the evidence, Mr G Fisk gave evidence to the Tribunal and he is the director of customer services of the Respondent. There is clearly unavailability of some documents relating to the relevant period as there is a policy not to retain these after 12 months and, therefore, apart from the documents which were in the bundle, matters of evidence of which Mr Fisk's evidence this morning demonstrate, come down to memory.

4.4. The Claimant says that he never took legal advice as he was not aware of any of his rights until June 2019. He says time was not mentioned.

4.5. As far as the claim itself is concerned there were two jobs which the Claimant applied for, one in a decision against him on 15 January 2018 and the second one resulting in a decision against him on 19 February 2018. The Claimant was not particularly concerned about the first decision, because he was satisfied that the other candidate did have a little more experience than him, but it was the appointment of the second candidate, a Mr Bennett, that upset him because in his view, Mr Bennett did not have the experience but as he said and because of the possibility of another job he did not think about the question of his rights.

4.6. It is clear that the Respondent did not have responsibility for the delay in the Claimant making application to the Tribunal.

4.7. As to the question of prejudice, if anything, there is more prejudice to the Respondent than the Claimant because of the missing documentation. However, Mr Fisk clearly described to the Tribunal the process of finding and appointing candidates. There is a short-listing and then applicants are scored against the person specification then the highest ranked are chosen for interview. He described this process as a careful recruitment process with criteria clearly set out and selection by two members of staff with a short list (six in this case) and an assessment made in the interview. As it happens in the second process Mr Bennett scored more highly than the Claimant. Mr Fisk suggested that his memory of matters had faded but he clearly described remembering his surprise and disappointment at the Claimant's performance in interview and he remembered Mr Bennett doing well. He remembered the distinction between the two.

5. Determination of the issues
(After listening to the factual and in the case of the Respondent legal submissions made by and on behalf of the respective parties the Tribunal decides as follows):

5.1. Time – The Tribunal is of the view that the reasons which the Claimant gave in his evidence about the ignorance of his rights so far as he is concerned outweigh the importance of other matters to be taken into account. Of course, the Tribunal has considered the prejudice against the Respondent, because they are in effect affected by their own hand and policy and the destruction of documentation. Taking all matters into account the Tribunal finds that the Claimant's ignorance of his rights was genuine and was reasonable.

> **5.2. The Tribunal is not concerned with the time from termination (3 May 2019 to 27 June 2019) but much more with the length of time since what we will call the Bennett incident. As the Tribunal has indicated it was that incident which ignited the earlier claim.**
>
> **5.3. In all the circumstances the Tribunal will extend time sufficient to validate the claim of the Claimant which was presented to the Tribunal on 27 June 2019 on the grounds that it just and equitable to do so.**

The Appeal

The grounds of appeal

6. By its grounds of appeal, as they stood at the outset of the full hearing, the Respondent contends that the Tribunal's stated reasons for concluding (1) that the Claimant's ignorance of his legal rights had been genuine and reasonable; and (2) that the reasons given by the Claimant for his ignorance outweighed the importance of the prejudice to the Respondent which it had identified at paragraphs 4.3 and 4.7 of the Judgment, were inadequate, because the Tribunal had failed to explain why it believed that the Claimant's ignorance of his legal rights:

   a. was reasonable at all material times; and

   b. outweighed any of the other factors.

7. That constitutes a **Meek**[1] challenge to the specified aspects of the Judgment. In the course of the hearing, the Respondent applied to amend its grounds of appeal to add the following further ground, reflective of the way in which Ms Moss sought to advance its case:

> **"No reasonable employment tribunal would have reached the conclusion that:**
>
> **(a) the Claimant's ignorance was reasonable throughout the period from January 2018 to 27 June 2019;**
>
> **(b) the balance of prejudice favoured the Claimant."**

[1] **Meek v City of Birmingham District Council** [1987] IRLR 250, CA

That constitutes a perversity challenge. I heard the parties' submissions in relation to that prospective ground of appeal, de bene esse, indicating that I would rule on the application when giving judgment.

