Neutral Citation Number: [2023] EAT 100

Case No: EA-2022-001040-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 July 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT)

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Between :

POLYSTAR PLASTIC LIMITED	**Appellant**
- and -	
MR M LIEPA	**Respondent**

- -
- -

Barnaby Large (instructed by DC Commercial Solicitors) for the **Appellant**
Martin Liepa the **Respondent** in person

Hearing date: 5 July 2023

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JUDGMENT

SUMMARY

Practice and procedure – race discrimination claim presented out of time – just and equitable extension – section 123(1) Equality Act 2010

The claimant had initially lodged a claim under the **Equality Act 2010** without including an ACAS early conciliation ("EC") number. He subsequently obtained an EC certificate but, at an ET hearing on 12 May 2022, it was identified that this could not rectify the error made with his first ET claim and he undertook to lodge a new claim. The claimant's second ET claim, which included ACAS EC numbers, was received and accepted by the ET on 1 June 2023. Although the second ET claim was out of time, the ET found that the claimant had had a genuine belief that his first ET claim was validly presented in time (although the basis for that belief was unclear) and held that it had not been proved that he had acted unreasonably. It was otherwise accepted that the respondent had suffered no prejudice as a result of the claimant's delay. The ET determined that it was just and equitable to extend time. The respondent appealed.

Held: allowing the appeal

The ET had been wrong to place the burden of proof on the respondent to disprove the claimant's understanding and/or that he had acted unreasonably when the question it was required to determine related to the claimant's asserted belief and his case that he had acted reasonably. This error alone was not, however, necessarily fatal to the ET's decision.

The ET had rejected the factual account relied on by the claimant for his understanding that he had not been required to go through ACAS EC before submitting his first ET claim, but had nevertheless found that his belief was genuine (albeit the basis for that belief was unclear). Other than stating the fact of the claimant's belief, however, the ET had not explained how it had assessed that factor in determining whether to exercise its discretion to extend time. Although it would have been open to the ET to conclude that it was just and equitable to extend time notwithstanding the absence of a good explanation for the delay (**Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640 [2018] ICR 1194 applied), its reasoning did not make clear that it had reached

that conclusion and its decision was thus rendered unsafe given the lack of adequate engagement with the reason for the claimant's default.

On the ET's findings of fact, the only permissible conclusion was that the claimant had not established (i) that his belief was reasonable; and (ii) that he had a good reason for his delay up to 12 May 2022. There was, however, more than one potential answer to the question whether it would, nevertheless, be just and equitable to extend time, and that issue was remitted to the ET, to be determined as part of the full merits hearing listed for December 2023. It would be a matter for the Regional Employment Judge as to whether that hearing should be before the same or a different ET.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal relates to the decision of the Employment Tribunal ("ET") to extend time, by some four months, for the bringing of a claim under the **Equality Act 2010** ("EqA"), on the basis that it was thought just and equitable to do so; see section 123(1) **EqA**.

2. I refer to the parties as the claimant and respondent, as below. This is the full hearing of the respondent's appeal against the judgment of the Southampton ET (Employment Judge Gray, sitting alone, on 25 August 2022), by which it was held that the claimant's ET claim, in which he complained of unlawful race discrimination, had been validly presented on 1 June 2022, and that it was just and equitable to extend time in respect of that claim.

3. Representation before the ET was as it has been on this appeal. The hearing before me has taken place in hybrid form, with the claimant attending remotely pursuant to his application not to be required to attend in person (see my earlier order, seal dated 22 June 2023).

The Procedural History and the ET's Findings of Fact

4. By a claim presented on 9 November 2021 ("the first ET claim"), the claimant made complaints of unlawful race discrimination and victimisation relating to events of September and October 2021, culminating in his dismissal on 15 October 2021. The first ET claim did not, however, include an ACAS early conciliation ("EC") certificate number, the claimant ticking the box at section 2.3 of the ET1 form to state that his employer had already been in touch with ACAS. That was disputed by the respondent in its ET3 response to the first ET claim.

