EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 May 2021
Judgment handed down on
9 July 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR D SHAW APPELLANT

INTELLECTUAL PROPERTY OFFICE RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	In Person
For the Respondent	MS A JOHNS (Of Counsel) Instructed by: Capital Law LLP Capital Building Tyndall Street Cardiff CF10 4AZ

SUMMARY

PRACTICE AND PROCEDURE

Reserved judgments and reasons; procedure on reconsideration applications

Following a full merits hearing the Employment Tribunal reserved its decision. In due course it promulgated its reserved judgment dismissing all of the claimant's claims. On a later date it promulgated its reasons for that judgment. The claimant's contention that it was an error of law not to promulgate the reasons at the same time as the judgment failed. While the practice was not to be encouraged, and carried certain dangers, it was not contrary to the rules to promulgate the reasons on a later date.

The claimant also applied for a reconsideration of the Tribunal's decision. The judge concluded that there was no prospect of the original decision being varied or revoked and refused the application on paper. Although the judge's reasons were very brief, they were sufficient.

Prior to reaching that decision, the judge directed that the respondent's comments on the reconsideration application be sought. It is not, generally, appropriate for the Tribunal to do that, when considering an application for reconsideration at the preliminary stage under rule 72(1). There may be particular circumstances in a given case, where it is appropriate to seek some specific information or input from the other party at the preliminary stage. But any such request, in such a case, should be tailored to those particular circumstances. In this case, the judge ought not to have made a generalised request for the respondent's comments. However, a separate ground of appeal, challenging the refusal of the reconsideration application on its merits, had been dismissed at a rule 3(10) hearing; and the refusal could not now be reopened.

HIS HONOUR JUDGE AUERBACH

Introduction – the Litigation in the Employment Tribunal and the Appeals

1. I shall refer to the parties as they were in the Employment Tribunal ("the Tribunal"), as claimant and respondent. The claimant joined the respondent on 1 September 2014 as an Associate Patent Examiner. On 18 November 2016 he resigned. Thereafter he presented a claim to the Tribunal containing multiple complaints.

2. Complaints of unfair dismissal, unlawful deduction from wages and disability discrimination in due course came to a full merits hearing. The disability discrimination complaints were of direct discrimination, discrimination arising from disability, victimisation and failure to comply with the duty of reasonable adjustment.

3. That hearing took place over eight days in April and May 2019 before EJ Gumbiti-Zimuto, Mrs V H Parsons and Mr J Appleton. The claimant was in person. The respondent was represented by counsel. At the end of the hearing the Tribunal reserved its decision. The Tribunal had made a temporary restricted reporting order protecting the identity of the claimant. The claimant also applied for a permanent anonymity order to be made, under rule 50 of the **Employment Tribunals Rules of Procedure 2013** ("**the 2013 Rules"**), anonymising him in the Tribunal's decision. The Tribunal reserved its decision on that application as well. It indicated that it envisaged publishing its decision on the rule 50 application ahead of its substantive decision. It envisaged that that would allow an opportunity for any appeal in that respect to be instituted before the substantive decision was published.

4. On 27 August 2019 the Tribunal promulgated a judgment and reasons refusing the claimant's application for an anonymity order under rule 50.

5. Also on 27 August 2019 Tribunal promulgated a judgment which read:

> **"The claimant's complaints are not well founded and are dismissed."**

I will call that the liability judgment.

6. On 2 September 2019 the claimant wrote to the Tribunal raising the fact that the liability judgment had been promulgated without reasons, and asserting that this was in breach of rule 62 of the **2013 Rules** and amounted to a procedural defect. Having received no reply, he followed up on 16 September, asking for immediate action, failing which, he wrote, he would be forced to issue an appeal.

7. On 30 September 2019 the claimant instituted his first appeal. That was against the liability judgment and against the decision on the rule 50 application.

8. On 9 October 2019 the Tribunal promulgated written reasons for the liability judgment, running to 33 pages.

9. On 21 October 2019 the claimant applied for a reconsideration of the Tribunal's decision dismissing his complaints.

10. On 10 November 2019 the claimant sent the EAT a further document containing further grounds of appeal challenging a number of aspects of the written reasons for the liability judgment that had been sent to the parties on 9 October 2019.

11. On 20 November 2019 the Employment Tribunal wrote to the parties at the direction of the Employment Judge. As to the overall delays, from conclusion of the evidence, to promulgation of the judgment, and then of the reasons, there were, said the letter, three reasons:

> **"(i) The Tribunal needed more time to reach a decision on all issues and accordingly the 13 and 14 May 2019 were also required. Finalising the draft judgment then required additional input and consideration by all the members of the Tribunal. In addition it was of course necessary to determine the rule 50 application and, as agreed with the parties at the final hearing, to ensure that the reasons in relation to that application were sent to the parties in advance of the reasons for the judgment in order that if the rule 50 decision was subject to appeal no further rule 50 issues arose in the interim.**
>
> **(ii) After a draft of the judgment was completed by the employment judge the Tribunal continued discussion (by email) on the draft and agreed a final version of the reasons for the Rule 50 issue on the 30 July 2019.**
>
> **(iii) There was some further correspondence between the Tribunal regarding the detailed drafting of the reasons for the judgment and this led to the final draft not being agreed by the Tribunal until about 23 September 2019."**

12. On 7 January 2020 the Tribunal promulgated a decision of the Employment Judge refusing the reconsideration application. This was headed "Judgment". It read as follows.