Orders of the Employment Appeal Tribunal

8. By order of HHJ Barklem, dated 16 April 2020 ("the Barklem Order"), the appeal was stayed, pending referral to the Tribunal for the purposes of answering the questions set out below:

> **"What were the reasons for its findings (i) that the Claimant's belief regarding his ignorance of his legal right to bring a claim of discrimination was reasonable and (ii) that such ignorance of his legal rights outweighed the prejudice to the Respondent arising from its non-retention of relevant documents? The reasons should include the evidence which is referred to in the Employment Tribunal's written reasons but not set out."**

9. The Tribunal provided its response to that order on 12 August 2020, the material part of which is set out, in full, below:

> "**2. In answering these questions, it should be borne in mind that an employment tribunal has a wide discretion in considering whether or not to extend time on just and equitable grounds – see Trusthouse Forte (UK) Ltd v Halstead EAT 213/86.**
>
> **3. Ignorance of Rights**
> **3.1. The ET took into account that the Claimant's ignorance must be genuine and reasonable.**
> **3.2. The Claimant was not aware that he had any rights shortly after the incidents giving rise to the claims.**
> **3.3. The Claimant had no knowledge of discrimination laws in England and Wales**
> **3.4. The Claimant had no awareness until mid-May 2019 when a friend, who had had a similar experience told the Claimant about it.**
> **3.5. The Claimant then went on the Internet.**
> **3.6. The Claimant did not take advice and says he was not aware of his rights until June 2019.**
> **3.7. The ET exercising its wide discretion took these reasons into account over any others.**
>
> **4. Prejudice Against the Respondent**
> **4.1. This related to the unavailability of some documents because of a 12-month policy by the Respondent to destroy records.**
> **4.2. A Mr Fisk gave evidence for the Respondent and because of the missing documents had to give evidence from memory.**
> **4.3. This he clearly did and because of this the ET took the view that any prejudice by reason of the lost documents against the Respondent was limited. Had Mr Fisk struggled the position might had been different.**
> **4.4. The policy of destruction might have worked against the Respondent, but it was the Respondent's own policy that caused the documents to be destroyed which it was now saying were evidence in the case.**

> **4.5. Exercising discretion and weighing up any prejudice against the Respondent the ET decided that the balance came down in favour of the Claimant."**

10. By order of HHJ Auerbach, dated 22 September 2020, the appeal was set down for a full hearing, for the following stated reasons:

> **"Whilst mindful of the Tribunal's wide discretion to extend time, having considered the original and supplementary reasons I consider the appeal to be arguable, in particular as to: (a) whether there are sufficient reasons as to why the Claimant's ignorance was thought to be reasonable (as opposed to genuine); (b) whether there are sufficient reasons as to the specific information that would have been contained in the selection exercise documents, which of this information the witness could or not could remember and the potential significance of what he could not remember; (c) the weight attached to the policy of destruction after 12 months being the Respondent's own policy."**

The Parties' Submissions

For the Respondent

11. Ms Moss began her submissions by acknowledging that the widest possible discretion is accorded to Tribunals to determine whether it is just and equitable to extend the primary limitation period and the limited scope for challenging their exercise of it: **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194, CA. This case, she submitted, fell within that scope.

Ignorance of rights and reasonableness

12. In this connection, Ms Moss referred to the judgment of Underhill LJ in **Adedeji v University Hospitals Birmingham NHS Trust** [2021] EWCA Civ 23, at paragraphs 37 and 38:

> **"37. […] The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) 'the length of, and reasons for, the delay'. If it checks those factors against the list in Keeble, well and good, but I would not recommend taking it as the framework for its thinking.**
>
> **38. I am not the first to caution against giving the decision in Keeble a status which it does not have. […]"**

A The reference to 'Keeble' was to **British Coal Corporation v** Keeble [1995] UKEAT/0413/94, in which Holland J had suggested that, when considering whether to extend the primary limitation period under one of the predecessor provisions to section 123(1)(b) EqA, a tribunal should have regard to the terms of section 33 of the **Limitation Act 1980**, which gives courts the power to extend the primary limitation period in personal injury cases.