5. Having been provided with the opportunity to respond on this point, by email of 7 March 2022, the claimant stated:

> "I am sorry but I had thought Polystar Plastics had communicated with ACAS. I have spoken to ACAS this morning and they have given me this reference number as I did speak to ACAS and it was agreed to go to the Tribunal only."

6. The ET recorded its understanding that the ACAS certificate obtained at this time was dated "*7 March 2022 to 9 March 2022*". The respondent having requested disclosure of the ACAS certificate, this was directed by the ET to be provided by 3 May 2022. An ACAS EC certificate was subsequently provided which the ET stated "*is understood to be the one dated 25 April 2022 to 27 April 2022*". The claimant's first ET claim was then accepted on 29 April 2022, on the basis that the original defect had then been corrected.

7. On 12 May 2022, a case management preliminary hearing took place before the ET, with orders made at that hearing being sent out to the parties on 16 May 2022. In the case management summary at the start of those orders, the ET recorded as follows:

> "In the light of the decision in **J. Pryce v Baxterstorey Limited** [2022] EAT 61, published this week, there is an issue about the rectification of the ACAS certificate number in this case. The Claimant has promised to issue a fresh claim form today."

8. The case management order then referred to the first ET claim and any new claim being consolidated. It was further directed that the claimant submit a schedule of loss and witness statement, together with all documents relied on relating to his contacts with ACAS, explaining why it would be just and equitable to extend time for the presentation of his claim/s. On 12 May 2022, pursuant to those directions, the claimant emailed the relevant documentation to the ET, including a new claim form ("the second ET claim").

9. On 25 May 2022, the ET emailed out to the parties as follows:

> "The order [sent out on 16 May 2022] recorded that the Claimant had promised to issue a fresh claim form. It is understood, by that, that the Claimant had agreed to present a fresh claim form. Although, by his email dated 12 May 2022, the Claimant has sent a new claim form to the tribunal, that is not the same as presenting it. The process for validly presenting a claim form [is] set out in the practice direction … Sending the claim form in the way that the Claimant has done does not issue or present a claim form."

10. On the same day, the claimant responded by email in the following terms:

> "I am really confused with this, as this was what [the ET] requested me to do, this was so the employment tribunal could merge both ET1 together. Also present in this email was all the other documents that [the ET] required me to send."

11. In any event, the claimant printed off the papers and posted them the next day, and a copy of the ET1 constituting the second ET claim (relying on both ACAS certificates referenced at paragraph 6 above) was received by post on 1 June 2022, which is when it was formally accepted That claim again made complaints of race discrimination and victimisation, pre-dating and surrounding the claimant's dismissal in October 2021. The respondent subsequently filed a further ET3 in response to the second ET claim.

12. At the hearing on 25 August 2022, the ET received evidence from the claimant and from Mr Toby (who heard the claimant's dismissal appeal), recording as follows:

> "32. The Claimant states in his witness statement that he had a phone call from Mr Toby … to discuss why he changed the reasons why the Claimant was dismissed. The Claimant says Mr Toby explained that Polystar had spoken to ACAS and would not be interested in early conciliation and that the Claimant needed to take them straight to the employment tribunal.
> 33. In his oral evidence the Claimant confirmed that this call would have been around the 8 or 9 November 2021 just before he submitted the first claim, the appeal outcome having been emailed to him on the 8 November 2021 ….
> 34. Mr Toby denies such a call took place. He has produced phone records of his outgoing calls for this period and the Claimant accepted that those records do not show a call to the Claimant from that phone number at that time. Of note is the records do not show incoming calls to that number, and no records have been produced for the land line number detailed in Mr Toby's email footer …. However, Mr Toby confirmed in his oral evidence that he was working from home on the 8th and in the AM on the 9th November 2021 before then going on holiday. He did not recall there being any call with the Claimant at that time."