> **"The application for a reconsideration is refused because I consider that there is no reasonable prospect of the original decision being varied or revoked. Where the claimant does not agree with the Tribunal's conclusions on aspects of the facts of the law this is a matter for an appeal not a reconsideration."**

13. On 3 February 2020 the claimant instituted his second appeal to the EAT. This was against the decision refusing his application for a reconsideration, as promulgated on 7 January 2020. The EAT wrote to the claimant that that appeal was not properly instituted, because the claimant had not supplied a copy of the Tribunal's reasons. The claimant replied to the EAT disagreeing with that view. But, in view of this correspondence from the EAT, he also wrote to the Tribunal, as he put it "on behalf of" the EAT, asking for written reasons, whilst setting out that his position was that the reasons were "those stipulated with the Judgment". He also invited the judge to confirm "that these are the sum extent of his reasons."

14. While he was awaiting a reply to that communication, on 17 February 2020 the claimant tabled an amended version of the second notice of appeal.

15. On 25 February 2020 the Tribunal promulgated a further document relating to the refusal of a reconsideration. This was headed "Reasons" and, under that: "For Judgment Sent to the Parties on the 7 January 2020." Below that, were four numbered paragraphs, the first two of which read:

> **"1 There is no reasonable prospect of success because the claimant is seeking to secure a change in the decision of the Tribunal by further argument.**
>
> **2 Where a party does not agree with the Tribunal's conclusions on aspects of the facts or the law this is a matter for appeal not reconsideration."**

16. Paragraph 3 cited **Trimble v Supertravel Limited** [1982] ICR 440 for the proposition that where a matter has been ventilated and argued during the course of Tribunal proceedings, any error of law falls to be corrected on appeal, not reconsideration. Paragraph 4 cited **Newcastle-upon-Tyne City Council v Marsden** [2010] ICR 743, for the proposition that dealing with a case justly included recognition of the importance of finality in litigation, the expectations of both parties, and the principle that a successful party should be entitled to regard a Tribunal's decision as final, unless there are exceptional circumstances.

The Grounds of Appeal

17. In relation to the first appeal, the original and supplementary notices of appeal between them raised, in summary, the following challenges.

18. First, there was a challenge to the decision on the rule 50 application. That was considered on paper by Soole J not to be arguable. The substantive decision had by that time been published

on the internet and the claimant did not apply for a rule 3(10) hearing in that respect. Secondly, there was a ground of appeal, in the original notice of appeal, challenging the judgment sent on 27 August 2019 as defective because it was sent without reasons. This was considered on paper by Elisabeth Laing J (as she then was) to be arguable. Thirdly, there was the further notice of appeal document, advancing substantive challenges to the written reasons for the judgment dismissing the claims. That was considered by Elisabeth Laing J not to be arguable; it was subsequently dismissed at a rule 3(10) hearing before Ellenbogen J.

19. Elisabeth Laing J also considered on paper the second appeal, concerning the refusal of reconsideration. She discerned three grounds. The first was that the Tribunal should not have refused to reconsider aspects of the facts of the law, or to revisit inferences that it had drawn. She considered that this was not arguable. That ground was also dismissed by Ellenbogen J at the later rule 3(10) hearing. The second challenge to the reconsideration decision contended that the tribunal had, in its procedural approach to that application, contravened rule 72 of the **2013 Rules**. Elisabeth Laing J directed the claimant to provide the EAT with the relevant correspondence, so that this could be further considered. The third ground contended that the judgment refusing a reconsideration did not comply with rule 62 or the guidance in **Meek v City of Birmingham District Council** [1987] IRLR 250. She considered that to be arguable. The claimant then furnished the correspondence relating to the reconsideration process. The matter was then referred to me. Having reviewed that correspondence, I was of the view that the second ground was arguable.

20. Accordingly, the challenges which proceeded to this full appeal hearing were:

(1) The challenge to the judgment dismissing the substantive claims, promulgated on 27 August 2019, on the basis that it contained no, or insufficient, reasons, and it was not open to the Tribunal to provide its reasons at a later date.

(2) The rule 72 process challenge to the reconsideration decision.

(3) The adequacy-of-reasons challenge to the reconsideration decision.

The Rules of Procedure

21. The relevant rules within the **2013 Rules** (omitting irrelevant parts) are as follows:

> **"Interpretation**
>
> **(3) An order or other decision of the Tribunal is either—**
>
> **(a) a "case management order", being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment; or**
>
> **(b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—**
>
> **(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); .**
>
> **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue).**
>
> **(iii) the imposition of a financial penalty under section 12A of the Employment Tribunals Act.**
>
> **Overriding objective**
>
> **2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—**
>
> **(a) ensuring that the parties are on an equal footing;**
>
> **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;**
>
> **(c) avoiding unnecessary formality and seeking flexibility in the proceedings;**
>
> **(d) avoiding delay, so far as compatible with proper consideration of the issues; and**
>
> **(e) saving expense.**
>
> **A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.**
>
> **Case management orders**
>
> **29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and**

in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

RULES COMMON TO ALL KINDS OF HEARING

General

41. The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.

DECISIONS AND REASONS

Decisions made without a hearing

60. Decisions made without a hearing shall be communicated in writing to the parties, identifying the Employment Judge who has made the decision.

Decisions made at or following a hearing

61.—(1) Where there is a hearing the Tribunal may either announce its decision in relation to any issue at the hearing or reserve it to be sent to the parties as soon as practicable in writing.

(2) If the decision is announced at the hearing, a written record (in the form of a judgment if appropriate) shall be provided to the parties (and, where the proceedings were referred to the Tribunal by a court, to that court) as soon as practicable. (Decisions concerned only with the conduct of a hearing need not be identified in the record of that hearing unless a party requests that a specific decision is so recorded.)

(3) The written record shall be signed by the Employment Judge.

Reasons

62.—(1) The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time or wasted costs).