B

13. In this case, the reason given for the lengthy delay had been the Claimant's ignorance of his legal rights. In that connection, Ms Moss referred to the well-known dictum of Brandon LJ in **Wall's Meat Co Ltd v Khan** [1978] IRLR 499:

C

> **"[…] if in any particular case an employee was reasonably ignorant of either (a) his right to make a claim of unfair dismissal at all or (b) how to make it or (c) that it was necessary for him to make it within a period of 3 months from the date of dismissal, an industrial tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.**
>
> **For this purpose, I do not see any difference, provided always that the ignorance in each case is reasonable between the ignorance of (a) the existence of the right, or (b) the proper way to exercise it or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see how it can justly be said to be reasonably practicable for a person to comply with a time limit of which he is reasonably ignorant. While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all he can hardly be found to have been acting unreasonably in not making enquiries as to how and within what period he should exercise it. By contrast, if he does know of the existence of the right it may, in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such enquiries. To that extent therefore it may in general be easier for a complainant to avail himself of the 'escape clause' on the ground that he was reasonably ignorant of his having the right at all than on the ground that knowing of the right he was reasonably ignorant of the method by which or the time limit within which he ought to exercise it."**

D

E

F

G

As paragraph 41 of **Townsley** made clear, submitted Ms Moss, the above dictum was of equal application where the just and equitable test for an extension of time applied, and it was important for the tribunal to be satisfied that it had been reasonable for the claimant to have remained in a

H

state of ignorance about any of the three relevant matters throughout the period of the primary time limit. Indeed, submitted Ms Moss, it was necessary to address that question throughout the entirety of the period of delay.

14. Whilst the Tribunal had been entitled to conclude that the Claimant had been genuinely ignorant of his rights at the very beginning of the period spanning the second of the two relevant acts and the presentation of his claim form, the point at which the Tribunal had found the Claimant to have become aware of those rights was not clear from the Judgment. Paragraph 4.2 of the Judgment appeared to suggest that the Claimant had possessed some knowledge of discrimination laws at the time of the matters giving rise to his claims, "but not to do with employment". It had been in early to mid-May 2019 when he had had a conversation with a friend who had had experience of discrimination that he had acquired "real awareness," following which he had looked at the internet. At paragraph 4.4, the Tribunal had recorded the Claimant's evidence that he had not taken legal advice, or been aware of any of his rights, until June 2019 and that "time" had not been mentioned. Thus, the Tribunal appears to have concluded that the Claimant's ignorance of his rights (to greater or lesser extent) had ceased somewhere between early to mid-May and June 2019. There was an absence of detail in the Judgment, and in the Tribunal's response to the Barklem Order, regarding what it was that had been discussed in May 2019, and why, and nothing to explain the delay between the second act of which complaint had been made and that conversation. Most people read newspapers and have conversations with friends regarding discrimination, submitted Ms Moss, particularly those who are members of an ethnic minority. This was not a case in which the Tribunal had found the Claimant to have possessed no knowledge of his rights whatsoever.

15. Having correctly stated the law (at paragraphs 3.1 and 5 of the Judgment), the Tribunal had not applied it. In essence, it had made findings relating to the Claimant's ignorance, but not

as to its reasonableness. Its response to the Barklem Order had advanced matters no further and had not provided the evidence expressly required by that order. As in the Judgment, the Tribunal's reasons relating to its finding of genuine ignorance had not addressed with consistency the date on which the Claimant had become aware of his legal rights, or the reasonableness of his ignorance at all material times (that is, throughout the entirety of the delay in presenting the claim). In short, the Tribunal had fallen into the same error as had the tribunal in **Townsley**.

16. Ms Moss submitted that **Townsley** was factually similar to the instant case. In that case, the Tribunal had extended time for the presentation of a claim of indirect race discrimination, having accepted as a question of fact Ms Townsley's ignorance of her right to bring such a claim by reference to her ethnic origin as a Scottish Gypsy Traveller. The Employment Appeal Tribunal held that the Tribunal had erred in failing to have asked itself whether her ignorance had been reasonable, in particular given its finding, amongst others, that she had been aware, at an earlier stage, of another Gypsy Traveller who had pursued her rights, with the assistance of the Commission for Racial Equality, through the courts. That latter finding, Ms Moss contended, was comparable to the finding made by the Tribunal in the instant case, that the Claimant had been aware of his rights, to some extent, as a member of an ethnic minority, prior to his conversation with a friend in May 2019.