And concluding:

> "35. The Claimant has not been able to prove at this hearing on the balance of probability that such a call took place."

13. Notwithstanding that finding, the ET went on to hold that:

> "36. … the Claimant's belief that the Respondent contacted ACAS as formed at that time does appear to be genuine. His understanding (albeit it is unclear how it was formed) has not been disproved on the balance of probability."

14. In reaching that conclusion, the ET referred back to the claimant's completion of the ET1 form in the first ET claim, when he had stated that the respondent had been in contact with ACAS; it found that was also consistent with what he had said to the ET in his email of 7 March 2022.

15. The ET further accepted that:

> "38. Up to the hearing … on the 12 May 2022 the Claimant had reasonable cause to believe his first claim had been accepted."

16. The ET then considered the claimant's behaviour subsequent to the ET hearing of 12 May 2022, finding he had acted promptly and reasonably in seeking to lodge the second ET claim. No issue is taken with the ET's conclusion in respect of the claimant's actions after 12 May 2022.

The ET's Conclusions and Reasoning

17. As the ET recorded (ET, paragraph 47), it was not in dispute that the first ET claim had not been validly presented, the claimant having accepted that he could not prove that the respondent had been in touch with ACAS when he submitted that claim (see **Pryce v Baxterstorey Ltd** [2022] EAT 61). It was equally common ground that the second ET claim (which included an ACAS EC certificate number) had been validly presented on 1 June 2022, when it was received by post, but had been lodged nearly four months out of time, given that it concerned events occurring in September/October 2021.

18. The ET noted that it was required to determine whether to exercise its discretion to extend time for the presentation of the second ET claim on the basis that it was just and equitable to do so (section 123(1)(b) **EqA**). In exercising that discretion, the ET had regard to the following factors:

(a) **The length of, and reasons for, the delay**: the ET had identified that it was relevant for it to consider "*the Claimant's explanation for why he did what he did when he did it*" (ET paragraph 31). In this regard, it found that the first ET claim had not been delayed and the claimant had only been made aware of the potential invalidity of that claim at the hearing on 12 May 2022, after which he had acted as he had understood he was required to do; the length of the delay was around four months but the reason for that was due to the course of the first ET claim through the ET process and the claimant's lack of understanding as to what he was required to do after the hearing on 12 May 2022. In these circumstances, the ET concluded:

> "I do not find that it has been proven on the balance of probability that the

Claimant has acted unreasonably in this matter." (ET paragraph 54 a.)

(b) **The extent to which the cogency of the evidence was likely to be affected by the delay**: the ET recorded that no evidence or submissions had been presented to it to suggest this was an issue for either side.

(c) **The extent to which the party sued had co-operated with any requests for information**: the ET recorded this was not a relevant consideration in this case.

(d) **The promptness with which the claimant had acted once he had known of the facts giving rise to the cause of action**: the ET accepted that the claimant had acted promptly, both in issuing the first ET claim and then in acting to correct matters following the ET's direction.

(e) **The steps taken by the claimant to obtain advice**: the ET accepted that the claimant had acted reasonably in not seeking advice as he thought that he knew what he was doing and that his first ET claim had been presented in time.

(f) **Prejudice to the parties**: if the extension was refused, the ET recorded that the claimant would lose his right of claim; if granted, the respondent would (if it chose) be required to respond to that claim. No other prejudice was asserted and the respondent had been able to present its response to the claimant's complaints since the first ET claim had been submitted; the potential prejudice to the claimant was greater than that faced by the respondent.

(g) **The merits**: the ET accepted that the claimant's claim had asserted a complaint of race discrimination and potentially victimisation; nothing had been presented to it that would demonstrate (at that stage) that the claims had no merit.

19. In the circumstances, the ET concluded that it was just and equitable that time should be extended for the second ET claim.