(2) In the case of a decision given in writing the reasons shall also be given in writing. In the case of a decision announced at a hearing the reasons may be given orally at the hearing or reserved to be given in writing later (which may, but need not, be as part of the written record of the decision). Written reasons shall be signed by the Employment Judge.

(3) Where reasons have been given orally, the Employment Judge shall announce that written reasons will not be provided unless they are asked for by any party at the hearing itself or by a written request presented by any party within 14 days of the sending of the written record of the decision. The written record of the decision shall repeat that information. If no such request is received, the Tribunal shall provide written reasons only if requested to do so by the Employment Appeal Tribunal or a court.

(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short.

(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.

RECONSIDERATION OF JUDGMENTS

Principles

70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment

where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Application

71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Process

72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

Reconsideration by the Tribunal on its own initiative

73. Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused)."

Arguments, Discussion, Conclusions

22. At the appeal hearing I had the benefit of written skeletons and oral submissions from the claimant and Ms Johns. I will focus on what seem to me to have been the most material points. I shall take each of the three challenges raised by these appeals in turn.

The Appeal in Respect of the Liability Judgment

23. It is important to keep in mind that this appeal was initially instituted, specifically, against the judgment promulgated on 27 August 2019, prior to the Tribunal later furnishing written reasons for that judgment. The specific ground of appeal which I have to consider asserted, in

summary, that the judgment was "in contravention of rule 62" and that it did not comply with the guidance in **Meek**. The basis for this was that no reasons were promulgated with the judgment. It asserts that the judgment "is self-evidently deficient as it contains no reasons."

24. By the time that this ground of appeal came to be considered by Elisabeth Laing J, the subsequent written reasons had been provided, and the Tribunal had also written its letter of 20 November 2019. When directing that this ground proceed to a full appeal hearing she said:

> **"I do consider it arguable that the ET did not have the power to give a written judgment on 23 August 2019 without any reasons and then to provide reasons after those were asked for after the appeal was lodged. The ET's explanation for not providing those reasons sooner (letter of 20 November 2019) does not allay my concerns."**

25. The claimant's principal submissions on this ground were, in summary, as follows.

26. First, the Tribunal's letter of 20 November 2019 stated that, as foreshadowed at the full merits hearing, the rule 50 reasons were provided in advance, so that the claimant could consider an appeal. But the Tribunal had in fact issued both judgments at the same time. Further, the claimant did appeal the rule 50 decision, but, before that was considered on the sift, the Tribunal promulgated its reasons for dismissing the substantive claims without any form of anonymisation. He was therefore *not* protected pending the outcome of his rule 50 appeal.

27. Secondly, the judgment was issued on 27 August 2019 even though the reasons were not agreed until 23 September 2019. The Tribunal had therefore bound itself to the outcome in August irrespective of whether, on further review of the evidence thereafter when comprehensively drafting the reasons, the judgment might prove to be flawed. That was unfair to the claimant. He referred to **Eyitene v Wirral Metropolitan Borough Council** [2014] EWCA Civ 1243. The present case was, he said, a complex case, where the Tribunal had reserved its

decision, and, it would appear, not yet fully agreed its findings when the judgment was issued, as the correspondence among the members of the panel continued thereafter.

28. Thirdly, while rule 62(2) allows for the possibility of a judgment being announced *orally*, with written reasons given in in writing at a later date, it could *not* be inferred from this that a judgment could also be given in *writing* on one date, with written reasons given at a later date. Unlike an oral judgment, a written judgment is a "binding written record which is published for the attention of third parties."

29. Further, there must be a temporal cut off for the provision of *Meek*-compliant reasons for a judgment, and that cut-off date must be the date of promulgation of the judgment itself. Otherwise, an appeal could be met by a further provision of reasons thereafter (which would be wrong). Further, there was no mechanism in the **2013 Rules** to enable a party to request written reasons after a written judgment was promulgated without accompanying reasons. Written reasons could only be requested after the giving of a judgment and reasons orally. Further, if the approach that the Tribunal had taken in this case was permissible it would become near impossible to know when a judgment was finalised and could be the subject of the appeal, and hence to calculate the time limit for doing so.

30. For all of these reasons, the flexibility of procedure conferred upon the tribunal by rule 2 and rule 41 could not be invoked to sanction what the Tribunal had done in this case.

31. Accordingly, this was a judgment without reasons. It did not convey why the claimant had lost, and the later reasons could not be relied upon. The claimant referred to **Jones v Owen**

[2013] UKEAT/0091/13, 16 October 2013, and submitted that, as happened in that case, the matter must be remitted to the Employment Tribunal for a complete rehearing.

32. Ms Johns' principal submissions were as follows.

33. The Tribunal complied with rule 62(1) when it provided its written reasons. Rule 62(1) does not preclude a judgment and reasons being sent on separate dates. The Tribunal complied with rule 62(2) in as much as both the judgment and the reasons were given in writing. The rule does not require this to be done at the same time. The rule specifically contemplates that the giving of a decision and the giving of reasons for it may occur at different times. The judgment was not itself reasons, and did not have to comply with the rules relating to them. The reasons, when provided, complied with rule 62(5). They were full and comprehensive.

34. The letter sent at the direction of the Judge on 20 November 2019 properly explained the delay in providing the reasons. It also explained that the claimant's chasing emails had not been brought to the Judge's attention at the time they were sent. The rule 50 decision was deliberately promulgated first, with good intentions, even if that aspect of matters did not go entirely according to plan. **Eyitene** confirmed that the process of producing reserved decisions when the Tribunal sits as a panel of three is a flexible one. There is no automatic requirement that the members sign off on the final written reasons before they are promulgated. What matters is that they agree the decision and the substantive reasoning. There was no reason to suppose that that did not happen in this case, or that these matters were handled other than as agreed between the three members of the Tribunal.