17. Ms Moss submitted that the Tribunal had been considering an extraordinary period of delay, of 16 months from the later of the two acts. That was comparable to the delay in **University of Westminster v Bailey** UKEAT/0345/09 and had similar characteristics. In **Bailey**, the claim had been brought somewhere between 12 and 19 months out of time. The EAT held (paragraph 35) that Dr Bailey's misapprehension as to the scope of the **Sex Discrimination Act 1975** (namely his lack of appreciation, until so advised, that the act applied to men, as well as women) required searching examination, relating, as it did, to elementary equality. Accepting

A that Dr Bailey had been significantly more sophisticated than the Claimant in this case, there was an equal, if not greater, elementary quality to the right of a person of colour not to be discriminated against in the workplace, even accepting that, so far as apparent from the Judgment, the Claimant had not been cross-examined to the effect that he ought to have sought legal advice at an earlier stage. In such circumstances, Ms Moss submitted, the Tribunal had been obliged to scrutinise his asserted ignorance more fervently than would have been the case had the relevant right been less well known (such as in **Bowden v Ministry of Justice and Anor** UKEAT/0018/17; the right to claim a pension for part-time judicial service).

18. The various phases of the period which had elapsed between the second alleged act of discrimination and the presentation of the Claimant's claim form ought to have been analysed separately, because, at each stage, there had been a material change in the prevailing circumstances, Ms Moss submitted. By February 2018, the Claimant had considered himself to have been unfairly treated, and, shortly after that, had had some awareness of discrimination law, but no real awareness until May 2019. The Tribunal ought to have considered whether it had been reasonable for him not to have asked a friend for advice once he had no longer been in contention for the role of contracts manager; or, later, once notice to terminate his temporary contract had been given and he had appreciated that his engagement by the Respondent would imminently end; or, later still, once it had ended. In fact, wrongly, the Tribunal, had gone as far as to say that it was not concerned with the period running from the termination of his contract until presentation of his claim form (Judgment, paragraph 5.2).

19. In all such circumstances, submitted Ms Moss, the Tribunal had failed to consider reasonableness at all; alternatively, reached a perverse conclusion on the issue; and, in any event, its judgment on that issue was not **Meek**-compliant.

Balance of prejudice

20. Turning to the balance of prejudice, Ms Moss submitted that the Tribunal had had regard to all appropriate factors, but had erred in its assessment of their respective weight. She referred to Underhill LJ's observation, at paragraph 32 of **Adedeji**, that, as part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension will be to open up issues which had arisen much longer ago, submitting that the position is the more significant, where, as in this case, the period of delay is substantial and extraordinary.

21. It was clear, from the witness statement of Mr Fisk, that the Respondent operated a policy of destroying all paperwork relating to a recruitment exercise approximately 12 months after the exercise had been completed. Had ACAS been contacted and proceedings been instituted in time by the Claimant, those documents would have been available. There had been no evidence before the Tribunal of any steps taken by the Claimant prior to their destruction which ought to have put the Respondent on notice of the need to retain them.

22. Whilst ultimately concluding that the balance of prejudice favoured the Claimant, curiously the Tribunal had acknowledged (paragraph 4.7, opening sentence) that it favoured the Respondent. The Tribunal had made four errors in the exercise of its discretion:

(1) Having noted that Mr Fisk had been able to give an account, at the preliminary hearing, of material events, based upon his recollection of the recruitment exercises, it failed to take into account the fact that he had not been cross-examined as to his recollection to the extent which would be necessary at the full hearing, regarding the issues which would be the subject of that hearing. The Tribunal, unfairly, had concluded that some

recollection of the events would suffice for that latter purpose, in the absence of the application forms for the other candidates; the interview notes; and the completed shortlisting document. Whilst the position was not as bad as it could have been had Mr Fisk had no independent recollection, there was considerable prejudice to the Respondent, which needed to be balanced by a reasonably good excuse for the delay. The Tribunal had not acknowledged the lesser weight likely to be attached to Mr Fisk's evidence, in the absence of contemporaneous documentation.