The Grounds of Appeal and Submissions in Support

20. The respondent's appeal was permitted to proceed on three grounds:

(1) The ET had erred in concluding that, when he presented the first ET claim, the claimant

had a reasonable belief that the respondent had contacted ACAS and, therefore, that he was not unreasonable in his delay prior to 12 May 2022; alternatively it had failed to provide adequate reasons for that conclusion.

(2) The ET had further erred in placing a burden of proof on the respondent to disprove the claimant's asserted belief.

(3) Given it had found that the respondent had not been in contact with ACAS, and there was no apparent basis for the claimant's belief to the contrary, the ET's decision was perverse.

21. In addressing the first ground of appeal, the respondent observes that, although the ET had correctly identified a key issue to be: "*the Claimant's explanation for why he did what he did*" (ET, paragraph 31, and see **Afolabi v LB Southwark** UKEAT/1024/00), the reasonableness of that explanation in respect of the delay prior to 12 May 2022 remained at large. It had been the claimant's case that he had been told of the respondent's contact with ACAS in a telephone call with Mr Toby; the ET concluded, however, that he had been unable to prove that such a call had taken place (ET, paragraph 35), ultimately finding (as the claimant had accepted) he could not prove that the respondent had in fact been in touch with ACAS (ET, paragraph 47). Although the ET had accepted that the claimant's belief was genuine, it effectively focused solely on the fact of the belief, making no finding as to whether it had been reasonably held, which amounted to an error of law and/or a failure to provide adequate reasons (see **Leeds & Yorkshire Housing Association Ltd v Fothergill** UKEAT/0211/20, per Ellenbogen J at paragraphs 31 and 34). Even if the language of the statute meant that the ET could extend time absent the claimant establishing a reasonable belief leading to his default, it still had to demonstrate that it had adequately addressed this issue (see **Malaba v Secretary of State for the Home Department** [2006] EWCA Civ 820 at paragraph 29). The ET's failure to engage with the question of the reasonableness of the claimant's belief meant it was unable to properly weigh this factor in the balance when determining whether it was just and equitable to extend time.

22. As for the second ground, the respondent points out that it is trite law that the onus must

always be on the person who asserts a proposition or fact which is not self-evident (see **Robins v National Trust Company** [1927] AC 515). In this case, having found that the claimant had not established the cause of his belief that the respondent had contacted ACAS, the ET nevertheless concluded that the genuineness of that belief was not "*disproved on the balance of probability*", albeit that it was unclear how the belief had been formed (ET, paragraph 36). Acknowledging that, taken alone, this point might be insufficient to lead to the ET's decision being set aside, the respondent contends that – to the extent that the ET was intending to state that it had found the claimant's belief was reasonable – it would be wrong for such a finding (itself unreasoned) to subsist where its apparent justification arose from an erroneous reversal of the burden of proof.

23. Turning to the third ground of appeal, the respondent contends that the ET's decision was perverse. It was founded upon a conclusion of reasonableness which related to the course of the first ET claim through the ET process, when that was a statement of effect rather than root cause, and the ET had failed to demonstrate that it had adequately and conscientiously addressed the issue of fact it was required to determine. Whilst a high hurdle (see **Yeboah v Crofton** [2002] IRLR 634 CA per Mummery LJ at paragraph 93), no reasonable ET, on a proper appreciation of the evidence and the law, could have reached the conclusion that the claimant had not acted unreasonably.

24. On the question of disposal, the respondent contends that it was axiomatic that there was nothing on which to found a conclusion that the delay was reasonable and there was thus no 'good' reason for the delay; this was a finding which *without the error* was the result that must follow (**Jafri v Lincoln College** [2014] ICR 920). The EAT was invited to uphold the appeal and to substitute findings that: (i) the claimant had not established that his belief was reasonable; (ii) he had not established a good reason for delay; and (iii) it was not just and equitable to extend time. In oral submissions, Mr Large clarified that, to the extent that the EAT considered that (iii) did not necessarily follow from (i) and (ii), the appropriate course would be to remit this matter to the ET, when it might appropriately be determined as part of the full merits hearing listed for December 2023.