35. The original challenge on appeal, to aspects of the substantive reasons for this decision, was found not to be arguable and dismissed at a rule 3(10) hearing. That decision could therefore in any event not now be revisited.

36. My conclusions in relation to this ground of appeal are as follows.

37. I start with the relevant provisions of the rules. The **2013 Rules** contemplate that decisions of an Employment Tribunal may take the form of either an order or a judgment – see rule 1(3)(b). The rules also distinguish between the decision itself and the reasons for that decision. In the case of a judgment, they therefore distinguish between the judgment itself and the reasons for the judgment. To put the matter another way, they distinguish between *what* the Tribunal has decided, and *why* it has reached that decision.

38. The structure of rules 60 to 62 reflects that distinction. That is signposted in the sub-heading of the group of rules of which they form a part – "Decisions and Reasons". It is then reflected in the fact that separate rules deal with the *mode* of giving of decisions – rule 60 for those made without a hearing and rule 61 for those made after a hearing; and with the giving of reasons – dealt with in rule 62.

39. The *timing* of the giving of a decision, and of the giving of reasons for that decision, are also dealt with in separate rules. Rule 61(1) provides that a *decision* may be announced at the hearing; or it may be reserved to be sent to the parties "as soon as practicable." Rule 62(2) concerns the provision of the *reasons* for a reserved decision. As Ms Johns correctly pointed out, and the claimant acknowledged, it makes no provision as to the timing of that. While it states that, in the case of a decision given in writing, the reasons "shall also be given in writing", it does

not state that this must be done at the same time. Had the author of the rules so intended, that could easily have been expressly stated by the addition of those few words.

40. Should such a requirement be implied? The claimant submits that not to do so would enable a Tribunal to supplement its written reasons on multiple occasions, including following an appeal. I do not agree. The rules do distinguish between oral reasons (if given) and the written reasons that may (if requested) also follow (and it is well-established that written reasons are not required to be a written verbatim transcription of the oral reasons). But they only envisage, or permit, the giving of *one* set of written reasons.

41. In so far as it was the claimant's case that the Tribunal had in fact revisited and added to its reasons, on this occasion, that is, with respect, not correct. The judgment document contained only the decision. It did not contain any reasons for that decision. The reasons sent to the parties on 9 October 2019 did not *supplement* reasons contained in the judgment sent on 27 August 2019. There were no reasons contained in the judgment. The reasons sent on 9 October 2019 were the entirety of the reasons *for* that earlier judgment.

42. In so far as this ground of appeal, as originally framed, complained that the judgment did not comply with rule 62 and was not *Meek*-compliant, that criticism is therefore misconceived. It is *reasons* which must comply with rule 62(5) and the guidance in *Meek*, not judgments. Before leaving this aspect, I note that the claimant criticised the judgment for referring to the claimant's complaints without listing them out. As to that, a judgment which was unclear or ambiguous as to which, among a number of complaints, it was dismissing, or indeed which upholding, would clearly be open to criticism and challenge. But this judgment plainly dismissed all of the

A complaints which were live and had been considered, under the given claim number, and at the full merits hearing, to which it clearly related.

B 43. The claimant submits that not to interpret the rules as requiring the reasons to be given at the same time as the judgment would give rise to uncertainty regarding time to appeal. But that is not the case. Rule 3(3)(a) of the **Employment Appeal Tribunal Rules 1993** stipulates that, in a case where written reasons have been reserved, the period for instituting an appeal is 42 days C from the date on which the written reasons were sent to the parties. It is only when the Tribunal has given oral reasons, and there has been no timely request for written reasons, that time to appeal runs from the date on which the written judgment was sent.

D 44. The claimant refers to the fact that rule 62 contains no mechanism for requesting written reasons, in a case where a reserved judgment has been sent, but the reasons for it have not been sent at the same time. But there is no need for such a provision. Provision is made for a party to E request written reasons, in a case where *oral* reasons are given, because there is no automatic obligation on the Tribunal to provide written reasons in such a case. But in any other case the rule itself requires the Tribunal to provide written reasons. They do not have to be requested.

F 45. I conclude that there is nothing in the mechanisms of either the **2013 Rul**es, or indeed of the EAT's Rules relating to time for appealing, which points to the conclusion that it must be G inferred of necessity that the reasons for a reserved judgment must be promulgated at the same time as the judgment itself. I turn to the other arguments.

H 46. The claimant submits that, were such a requirement not to be implied, a Tribunal could hold back its reasons until after an appeal and – it is implied in his submission – tailor them

A accordingly. But, as we have seen, in such a case, the unsuccessful party has time to appeal on their side until the reasons have been promulgated. Further, this concern strikes me as more apparent than real, not least because most, though not all, appeals are founded on a challenge to the substantive content of the Tribunal's written reasons, and therefore cannot be advanced until these are to hand in any event.

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47. The claimant submits that it cannot be right that a Tribunal can issue a decision before it has settled finally on its reasons for that decision, and that to do so could be productive of injustice, by the Tribunal prematurely tying its own hands. This argument does indeed point to potential dangers which may arise if a Tribunal gives its decision ahead of giving its reasons for that decision. But I do not think it points to the conclusion that it must necessarily be wrong to do so. Potentially, the same danger lurks if the Tribunal announces its decision at a hearing, but does not give oral reasons at the same time; but this is a way of doing things that the rule expressly permits.