(2) Moreover, Mr Fisk had been only one of two decision-makers, the second of whom would also have been prejudiced by the absence of contemporaneous documentation.

(3) Too much weight had been attached to the fact that the relevant documentation had been destroyed as part of the Respondent's own policy, implicit in which was the Tribunal's criticism of the latter. The fact that it had been mentioned twice (Judgment, paragraph 5.1; Further Reasons, paragraph 4.4) indicated that it had been given undue weight.

(4) Alternatively, if and to the extent that the above matters were considered and properly weighed by the Tribunal, that could not be discerned from the Judgment, which was, therefore, not **Meek**-compliant.

Disposal

23. Ms Moss submitted that, there having been clear errors of law, including a perverse exercise of the Tribunal's discretion, only one outcome was possible, on a proper application of the legal principles to the facts as found by the Tribunal: the Claimant's ignorance of his rights

had been entirely unreasonable over an extended period, set against which the Respondent was not in a position to defend itself against his substantive claims in the way in which it should be entitled to do. Accordingly, the Claimant's application to extend the primary limitation period ought to have failed, and the EAT ought to substitute such a finding, in accordance with **Jafri v Lincoln College** [2014] EWCA Civ 449, consistent with the approach which the EAT had adopted in **Bailey**. A different approach had been adopted in **Bowden** because the available evidence in that case had been incomplete. It would be disproportionate for that issue to be remitted to a Tribunal. Alternatively, any remission should be to a differently constituted tribunal; the Judgment was totally flawed and the Tribunal had already been given an opportunity to explain itself further, which had simply resulted in a repetition of its original findings.

The basis of the application to amend the grounds of appeal

24. Having regard to the principles in **Khudados v Leggate** [2005] ICR 1013, EAT, Ms Moss submitted that it was in the interests of justice to allow her application to amend the grounds of appeal because the additional ground encapsulated the appeal which the Respondent sought to advance. As originally drafted, prior to receipt of the Tribunal's Further Reasons, the grounds had asserted inadequacy of reasons. It was proportionate to hear the appeal on the amended basis and the Claimant had suffered no prejudice, because he had been on notice of the arguments to be run upon receipt of the Respondent's skeleton argument, which had been served two weeks prior to the hearing. The appeal, as amended, had clear merit and gave rise to no delay. It would allow the EAT to substitute its own decision, rather than remitting the matter. If the application were rejected, the Respondent would be deprived of the right to advance a meritorious ground of appeal and the appeal would proceed on **Meek** grounds alone, inevitably resulting in remission, were it to succeed. The application had not been made sooner because it

had not been appreciated that the grounds ought to be amended following receipt of the Tribunal's further reasons, until the hearing of the appeal.

For the Claimant

25. The Claimant told me that he objected to the Respondent's application to amend its grounds of appeal. Whilst he had "skimmed through" its skeleton argument when received, he had not absorbed it. He had understood the reasonableness of his ignorance of his legal rights to be in issue on appeal and that the Respondent was concerned about the effect of the absence of the documentation which it had destroyed and the associated prejudice which it would suffer.

26. The Claimant submitted that the Judgment had been produced by a reputable judge, whose analysis had been reasonable and who had seen the case for what it was; he was surprised at the Respondent's entitlement to impugn it before the Employment Appeal Tribunal. The appeal had focused on the late submission of his claim form, but the crux of the matter was that he had been discriminated against by the Respondent. That, straightforward, case had been overly complicated. The Claimant told me that he clearly recalled the Employment Judge having expressed surprise at Mr Fisk's evidence, during cross-examination, to the effect that he could remember the Claimant's interview well, having previously stated that he could not recall it. (Ms Moss's instructions were that the chartered legal executive who had represented the Respondent at the hearing below did not recall such an exchange, but did recall the evidence given by Mr Fisk, as recorded at the end of paragraph 4.7 of the Judgment. I do not consider that anything turns on any exchange between the Judge and Mr Fisk in connection with that evidence.)