The Claimant's Position

25. The claimant makes the point that he acts in person, has no knowledge of the law, and struggles with reading and writing; he is thus put at a disadvantage in seeking to respond to the appeal. The claimant also observes that the process in the ET was confusing for him but as soon as he was asked to re-submit his ET1 form with his ACAS reference numbers, he did so within 24 hours. When he was then told (around three weeks later) that the ET1 could not be submitted by email, he re-sent this by post within 24 hours and it was received by the ET shortly afterwards.

26. The claimant maintains his account that he had been telephoned by Mr Toby, who had informed him that the respondent had been in contact with ACAS. In any event, he considered that it would be wrong for him not to be able to pursue his claim merely because he had failed to put a reference number on a form or because a letter reached the ET 24 hours late: such minor technicalities should not determine what was right or wrong.

The Law

27. By section 123(1) **Equality Act 2010** ("**EqA**") it is provided that proceedings:

> "… may not be brought after the end of- (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable."

28. The burden of persuading the ET to exercise its discretion to extend time will be on the claimant (see **Chief Constable of Lincolnshire Police v Caston** [2009] EWCA Civ 1298); that burden has, however, been described as one of persuasion, rather than a burden of proof or evidence as such (**Abetawe Bro Morgannwg University Local Health Board v Morgan** UKEAT/0320/15, per HHJ Shanks at paragraph 9). That said, as the respondent observes, the onus must always be on the person who asserts a proposition or fact which is not self-evident (see **Robins v National Trust Company** [1927] AC 515).

29. As for the factors that will be relevant in determining whether to extend time, in **British Coal Corporation v Keeble and ors** [1997] IRLR 336 EAT, it was suggested that ETs would be assisted

by considering the matters listed in section 33(3) of the **Limitation Act 1980**, a section that deals with the exercise of discretion in civil courts in personal injury cases, and which requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: (a) the length of, and reasons for, the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued has cooperated with requests for information; (d) the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate advice once they knew of the possibility of taking action.

30. Subsequently, in **Southwark London Borough Council v Afolabi** [2003] ICR 800, the Court of Appeal confirmed that, while the checklist in section 33 of the **Limitation Act 1980** provides a useful guide for the ET, it need not be slavishly adhered to. Similarly, in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640 [2018] ICR 1194, the Court of Appeal (dismissing an appeal from the decision of HHJ Shanks referred to above) observed that it was plain from the language used that Parliament had chosen to give ETs the widest possible discretion: unlike section 33 of the **Limitation Act 1980**, section 123(1) **EqA** did not specify any list of factors to which the ET was instructed to have regard and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contained such a list; the only requirement was that the ET should not leave any significant factor out of account, identifying that:

> "19. … factors which are almost always relevant to consider when exercising any discretion whether to extend time are (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

31. The Court of Appeal further noted that the width of the discretion afforded to the ET meant that there was very limited scope for challenging the exercise of that discretion on appeal:

> "20. … It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor

> which is plainly irrelevant – or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable …"

32. Considering the employer's argument in that case, to the effect that the ET could not properly conclude that it was just and equitable to extend time in the absence of an explanation from the claimant (supported by evidence) as to why she had not brought her claim in time, the Court of Appeal (Leggatt LJ giving the lead judgment, with which Bean LJ agreed) continued:

> "25. I cannot accept that argument. As discussed above, the discretion given by s 123(1) of the Equality Act to the employment tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard. Nor do I consider that the original decision of the EAT went any further than that. The error identified by Langstaff J, as I read his judgment, was that the tribunal had failed to give any consideration at all to the reason for the delay in bringing the claim and had therefore failed to have regard to a relevant factor. I agree, however, with HHJ Shanks in his judgment given on the second EAT appeal that Langstaff J was not 'intending to suggest that if a claimant gives no direct evidence about why she did not bring her claims sooner a tribunal is *obliged* to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended.'
>
> 29. It is plain that in its second judgment the employment tribunal did give consideration to the reasons why the claimant had not commenced proceedings until March 2012. The identification of those reasons and the weight to be given to them were matters for the tribunal. There was no requirement that it had to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the claimant's favour."