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48. As the decision, and discussion, in **Eyitene** confirms, where the Tribunal sits in a panel of three, and produces a unanimous decision, what matters is that the conclusions and the essential supporting reasoning should have been agreed by the three members of the Tribunal. It is not necessary for the lay members to see, or have approved, the final wording of the written reasons. The judge has overall responsibility for that, and indeed it is very common that the lay members do not see, or wish to see, the final text before it is sent out. Similarly, where an oral decision and reasons are given at a hearing, the members and the judge will have agreed the substance beforehand, but not the precise words; and the judge will, while no doubt drawing on speaking notes, according to his or her own style, to a degree extemporise when giving the oral reasons, in terms of the precise words that are actually uttered.

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49. Further, the fact that the Tribunal, when it gives its decision, has not yet given its reasons, or completed the process of setting out those reasons in full detail in writing, does not mean that it has not in fact come to a properly-reasoned decision. All that matters is that, at that point, the judge and the members should have agreed the outcome, and agreed the substance of the essential reasoning supporting the decision. It is not necessary for them to have agreed the precise words in which those reasons will be expressed.

50. In this case the Tribunal's 20 November 2019 letter conveyed that, following the hearing, the Tribunal deliberated its decision on 13 and 14 May 2019 and continued discussion by email on a draft prior to 30 July 2019, when the rule 50 reasons were agreed. At that point it was the *detailed* drafting of the written reasons for the substantive decision which was not yet complete. The letter noted, correctly, that this detailed drafting was a task which fell to the judge; and it noted that the final draft was agreed on around 23 September 2019. There was no suggestion in that letter that the judge and members had not deliberated, agreed the outcome and agreed the reasons in substance, at the point when the judgment was sent out. I do not think there is any evidence of any procedural irregularity, such that this judgment cannot stand.

51. The claimant argues that the giving of an oral decision is not to be equated with the issuing of a written judgment, as the latter constitutes what he calls a "binding written record which is published for the attention of third parties." But the pronouncing of an oral judgment constitutes a definitive determination of the point in question, at the very moment that it is announced, just as the issuing of a written judgment does. In either case, from that moment, that Tribunal has no power to revisit the matter, except in so far as the rules relating to reconsiderations allow. Although the written judgment, once published on the internet, will be more easily accessible to

a wider audience, a judgment pronounced in open court will be heard by any member of the public present, and may be freely reported and referred to by anyone present or the parties themselves, from the moment that it is pronounced. In both cases, this is subject to the powers of the Tribunal to restrict publicity in a case where it is proper to do so.

52. The claimant makes the point that in this case the delayed promulgation did not result in his anonymity being safeguarded pending the result of any appeal. Assuming that both the judgment and the reasons were, when respectively promulgated, posted on the Tribunals website in unredacted form, he would appear to be right about that. But I do not think that is reason alone to doubt the Tribunal's sincerity in terms of what it intended or assumed would happen. I note in this regard that the period from the date when the judge signed both judgments to the date when he signed the reasons for the substantive decision was exactly 42 days. Perhaps, though it is speculation, the judge assumed that, if the claimant appealed the rule 50 decision in the meantime, he, the judge, would learn of that.

53. Be that as it may, in any event this criticism does not provide a reason to conclude that sending out the judgment first, and the reasons later was, in law, wrong.

54. For all of these reasons I conclude that this ground of appeal fails.

55. However, before I move on, I observe that I do caution against the practice of giving judgment ahead of giving reasons, whether orally or in writing. Though I do not rule out that there might be certain circumstances in which there could be particular reasons for that to be an appropriate course, my decision should not be seen as encouraging it as a general practice. Further, the fact that it is not, automatically, prohibited by the rules, and did not provide a valid

basis for challenging this decision in this particular case, does not mean that the practice is risk-free, or that it might not, in the circumstances of another, different, case, give rise to some grounds for challenge to the integrity of the decision or decision-making process. There are also better, and dare I say, more effective ways, of securing the objective of holding the ring pending the outcome of any challenge to a refusal of a rule 50 order.

The Appeal Against the Reconsideration Decision

56. I need to start by setting out the procedural chronology relating to this aspect in more detail.

57. Following receipt of the judgment dismissing his claims, and the subsequent promulgation of the written reasons, on 21 October 2019 the claimant applied for a reconsideration. On 5 December 2019, at the direction of the judge, the respondent's representatives were asked for their written comments on that application. The claimant was not copied in, although there is no evidence that this was the result of a deliberate direction, and I assume that it was an oversight on the part of the judge or the administration. On 18 December 2019 the respondent's solicitors tabled their written comments. They copied in the claimant. On 30 December 2019, and although no direction had been made, requiring or permitting him to do so, the claimant tabled a written response to the respondent's written comments, copying in the respondent. On 7 January 2020 the Tribunal promulgated the judge's decision, dated 30 December 2019, dismissing the reconsideration application.

58. On 3 February 2020 the claimant presented his notice of appeal. The EAT responded that it was not properly instituted because he had not supplied a copy of the Tribunal's reasons. The

claimant replied disagreeing with that view, but, in view of this, also wrote to the Tribunal in the manner that I have already described.

59. On 25 February 2020 the Tribunal then sent the reasons document, the contents of which I have already described

60. In relation to the reconsideration decision there are two live grounds of appeal. I will consider the "reasons" challenge first. The original basis of challenge was that the contents of the judgment document, refusing the reconsideration, and sent on 7 January 2020, contained reasons, but not sufficient reasons to comply with rule 62. After the EAT indicated that the Registrar considered that the appeal was not properly instituted because a copy of the Tribunal's reasons had not been provided, and although he did not agree with that view, the claimant then added an alternative line of argument to the effect that the reconsideration judgment promulgated on 7 January 2020 was defective because it was *not* accompanied by reasons. In his skeleton argument for the appeal hearing his primary position was the one that he adopted originally: that the judgment document did contain reasons, but these were insufficient; although he did not abandon the second, fallback, line of argument.