27. The Claimant submitted that, if the Respondent were to succeed in demonstrating an error of law, his preference would be for the matter to be remitted to the same tribunal. That tribunal had understood the nature of his case.

28. In addition to his oral submissions, I considered, with care, the Claimant's Respondent's Answer, together with two detailed e-mails which he had submitted as his skeleton argument. Much of the material contained in all such documents was directed at his substantive claims, rather than the matters that are the subject of this appeal. Both in those documents and in the course of his oral submissions, the Claimant reiterated his ignorance of his legal rights, and of the associated limitation period, prior to presenting his claim form. He also stated that, over a 12-month period, Mr Fisk had told him that he (the Claimant) was being considered for the role of contracts manager, which had given him false hope, though he could not recall having told the Tribunal that, at the preliminary hearing.

Discussion

The Respondent's application to amend the grounds of appeal

29. Having regard to the principles in **Khudados**, I consider it appropriate to grant the application to amend the Notice of Appeal, for the following reasons. Albeit that the need for the amendment was appreciated late, at the hearing itself, the application was then made as soon as practicable, as required by paragraph 3.12 of the EAT Practice Direction 2018. No delay was caused by the amendment, which was consistent with the Claimant's understanding of the matters which were the subject of the appeal and with the reasons given by HHJ Auerbach when sifting the appeal to a full hearing. Both parties were able fully to advance their arguments regarding the amended ground at the hearing, such that no additional court time was consumed in its consideration. In those circumstances, I consider that no prejudice is caused to the Claimant by allowing the amendment. By contrast (and recognising that this is not, of itself, determinative), were I to refuse the application, the Respondent would be deprived of an appeal having good prospects of success, arising from the same factual matters which underpin the existing ground of appeal.

30. I, therefore, turn to consider the grounds of appeal as amended. It is convenient collectively to address the various errors of law which are said to arise in connection with (1) reasonableness of ignorance, followed by (2) the balance of prejudice.

Reasonableness

31. Notwithstanding the Tribunal's references to its need to be satisfied of both the fact of the Claimant's ignorance of his legal rights and the reasonableness of that ignorance, nowhere in the Judgment is the latter issue addressed. Furthermore, that lacuna has not been filled by the response provide to the Barklem Order, in which connection Ms Moss is right to emphasise the absence of the evidence for which that order had called. Whilst the grounds of appeal as amended do not challenge the finding of genuine ignorance, per se, the reasonableness of that ignorance had to be addressed throughout the substantial period in question. As Ms Moss contended, properly analysed it might well be that ignorance which was reasonable at one stage ceased to be reasonable as time progressed and circumstances changed. There is simply no analysis of that issue by the Tribunal, and, moreover, an express and unexplained statement (Judgment, paragraph 5.2) that it was not concerned with the period running from 3 May to 27 June 2019.

32. On the evidence recorded by the Tribunal, the following questions, at least, arose:

(1) Given that the Claimant had had some knowledge of discrimination laws in this country, why had he not made enquiries; undertaken any research; and/or sought advice, at least from February 2018 onwards?

(2) As part of the above question, following his conversation in early to mid-May 2019 with a friend who had had experience of employment discrimination, and subsequent internet searches, why had he not sought legal advice until June 2019, or presented his claim until 27 June 2019?

33. Absent such questions and a consideration of the answers provided to them, the question of reasonableness could not be determined, and any finding that the Claimant's ignorance was reasonable throughout the relevant period would be perverse.

34. For the sake of completeness, it is axiomatic that a tribunal cannot give reasons for a decision which it has not made. On that basis, the **Meek** challenge in relation to this issue fails. If, however, the Tribunal is to be taken as having made an implicit finding that the Claimant's ignorance was reasonable for as long as it endured, I would accept Ms Moss' submission that the Judgment is not **Meek**-compliant in that respect.

35. The appeal succeeds in relation to the issue of reasonableness.

Balance of prejudice

36. Section 123(1) EqA provides that (subject to sections which are not material for current purposes) proceedings on a complaint within section 120 may not be brought after the end of a period of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable.