33. In **Concentrix CVG Intelligent Contact Ltd v Obi** [2022] EAT 149, [2023] IRLR 35, although noting that there were conflicting decisions at EAT level, HHJ Auerbach adopted the approach laid down in **Morgan**, observing:

> "49. I do not need to analyse case by case the various authorities of the EAT on the question of whether, if the tribunal cannot discern any reason at all from any of the evidence as to why a claim has been presented late, it is or is not thereupon bound to conclude that time cannot be extended. …

> 50. Without any assistance or guidance from the Court of Appeal, I would unhesitatingly hold that such a conclusion does not as a matter of law mean that a just and equitable extension must be refused in every case, and that it would necessarily always be an error to extend time. In fact, I consider that that view is supported by the most recent decisions of the Court of Appeal."

34. In **Concentrix** the employer argued that the Court of Appeal in **Morgan** was concerned with a case in which there was no evidence from the claimant herself as to why she had failed to bring her claim in time; any wider observations - as to whether time might be extended where no reason was apparent at all from the evidence – were thus said to be *obiter*. Considering that argument, HHJ Auerbach held:

> "61. Even if these remarks were strictly *obiter*, I consider that what was said in **Morgan** … supports the principle that appears to me to be the right one to apply. I also do not think that what is said at [19] indicates otherwise. The statement that it is almost always relevant to consider the length of, and reasons for, the delay, is unsurprising; and, indeed, I am not sure that anyone has yet been able to come up with an example of a case in which it would be immediately obvious that this was wholly irrelevant, and did not need to be considered as a potential issue at all. As I have noted, [counsel for the parties] … in fact both agreed that failure to consider this question at all would be an error. But that is not the same as saying, and nor does this passage in **Morgan** say, that if, upon consideration, no reason is apparent at all from the evidence, then necessarily in every case the extension must, as a matter of law, be refused.

35. HHJ Auerbach also considered this approach to be supported by the reasoning of Underhill LJ in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23.

36. In **Adedeji**, the Court of Appeal again warned against rigid adherence to the list of factors set out at section 33 **Limitation Act 1980**, emphasising the very broad general discretion afforded by section 123(1) **EqA**:

> "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 … 'the length of, and the 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."

37. As for the explanation that an ET is required to provide for the conclusion it reaches, by rule 62(5) schedule 1 **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**

it is provided that the ET's reasons should:

> "…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..."

38. As the case-law makes clear, however, ET decisions must be read fairly and as a whole, without being "*so fussy that it produces pernickety critiques*" or engaging in "*Over-analysis" or* "*being hypercritical*", "*focussing too much on a particular passage or turns of phrase*" (**Brent v Fuller** [2011] EWCA Civ 267). Moreover, "*what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind*" (**DPP Law Ltd v Greenberg** [2021] EWCA Civ 672).

39. ET decisions "*are not intended to include a comprehensive and detailed analysis of the case*" but simply "*to tell… in broad terms why they lose or… win*", save that there should also be sufficient account of the facts and reasoning to enable an appellate court to assess whether a question of law arises (**Meek v City of Birmingham District Council** [1987] IRLR 250); as the Court of Appeal expressed the point in the asylum appeal in **Malaba v Secretary of State for the Home Department** [2006] All ER (D) 225:

> "… an appellate tribunal expects findings to be adequately reasoned. By its reasoning, the fact-finding tribunal not only tells the losing party why he has lost but may also be able to demonstrate that it has adequately and conscientiously addressed the issue of fact which has arisen." (per Pill LJ at paragraph 29)