61. A decision on a reconsideration application is a judgment within the meaning of rule 1(3). The provisions of rule 62 therefore, in principle, apply to it. Accordingly, for reasons I have already explained in relation to the liability judgment, if the correct conclusion were to be that the reconsideration judgment document promulgated on 7 January 2020 did not include reasons at all, then the claimant's fallback argument – that it was, for that reason, defective, because reasons must be provided at the same time as the judgment – would not be sound.

62. But in fact in this case the respondent's submission – in agreement with the claimant on this point – was also that the judgment document promulgated on 7 January 2020 *did* include reasons; but its case – in disagreement with the claimant – was that these reasons were, in the circumstances, sufficient; and that the further "reasons" document issued by the Tribunal on 25 February 2020 did not in fact materially add to them.

63. I agree with the parties that the judgment document did include some reasons. While, as I have explained, there is a clear distinction between a judgment and the reasons for that judgment, whether a given document in fact contains reasons, as well as the judgment, is not necessarily determined by its heading, but depends upon an examination of its overall contents. The *decision* on this occasion was the decision to refuse the reconsideration application. The January 2020 document communicated that decision. But it *also* conveyed that the judge considered that there was no prospect of the original decision being varied or revoked; *and* it went on to state that a disagreement with the Tribunal's conclusions on the facts or the law does not provide good grounds for reconsideration. In so saying it gave, albeit very briefly, the judge's reasons for that decision.

64. The real issue on this ground, then, is whether those reasons were sufficient. The question of what standard must be met by the reasons for a refusal of reconsideration under rule 72(1) was considered in **Modha v Babcocks Airport Limited**, UKEAT/0060/19, 4 July 2019. As the discussion there identifies, a decision to refuse a reconsideration amounts to a judgment. But the wording of rule 62(5) is not suitable to be applied, as it stands, to decisions of that sort, as that wording is geared to decisions on issues arising in the substantive proceedings. The **Meek** principle means that the essential requirement is that, for any given decision, reasons should be given which are sufficient to enable the reader to understand why that particular decision has

been taken. Where a reconsideration application is refused on preliminary consideration, the reasons need to convey why the judge has formed the view that there is "no reasonable prospect" of that application leading to the decision in question being changed. In the **Modha** case itself the decision communicated that the judge had formed that view, but said nothing about why the judge done so. That was not sufficient.

65. The claimant submitted that this case was, in substance, like **Modha**. The reasons in this case went slightly further than they did in **Modha**, but they were still not enough. However, I agree with Ms Johns that the additional content in this case made a substantive difference. Brief though the reasons were, embedded in them were two propositions. The first was that the judge considered that the reconsideration application consisted entirely of points of disagreement with the Tribunal's findings of fact or conclusions of law. The second was the proposition of law that disagreement with the Tribunal's findings of fact or conclusions of law does not provide good grounds for a reconsideration. I think that was sufficient to communicate to the reader why, in substance, the judge considered that this reconsideration application had no reasonable prospect of success. The judge's view was also plainly that this description applied to every part of the application; so it was not necessary for him to go through each element of the application, saying that in relation to each aspect, one by one.

66. Accordingly, I would not have allowed the appeal against the reconsideration decision on this first ground of challenge to it.

67. I turn, then, to the second ground of challenge. The core of the challenge here was that the Tribunal had not followed the mandatory procedure laid down by rule 72. The first required step is for the judge simply to consider the application on paper. If the judge considers, on doing

so, that it has no reasonable prospect of success, it should be refused. Otherwise, a response to it should be sought *and* the views of the parties should be sought on whether it can be determined at a hearing. Thereafter it should be determined at a hearing unless the judge decides that the interests of justice do not require there to be one.

68. In this case, said the claimant, the prescribed process had not been followed. If the judge had simply skipped the rule 72(1) stage, and gone to the rule 72(2) stage, that was in principle wrong: **TH White & Sons Limited v Ms K White**, UKEAT/0022/21, 26 March 2021. Further, in that case the parties' views on whether to hold a hearing should have been sought. If, however, what the Tribunal had done was to invite written submissions from the respondent on the application, at the first stage, *before* deciding whether the application should be refused as having no reasonable prospect of success, that was still wrong. It meant that the respondent's views were sought when they should not have been, putting it to time and cost; and they were taken into account at a stage when the claimant had no opportunity to request a hearing. There was, submitted the claimant, no power to depart from the prescribed process, which was mandatory. He relied on the discussion to that effect in **TCO In-Well Technologies UK Ltd v Stuart** [2017] UKEATS/0016/16, 19 April 2017 and in **White**.

69. Ms Johns' said she accepted that rule 72 set out a mandatory overall framework for the consideration of reconsideration applications, as discussed in these authorities. But, in this case, the Tribunal had clearly not skipped over the rule 72(1) stage, but issued a decision, on preliminary consideration, that the application had no reasonable prospect of success. While rule 72 did not expressly provide for the Tribunal to seek the input of a party other than the party making a reconsideration application, at the first stage, there was nothing in the rule to *prohibit* the Tribunal from engaging in additional communications with the parties at that stage. If the

Tribunal considered it would be assisted by written submissions from the other party, it was entitled to seek them, in exercise of its general wide case management powers under rule 29. She referred also to the overriding objective in rule 2 and the Tribunal's power to manage the conduct of hearings as it saw fit, in rule 41. As was discussed in **White**, at [38], the EAT should not interfere with a proper exercise of case management powers.

70. Further, she submitted, as the application was misconceived, the Tribunal could and would, in any event had rejected it without needing to hold a hearing. In any event, the underlying decision to reject the application was correct, and, given that it had separately been unsuccessfully challenged on appeal, it must stand.