37. As noted above, Ms Moss does not contend that the Tribunal had regard to inappropriate factors, or omitted to have regard to additional, appropriate factors when deciding whether it was appropriate to extend time for the presentation of the claim form. Her criticism is the relative and inadequate weight which the Tribunal attached to the prejudice to the Respondent caused by the destruction of relevant documentation. In order to succeed in such a challenge, the Respondent must demonstrate that the Tribunal's conclusion fell outwith the very wide ambit

within which different views may reasonably be taken about what is just and equitable (**Morgan**, paragraph 20). In this case, I am satisfied that such a challenge succeeds.

38. In the absence of any consideration by the Tribunal of the reasonableness of the Claimant's (diminishing) ignorance up to the point at which he presented his claim form, no analysis of what was just and equitable could be undertaken. That is because the reasonableness of any genuine ignorance on the part of the Claimant throughout the period in question was an essential circumstance against which the acknowledged prejudice to the Respondent fell to be weighed. As the exercise to be undertaken called for assessment of the relative weight to be attached to the various considerations in play, the omission of one such significant consideration from the balance inevitably rendered the Tribunal's overarching conclusion perverse.

39. However, I reject the other basis of perversity for which Ms Moss contended:

(1) It is clear that the Tribunal had in mind the prejudice to the Respondent in defending the substantive claims at a full hearing. At paragraph 4.7 of the Judgment, it addressed Mr Fisk's recollection, not merely of the recruitment process per se, but of the respective performances of the Claimant and Mr Bennett in that process and the distinction between the two.

(2) Whether or not a co-decision-maker's recollection was as good as Mr Fisk's, there was no indication in Mr Fisk's witness statement that that individual would be called as a witness, or himself lacked any independent recollection of events. In such circumstances, the Tribunal is not to be criticised for failing to weigh such matters in the balance.

(3) The fact that the Respondent had been the author of its own misfortune in destroying the relevant documentation was a relevant consideration, and I attach no significance to the fact that reference to it was repeated in the Tribunal's response to the Barklem Order. It was not the only matter repeated — the Tribunal had been asked to set out its reasons.

40. Nonetheless, the extent of the prejudice caused to the Respondent by the destruction of the documentation could not be assessed, meaningfully, without prior analysis of the information which had been recorded in it; the importance of that information to the substantive case to be advanced by each party; and the extent to which the evidential deficit could be mitigated by the specific matters which Mr Fisk and any other relevant witness independently could recall. The extent to which such an analysis was undertaken as a precursor to the conclusions set out at paragraph 4.7 of the Judgment is not apparent and, in that respect, the Judgment is not **Meek**-compliant.

41. The appeal succeeds in relation to the Tribunal's assessment of the balance of prejudice.

Disposal

42. I have given careful thought to the question of disposal in this case, recognising that any further delay in a claim arising from events now three years old, in which relevant contemporaneous documentation is no longer available, is particularly undesirable, should the claim be allowed to proceed.

43. I turn, briefly, to consider the cases from which Ms Moss drew support for her contention that I ought to substitute my own decision for that of the Tribunal, both as to reasonableness of ignorance and the balance of prejudice, and to conclude that the primary limitation period should not be extended.

44. In **Bailey**, the EAT considered it appropriate to substitute its decision that time should not be extended. HHJ McMullen QC described Dr Bailey thus, at paragraph 4 of his judgment:

> **"The Claimant is a litigant in person, which he draws to my attention throughout his address and written submissions. He is, by profession, a senior lecturer at the University. He teaches business strategy and, of particular relevance to today's proceedings, he teaches on the Masters Course for HR and Personnel Development. He is surrounded by colleagues who know about employment law. He is a member of the UCU, the union recognised by the University and nationally. He sits, elected by his colleagues and on the UCU ticket, on the appropriate bodies of the University. He has five post-graduate degrees and has a long history of public service in representing others, as recognised by the Queen's honour."**