Analysis and Conclusions

40. The focus of this appeal is on the ET's decision in relation to the period of time between the events in issue (September/October 2021) and the ET hearing of 12 May 2022; the respondent takes no issue with the ET's finding that the claimant acted reasonably after the difficulty with the first ET claim was identified at the 12 May 2022 hearing. It is also accepted that the ET correctly identified that it was relevant to consider (a) the length of, and reasons for, the delay and (b) the question of prejudice arising from that delay. More particularly, the respondent acknowledges that it cannot point

to any forensic prejudice arising from the claimant's default in this case; the only issue is whether the ET correctly approached the assessment said to have been required of it in considering the reason for that default.

41. It is the respondent's case that, having determined that the claimant had a genuine belief that he was not required to enter ACAS EC, albeit he could not establish the facts he relied on to explain why he held that view, the ET then needed to determine the reasonableness of his belief; it was insufficient for it to solely focus on the fact of the belief. To the extent that the ET had found that his belief was not unreasonable (as might be inferred from its reasoning at paragraph 54 a.), it had failed to provide any explanation for that finding, save that his understanding had "*not been disproved on the balance of probability*" (ET, paragraph 36).

42. In discussion during the course of oral argument, Mr Large accepted (*per* the Court of Appeal in **Morgan**) that finding there was no acceptable reason for the delay did not mean that an ET was required to refuse to extend time under section 123(1) **EqA**; as he acknowledged, there might be cases where (for example) the ET has found that no good reason has been demonstrated for the claimant's default but the lack of prejudice meant that it would be just and equitable to extend time in any event. Mr Large emphasised, however, that - as had also been made clear in **Morgan** - the reason for the delay was a relevant factor that the ET would invariably be required to take into account (and had been recognised to be a relevant factor in this case), and it was his submission that the ET's reasons needed to show that it had engaged with this question so as to demonstrate that it had properly weighed this factor in the balance in carrying out the assessment it was required to undertake. Allowing that it might then have been open to the ET to determine that the absence of prejudice was sufficient reason to extend time on just and equitable grounds, Mr Large contended that the ET's decision was rendered unsafe by reason of its failure to demonstrate engagement with this question, alternatively by its reversal of the burden of proof.

43. Considering the first period of delay (up to 12 May 2022), the ET found this was due to "*the course of the first claim form through the Tribunal process*" (ET paragraph 54 a.). That conclusion

was, however, premised on the prior finding that the claimant had genuinely believed that his first ET claim had been validly presented in time. He was unable to prove the facts he relied on to explain why he had held that belief but the ET – having heard the claimant's evidence on this point, duly tested in cross-examination – permissibly found that he had, indeed, genuinely believed that the respondent had already contacted ACAS and saw no point engaging with EC. What the ET did not then go on to determine was whether it could be said that that belief was reasonably held by the claimant. The issue for me is whether that matters.

44. To the extent that the ET's reasoning demonstrates any attempt to weigh the reasonableness of the claimant's belief prior to 12 May 2022, it is unhelpfully couched in terms of what the respondent was not able to disprove ("*His understanding … has not been disproved …"* ET, paragraph 36; "*I do not find that it has been proven on the balance of probability that the Claimant has acted unreasonably …"* ET, paragraph 54 a.). As it was the claimant's case that he held a reasonable belief that the respondent had already contacted ACAS, it was for him to establish that matter; although there is no formal burden of proof in assessing questions of justice and equity under section 123(1) **EqA** (*per* HHJ Shanks in **Morgan**, *supra*), it is for a party asserting a positive case to establish the matter in issue (**Robins**); it was an error for the ET to suggest that the respondent bore a burden of proof (to the civil standard) to disprove the claimant's case in this regard.