71. My conclusions on this ground are as follows.

72. First, I consider what light prior authorities may cast on this issue.

73. There are two important general points made in **Stuart**. The first is that the starting point is that, once a Tribunal has given a decision, it has fulfilled its task, and that decision cannot ordinarily be revisited by it. The rules concerning reconsideration provide a statutory mechanism in accordance with which a decision *may* be revisited, but the Tribunal has no power to do so outside of that mechanism. The second is that those rules prescribe the routes by which a decision may be reconsidered, and, a structured, staged, process for doing so. In **Stuart** the Tribunal had not adhered to these precepts, because it had not observed the distinction which the rules create, between an application by a party for reconsideration, to which time limits apply, and a decision by the Tribunal to reconsider its own earlier decision, on its own initiative, which may be taken at any time. In that case, having received an application from a party, which was out of time, the

A Tribunal then decided to reconsider the decision on its own initiative. It thereby wrongly circumvented the requirement to consider whether time should be extended in respect of the late application of which it was first seized.

B

74. I note that a similar issue was said to arise again in **Banerjee v Royal Bank of Canada** [2021] ICR 359. However, the discussion in **Banerjee** does not contain anything that contradicts the general precepts articulated in **Stuart**. Rather, in that case the EAT concluded that, on the

C particular facts of that case, the Tribunal had not, in fact, departed from the structure of these rules, because there had been no actual application for reconsideration by a party, only a decision by the Tribunal to act on its own initiative.

D

75. In **White** an issue was raised as to whether the judge had erred by not first reaching a decision, under rule 72(1), as to whether there was no reasonable prospect of the original decision being altered, before proceeding to list the application for hearing by the judge and members

E under rule 72(2) and (3). The EAT observed at [49] and [57] that rules set out a structured and mandatory process for the consideration of applications for reconsideration, which require the judge first to take such a decision under rule 71(1). As, in that case, it was unclear whether the

F judge had indeed done so, the EAT indicated that the judge should clarify the position, and, if no such decision had yet been taken, proceed to take it.

G 76. While the discussions in both **Stuart** and **White** therefore emphasise, in their different ways, the importance of adhering to the structure of the reconsideration rules, in terms of the different stages that must be followed where there is a reconsideration application, in neither case

H was the EAT concerned with the particular precise scenario that arises in the present case. The Tribunal in the present case did not circumvent, or leave out, a substantive stage of the procedure,

as was said to have (or possible have) occurred in those two cases. Rather, it took an additional step, not catered for in the rules.

77. When considering whether the Tribunal thereby overstepped the mark, two general, and related, principles must be borne in mind. Firstly, in accordance with rule 29, the Tribunal has a general power to make case management orders, which is not confined or limited by reference to the specific rules which follow. While this power must of course always be exercised judicially, and in accordance with the overriding objective in rule 2, it is well established that the EAT can only interfere in the exercise of a case management discretion if there has, in a recognised sense, been an error of law. This is discussed in many authorities, but a recent example can be found in **White** at [38] and following.

78. Secondly, it is simply not possible for rules of procedure dealing with particular areas of the Tribunal's activity to cater for every scenario or circumstance which might arise. Their provisions cannot be treated as providing a wholly exhaustive account of the actions which a Tribunal can permissibly take. Accordingly, it cannot be the case that there is literally no step or action which a Tribunal can take, when seized of a reconsideration application from one of the parties, or having decided, under rule 73, to initiate the process itself, if it is not expressly catered for in the reconsideration rules.

79. Plainly, the Tribunal may not omit a step which is specifically required by the rules. With regard to matters on which the rules are silent, the Tribunal's general case management powers may be exercised, as appropriate, in responding to developments that may arise, and in the course of the process, provided only that what the Tribunal does goes, as it were, with the grain of the rules. The Tribunal may exceed its powers, and the EAT may intervene, if what the Tribunal

does plainly materially undermines or circumvents the procedures prescribed by the rules, or important safeguards of fair treatment which they are intended to provide. But when being invited to intervene in relation to conduct about which the rules are, as such, silent, the EAT should not do so for the sake only of procedural purity. The overarching touchstone should be the principles of fairness and justice embodied in the overriding objective.

80. Standing back, it seems to me that the general purpose of rule 72(1) is to provide for what, in relation to an appeal, would be called a sift or a permission stage. What a reconsideration application has in common with an appeal, is that it seeks to disturb a substantive decision that has already been taken. As the discussion in **White** noted, a sift or permission stage means that a challenge which, on its face, has no reasonable prospect of success, can be rejected, without needing to put any other party to the trouble or cost of having to respond to it. Where a Tribunal of three took the original decision, these provisions also enable a weak application to be rejected without needing to involve the lay members.

81. For this reason, as discussed in **White**, it would be wrong for a Tribunal, when considering a reconsideration application from a party, to skip over the rule 72(1) stage altogether. Similarly, I am inclined to think that it would be wrong for the Tribunal, at the rule 72(1) stage, to *require* another party to participate. But is it necessarily always wrong to *invite* written comment or submission from the other party? As to that, to do so may be said to run the risk of over-complicating, and potentially delaying what is designed to be a straightforward and expeditious process for disposing of applications which are, on their face, unarguable. Further, the argument specifically advanced by the claimant in this case, is that doing this enables the other party to put forward a response, dedicated to persuading the judge that the application should be rejected,

without the applicant having the opportunity to seek a hearing, as they would do, if the mater proceeded to the rule 72(2) stage.