45. At paragraphs 27 and 28, he continued:

> **"27. The Judge recorded the circumstances: it was not unreasonable for the Claimant to hold back and not to rush to litigation, he had a long career, which was coming to an end, the law was difficult and the Claimant was a litigant in person unaware of legal rules. I credit Dr Bailey with the usual attributes of a litigant in person: stress, unfamiliarity in the courtroom and solipsism. But as he has presented to me, he was at no disadvantage for representing himself. It must be borne in mind he was making a simple non-legal case, a senior lecturer in one university talking to a professor in another about his grading and late appeal; a walk in the grove. He is in the profession of communication in public and he is at the very top end of those litigants in person who are entitled to fair treatment. He suffered no disadvantage before the Employment Judge or before me. This was not a factor to be weighed in his favour.**
>
> **28. The plea must be considered analytically, which the Judge did not do. Most people who suffer an adverse decision at the workplace do not have an employment lawyer on site. They may know how to reach one or be a union member. If they take steps in litigation such as issuing a claim or advocacy, they are aptly described as litigants in person and are entitled to a generous reception by the courts. What an ordinary working person on hearing an adverse result does is to ask around or do research seek professional advice. All he had to do was to put in a claim and explain why he did not do so for almost two years. To describe him at that stage as a litigant in person overstates the point."**

46. Ms Moss was right to acknowledge that the Claimant in this case is less sophisticated than Dr Bailey. Furthermore, in explaining why it was that it was appropriate for the EAT to take the decision, rather than remit the matter to a tribunal, HHJ McMullen QC was clear (at paragraph 38) that the claim had been presented a year after the date on which Dr Bailey had

appreciated that the Sex Discrimination Act 1975 applied equally to men. At paragraph 41, he held that:

> **"…Misunderstanding the elementary scope of the Act is not a reason. He was a person who knew, or should have known, the importance of presenting a claim quickly after 1 June 2006, or if I am wrong about that, April 2007, and lodging a claim in 2008 was way beyond any reasonable elongation of time. The undisputed evidence is that in April 2007 he filed a grievance which satisfied the 2002 Act regime for an Employment Tribunal claim of discriminatory grading. It is not just and equitable to allow him a further year. And if I am wrong about that, three months from January 2008 to 21 April 2008 is not justified. I accept the University is disadvantaged by this delay for not having access to the relevant material and I can add those points to the three factors which the Judge himself considered as being in favour of the Respondent. The Claimant's awareness of the situation and the problems relating to the obtaining of information are insubstantial."**

Bailey was a stark case, as was **Townsley**, in which the EAT was similarly prepared to substitute its own view for that of the Tribunal.

47. In this case, there is limited evidence recorded by the Tribunal and available to me, and there are limited findings of fact by the Tribunal following its receipt of evidence from the Claimant and Mr Fisk. In my judgment, it cannot be said that there can be only one conclusion as to the reasonableness of the Claimant's ignorance throughout the period to be scrutinised, and, in any event, the extent to which he was questioned regarding certain key matters going to that issue (see paragraph 32 above) is unclear. Similarly, the evidential basis for the Tribunal's conclusions as to the prejudice caused by the Respondent's destruction of documentation, having regard to the significance of the particular material which (1) that documentation had contained; and (2) Mr Fisk (and any other potential witness) could and could not recall, is nowhere stated and could admit of one more than one conclusion. The nature and extent of that prejudice would fall to be weighed against the reasonable ignorance, if established, of the Claimant. All such

matters are, classically, for an employment tribunal to decide. I note that a similar conclusion was reached by HHJ Richardson, in **Bowden**.

48. I have had regard to the principles in **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763, EAT. I bear in mind the nature and extent of the flaws in the Judgment, coupled with the fact that, having been given the opportunity to explain the reasons for its conclusions, supported by the evidence which had informed those reasons, the Tribunal essentially committed to its earlier position. A re-think by that Tribunal, at this stage, appears impracticable. In my judgment, the appropriate course is for the matter to be remitted to a differently constituted employment tribunal, for a preliminary hearing to decide all aspects of the question of whether it is just and equitable to extend time for the presentation of the Claimant's claims of race discrimination until the date on which he presented his claim form.