Bar Council response to the Tribunal Procedure Committee Consultation on Changes to the Procedure Rules on the Provision of Written Reasons for Decisions

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Tribunal Procedure Committee consultation on Changes to the Procedure Rules on the Provision of Written Reasons for Decisions.[1]

2. The Bar Council represents approximately 18,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

[1] Consultation

Question (10) (Employment Tribunals): Do you agree with the introduction of short-form and full reasons in the Employment Tribunals?

4. We disagree with the introduction of short-form reasons in Employment Tribunals.

5. We consider that Rules 62(5) and 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('ET Rules') already require Judges to give reasons that address the issues, factual findings, relevant law and its application in a manner which is proportionate to the complexity of the issues and avoids unnecessary formality, delay and expense. Rule 62(5) correctly captures what is required having regard to the rule of law, good judge craft, and access to justice.

6. To add a requirement for Judges to distinguish between, and to draft, short-form and full written reasons would introduce unnecessary complexity and would likely lead to a duplication of work and additional delay. Parties dissatisfied with short-form reasons would likely go on to request full written reasons, adding to judicial workload and tribunal backlogs.

7. Requests for short form reasons followed by those for full reasons may also cause significant delay within proceedings, for example where there is a delay in both providing short form reasons, and then again in providing full written reasons. This could lead to an unnecessarily protracted process. If a party then decides to appeal, and an appeal succeeds and the case is remitted to be heard again, this could add to the overall delay in re-hearing the case. That would impact access to justice, as witnesses would then be called to give evidence again, possibly several years later.

8. The addition of further time limits in respect of short-form and full written reasons would add complexity and has the potential to increase confusion and lead to satellite litigation, particularly in respect of unrepresented litigants who form a large proportion of litigants in the Employment Tribunal. We consider that there are likely to be a significant proportion of out-of-time applications which will then need to be dealt with under Rule 5 of the ET Rules, again adding to judicial workload.

9. Providing written reasons for only part of a decision may lead to satellite issues and could be counter-productive where there are inter-related issues in any event. Issues within a case may be overlapping and factual findings in respect of one cause of action may be relevant to another cause of action, or matters (such as for example, findings on credibility of a witness) may be relevant to more than one cause of action.

10. It is important that both parties understand the reasons why they have won or lost. As reasons are already required to be proportionate, a rule curtailing them would impede access to justice. Short-form reasons in the manner proposed would be less likely to enable a party in receipt to understand whether legal or factual errors have been made. This is a key requirement in understanding whether there is any merit in an appeal. This would be particularly likely in a complex matter. A higher proportion of discrimination claims and those involving parties or witnesses with protected characteristics or vulnerabilities are complex. The proposed rule change therefore has the potential to be indirectly discriminatory.

11. Further, the ability to seek legal advice may be affected. This is particularly so for unrepresented litigants who are less likely to have made a full record of proceedings themselves, and who may need or want to seek legal advice, for example on appealing a decision, or where the other party makes a costs application against them. In such circumstances it is important that a litigant in person can show a lawyer the full written reasons. Lawyers simply cannot advise their clients properly if they do not have the full written reasons.

12. Both successful and unsuccessful parties need to be able to request full written reasons so that they can understand why the Judge or panel has made a particular decision. Full written reasons are not only necessary for appealing decisions. Parties may want full written reasons for a host of different reasons, such as:

- There may be a further hearing in the same case (for example where a substantive issue is dealt with as a preliminary matter prior to a final merits hearing) where the findings at the preliminary hearing have a bearing on the matters to be determined at the final hearing.
- Respondents may want written reasons to inform their internal practices or to assist discussions with unions, or they may have an ongoing employment relationship with the claimant, and want written reasons to inform next steps.
- Parties may want to apply for costs.
- There may be litigation on the same matter in another forum and the written reasons may be required in order for parties to take legal advice (for example on merits of the other claim, abuse of process, or estoppel).
- A party may be faced with a similar claim (or potential claim) and need full written reasons to seek legal advice on the other claim.

13. Parties are less likely to feel satisfied with or to accept outcomes if they do not fully understand why they have won or lost. The ability to reflect and gain personal or institutional growth may be hampered, with the result that more proceedings come to tribunal from Claimants and Respondents who have not learned the lessons of prior proceedings.

14. We note that the proposed change introduces an "interests of justice" exception, where successful parties would be able to seek written reasons if a Judge determines that would be in the interests of justice. Judges can typically exercise a significant amount of discretion when applying this test. In practice, the method of appealing a decision under this part of the rules would lie by way of appeal to the Employment Appeal Tribunal. Appealing a refusal by a Judge to grant a successful party written reasons would therefore be time consuming, disproportionate, and possibly very difficult given the judicial discretion inherent in the test.

15. We acknowledge that some parties seek written reasons tactically, knowing they will then be available to the public on the internet, save where reporting or publication restrictions are in place. However, we consider that this is a separate issue which is not considered in this consultation.

16. We also do not know whether short form reasons would be published online, and consider this is likely to be a matter for the tribunal administrative team, rather than the TPC, however we consider that there may be issues in respect of publishing short form reasons online.

17. We do not consider the proposal likely to achieve the stated aims of increased efficiency and reduced delay. Rather, we consider the proposal to be contrary to those aims.

Question (11) (Employment Tribunal Rules): Should the time limit for requesting short form reasons be 7 or 14 days?

18. As set out in answer to Question 10, we do not consider that short form reasons should be introduced. However, if short form reasons were introduced, we consider that the time limit for requesting them should be 14 days rather than 7 days.

19. We note that at paragraph 60 of the consultation it is said that the TPC does not consider that a reduction in the time available to request a written statement of reasons will result in more appellants making a protective application for written reasons. We disagree with this, and consider it is very likely that parties will make protective applications for short form reasons at a hearing. This will add to judicial workload.

20. A 7-day time limit is likely to result in a higher number of parties (particularly litigants in person) requesting written reasons out of time. This may cause unfairness, particularly to unrepresented parties who may need additional time to consider their position or seek advice, or to those with other barriers to using the tribunal system, such as those with disabilities or those for whom English is a second language. This would likely lead to satellite litigation.

21. In addition, it is important that the rules relating to time limits are kept simple. If the time limit for both short form reasons and full reasons is 14 days this will be less confusing for all parties.

Question (12) (Employment Tribunal Rules): Do you agree with the omission of rule 61(3) of the ET Rules?

22. We disagree with the omission of rule 61(3). We consider that the administration involved in adding a digital signature is not onerous. There are some benefits to the inclusion of the Employment Judge's signature. A signature will be seen by many as adding gravitas to the decision, which can be beneficial for both parties, but particularly for litigants in person, as it provides additional reassurance that the Judge has themselves agreed and signed off the decision.

Bar Council[2]

22 October 2024

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[2] Prepared by members of the Law Reform Committee