45. It may be that the ET was not intending to go quite so far in its reasoning: by finding that it had not been proved that the claimant had acted unreasonably, the ET might not have meant to suggest that it had actually found that he had acted reasonably. As Mr Large accepted, on a liberal reading of the judgment, the ET's unhelpful references to the burden of proof in this regard need not be fatal to its decision. That, nevertheless, still leaves the question whether the ET's conclusion is rendered unsafe by its apparent failure to reach a finding as to the reasonableness of the claimant's belief.

46. Whether there might be cases where the reason for the delay is simply irrelevant to the ET's exercise of its discretion under section 123(1) **EqA** (in **Morgan**, the Court of Appeal considered this was a factor that would "*almost always*" be relevant), in this instance the ET plainly did recognise

that this was something it needed to take into account (see ET, paragraphs 31 and 54 a.). Moreover, to some extent it did then go on to make a finding as to the reason for the relevant period of delay: the claimant held a genuine belief, "*albeit it is unclear as to how it was formed*", that this was a case in which one of the exceptions to the requirement to undertake ACAS EC applied (ET, paragraph 36). However, having found that the claimant had been unable to demonstrate the facts he relied on as giving rise to his belief (ET, paragraph 35), the ET did not then go on to explain how it had then assessed the claimant's genuine, but mistaken, understanding. Although the ET might have seen any issue in this regard as outweighed by other considerations (as Mr Large has acknowledged, it might permissibly have taken the view that its conclusion on the question of comparative prejudice ultimately answered the question whether it was just and equitable to extend time), its reasoning does not make this clear.

47. I therefore agree with Mr Large that the ET's reasoning does not explain how it assessed the reason for the relevant period of delay in this case. I further agree that this gives rise to an error of law, as the failure to properly engage with the "*reason*" question meant that the ET could not demonstrate how it had weighed this factor in the balance when exercising its discretion to decide whether it was just and equitable to extend time. It also seems to me that Mr Large is correct in his submission that, on the ET's findings of fact, the only proper conclusion must be that the claimant had not established that his belief was reasonable and, therefore, that he had a good reason for his delay – to the extent that the ET held otherwise, that aspect of its decision is properly to be characterised as perverse.

48. I am not, however, persuaded that it must then follow that it was not just and equitable to extend time. Accepting that the claimant was not able to establish a good reason for his delay up to 12 May 2022, I consider that (as Mr Large agreed in oral argument) it might, nonetheless, have been open to the ET to conclude that time should be extended under section 123(1) **EqA**. The discretion afforded to the ET under section 123(1) is very broad, and I do not consider there is proper basis for limiting the exercise of discretion thus afforded by Parliament only to those cases where a claimant

can establish a good reason for their delay.

Disposal

49. For the reasons I have provided, I therefore allow the respondent's appeal and set aside the ET's judgment. Furthermore, to the extent that the ET found otherwise, I substitute findings that the claimant had not established (i) that his belief was reasonable; and (ii) that he had a good reason for his delay up to 12 May 2022. As, however, there is more than one potential answer to the question whether it would, nevertheless, be just and equitable to extend time, that issue must be remitted to the ET. As Mr Large has suggested, rather than import further delay into this matter, it is appropriate for that matter to be determined as part of the full merits hearing that I am told has already been listed for December 2023. Having regard to the guidance provided in **Sinclair Roche & Temperley v Heard and Fellows** [2004] IRLR 763, EAT, I do not consider that this is a case where it can be said that the ET's reasoning was fundamentally flawed or that there is any risk that remission to the same ET would be seen as affording it a second bite of the cherry. On the other hand, there is no particular reason (for example, in terms of saving of costs) why this issue should be determined by the same ET. In the circumstances, I make no direction as to whether this matter should be remitted to the same or a different ET; that will be for the learned Regional Employment Judge to decide, bearing in mind that the question whether time should be extended on just and equitable grounds will now fall to be determined at the full merits hearing in this case.