82. In my view these arguments have considerable force. I would not go so far as to say that it can never be permissible for the judge to seek *some* written input or information, in an appropriate case, from a party other than the applicant, before reaching a decision at the rule 72(1) stage. There might, for example, be some factual proposition advanced on the application on which they might be able, usefully and straightforwardly, to shed some light; or a point raised in relation to which they may be able to furnish a document which will assist the Tribunal to assess the application. These are just examples which occur to me. In an appropriate case of that sort, the Tribunal may consider, with good cause, that, if such limited input is sought, and the applicant is also allowed the opportunity of a written response or comment on whatever is provided, no injustice will be caused by then proceeding to a stage one decision on paper, and without the applicant having had the opportunity to request a hearing.

83. In stopping short of concluding that this is a step that can never properly be taken, I have taken into account that, even at stage two, although the starting presumption is that there will be a hearing, the judge may direct otherwise if they consider it is not necessary to have one in the interests of justice. I therefore do not think that it would necessarily always go against the grain of the rule 72 scheme to allow some input from another party at stage one; although in such a case the applying party should have the opportunity to make further representations, as they would, under rule 72(2), in a case where a decision was taken to determine the application at stage 2 without a hearing.

84. However, in my view, it is not appropriate for the judge, at stage one, generally to seek a response or comment from another party, in an open-ended way, without having formed a view that there is a particular reason for seeking it, in view of some particular feature of the application, or other particular circumstances of the case. Further, in general, where such a request is made, it should be appropriately tailored of framed, to reflect the particular reasons why it has been made, and should convey, however briefly, if it is not inherently obvious, some indication of why the judge has decided that making the request will assist the taking of a fair decision on paper at the rule 72(1) stage.

85. I cannot, and do not seek to, prescribe the circumstances in which this step may be taken; but it should not be taken as a matter of routine, or without the judge having formed the view that there is a specific reason to do so in the given case. If a judge is, on first consideration, not confident that the application has no reasonable prospect of success then, ordinarily, the proper course will be to decide not to refuse it at stage one, and to proceed to stage two, in the first instance seeking a response, and the views of the parties on whether the application can be determined without a hearing. To do otherwise risks materially subverting the safeguards that are built in to the structure of rule 72, for both parties.

86. I turn to apply these principles to the facts of this case.

87. In this case, at the direction of the judge, the respondent was simply emailed asking for comments on the reconsideration application. This was a general request, and no particular reasons for making it were given. The respondent replied by tabling a document which interpolated comments into the claimant's document, section by section. I have assumed that it was oversight that the original request was not copied to the claimant; and the respondent properly

copied the claimant in on its response. He then sent a reply interpolating his own replies to the respondent's responses (though it is not clear whether it was taken into account).

88. As the judge sought the respondent's comments generally on the application, and did not identify any particular reason to do so, this does not appear to me to have been an appropriate or necessary course to take, before reaching the rule 71(1) decision in this case. That said, I note that the claimant was copied in on the response. He, on his own initiative, tabled a response to the respondent's submissions, but did not, in that document, object to the procedure that had been followed, or ask for a hearing.

89. However, the claimant did, of course, challenge what the Tribunal had done in his notice of appeal. But, importantly, he also sought to challenge the decision to refuse his application for reconsideration *in substance*. *That* challenge was considered by Elisabeth Laing J, who therefore considered the merits of the decision to refuse the reconsideration. Although she considered the procedural challenge required further investigation (and, I, in due course, considered it arguable) she considered the substantive challenge not to be arguable. She wrote:

> **"The Appellant's application for reconsideration was a detailed and wholesale invitation to the ET to revisit its judgment on liability. The ET did not arguably err in concluding that it was not in the interests of justice for it to carry out that exercise when it had already considered the merits of the claims in detail in judgment 1, and to decide that, if it arguments that it had erred in the wholesale way in which the application for reconsideration suggested, such arguments were better considered on an appeal."**

90. At the hearing of this appeal, I invited the parties' submissions on what course I should take if any of the grounds of appeal succeeded. Ms Johns submitted that, even if this ground succeeded, as the claimant had lost his challenge to the refusal of reconsideration on its merits, that decision must stand. The claimant criticised the EAT's decision rejecting his appeal on its merits. He suggested that Elisabeth Laing J's use of the word "wholesale" indicated that it was

simply the large number of points of challenge that were considered objectionable; but that was simply a reflection of the length and range of the Tribunal's decision. In any event, he said, while the EAT had seen the reconsideration application, it had not seen all the evidence of which the Tribunal would have been aware from the original trial, and so did not have the same ability to judge the validity of his application. Further, he said, it was not clear whether the Tribunal judge had in fact seen, and taken into account, his reply to the respondent's response, when reaching his decision to refuse the application.

91. However, the short answer to all these submissions is that there was a rule 3(10) hearing in respect of the proposed challenge to the merits of the reconsideration decision, and it was dismissed at that hearing by Ellenbogen J. It is apparent from this, that, like Elisabeth Laing J, Ellenbogen J considered that the challenge to the refusal of the reconsideration application was not even reasonably arguable. Her decision in fact disposes of the matter; but I add that, having read the Tribunal's decision and that application myself, I respectfully agree with them both. This is, in truth, apparent, without need to turn to the respondent's comments; and I cannot see any basis on which the Tribunal could properly have granted that application. So, while I consider this particular ground of appeal to have been meritorious, in view of the fact that the challenge to the merits of the refusal of reconsideration was dismissed at a rule 3(10) hearing before the EAT, that decision must, therefore, still stand.

Outcome

92. For the foregoing reasons the ground of challenge to the liability decision which was before me fails, as does the "reasons" challenge to the reconsideration. Although the challenge to the decision of the judge to invite the respondent's comments on the application, is, as such, meritorious, for reasons I have explained, the decision to refuse the reconsideration, as such, must

stand. The judgments dismissing the claims, and dismissing the reconsideration application, therefore both stand.