Appeal No. UKEAT/0423/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 February 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

CAMDEN FEDERATION OF TENANTS & RESIDENTS ASSOCIATION APPELLANT

MS S HAYWARD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR MEURIG I HORTON (Representative)
For the Respondent	MS VICTORIA WEBB (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW

SUMMARY

PRACTICE AND PROCEDURE

Application for review of judgment in default

Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004

ET1 sent to Respondent by Employment Tribunal but not received. Application for review initially failing to comply with requirements of r.33(2) ET Rules 2004. Later application/amendment of original application in correct form. Application still made out of time.

Employment Judge considering no discretion given failure to comply with r.33(2). Failing to consider second application/application as amended.

Wrongful fetter on discretion.

As unable to say how EJ would have exercised discretion, matter remitted to ET for re-hearing of application.

HER HONOUR JUDGE EADY QC

1. I refer to the parties as the Claimant and the Respondent, as they were below.

2. This is an appeal by the Respondent against the judgment of the London (Central) Employment Tribunal, sitting on 30 October 2012 under the chairmanship of Employment Judge Charlton, sitting alone; the reserved judgment and written Reasons being sent to the parties on 13 November 2012. There is also a cross-appeal by the Claimant in respect of the same judgment.

3. The Claimant was represented by her trade union representative before the Employment Tribunal but is represented by Ms Webb of counsel before me. The Respondent was represented by Mrs Fairclough-Hayes, consultant, before the Employment Tribunal and is now represented by Mr Horton, consultant.

The background to this appeal

4. The background to the appeal and cross-appeal needs some explanation.

5. By an ET1, presented on 7 June 2012, the Claimant, who was then still employed by the Respondent, made a complaint of disability discrimination and other claims (the first claim). The Respondent filed its ET3 in the first claim on 11 July 2012. No representative was shown as acting at that stage.

6. On 22 June 2012 the Claimant was summarily dismissed. On 5 July 2012 she issued a further ET1, claiming unfair dismissal, holiday pay and other payments (the second claim).

7. The Notice of Claim was sent to the Respondent on 10 July 2012, stating a response had to be filed on the prescribed form by 7 August 2012. That was sent to the same address of the Respondent as for the first claim.

8. On 11 July 2012 the Respondent had instructed a firm of consultants, Peninsula, to act for it. On 31 July and 2 August 2012, Peninsula contacted the Employment Tribunal saying the Respondent had not received a copy of the second claim.

9. On 3 August 2012 the Claimant's representative sent a copy of the second claim to Peninsula. On 7 August 2012 the Employment Tribunal granted the Respondent an extension of time to file its ET3 in the second claim until 28 August 2012.

10. By this stage the Respondent accepted it had a copy of the ET1 sent to it by the Claimant, but it had still received nothing from the Employment Tribunal. It expressed concern that it could not be sure that the copy received from the Claimant was the same as lodged with the ET.

11. On 17 August 2012 Peninsula wrote to the Employment Tribunal, making clear they did not accept that the ET1 in the second claim had been served on the Respondent. On 3 September 2012 the Employment Tribunal (Regional Employment Judge Potter) wrote to the Respondent, stating that the ET1 has been properly served on 10 July 2012, and further copies had been provided to the Respondent by the Claimant on 3 August and by the Employment Tribunal on 7 August along with an extension of time to file the ET3. The Respondent was given a further extension of time to 11 September 2012 to file the ET3, and a case management discussion was listed for 20 September 2012.

12. The Respondent contended later that this communication was never received, though it had been sent to what appeared to be the correct e-mail address.

13. On 19 September 2012 the Employment Tribunal communicated with the parties that there had been no response to the second claim, so it was proceeding to the case management discussion on 20 September on the basis of there being no response. Judgment in default on the second claim was issued on 20 September 2012, and there was a written judgment in that regard, dated 21 September 2012, with the direction that the Respondent should apply for a review by 4 October 2012. Further directions were given that the Claimant should provide proper particulars of her claim by 4 October, and the Respondent should then have until 18 October to provide its grounds, if any, for opposing the Claimant's claim.

14. Outside the time permitted for it to do so, on 10 October 2012 (although apparently prepared on 1 October 2012), the Respondent applied for a review of the default judgment.

15. On 17 October 2012, the Respondent received a copy of the ET1 and the blank ET3 form from the Employment Tribunal (the ET having sent these documents out again). On 29 October 2012 the Respondent then sent in, albeit apparently outside business hours, a completed ET3 and a repeat application for a review of the default judgment.

16. On 30 October 2012 the Employment Tribunal, under the chairmanship of Employment Judge Charlton, considered what it took to be the application for review of the default judgment, as made on 10 October 2012 and refused that application. It is that refusal with which this appeal is concerned.

The Employment Tribunal judgment

17. The Employment Tribunal noted the chronology of this matter, broadly as I have set out above, and observed that the Respondent had not provided grounds for responding to the claim contrary to rule 33(2) of the **Employment Tribunal Rules 2004** until the evening before the hearing, albeit that the document in question appeared to have been drafted on 1 October.

18. The Employment Judge accepted the evidence from Mr Miller, for the Respondent, that the ET1 sent out by the ET on 10 July (see paragraph 3) had never been received by the Respondent. The Employment Judge noted that rule 61(2) provides that a notice or document sent by post will be taken as having been received unless the contrary is proved. The Employment Judge did not find, however, that the ET1 in the second claim had *not* been sent out by the Tribunal. His conclusion (see paragraph 3) was that it had been sent. Having accepted Mr Miller's evidence, however, the Employment Judge allowed that the fact that the ET1 had not been received could give a "good reason for failing to put in a response in time."

19. Allowing that such a "good reason" might exist, the Employment Judge was concerned that, when Peninsula had been instructed and informed that a second claim was expected, nothing had been done. On the other hand, he noted that, prior to the ET1 being sent out, the Respondent had made some attempts to contact the Employment Tribunal to ask what was happening with the anticipated second claim.

20. The Employment Judge considered the question of the merits of the claim and the response but felt that this was evenly balanced. Whether the Respondent had a reasonable prospect of success in defending the claim would depend on the evidence. It was not a case where it was possible to say that the merit was all on one side or the other.

21. Referring to rule 33 of the 2004 Tribunal Rules and the requirements for an application for review of the default judgment, the Employment Judge observed that the Respondent had failed to provide a response to the claim in breach of rule 33(2). Rule 33(2) was mandatory, and the Respondent had only provided its response to the claim the day before the application was due to be heard by the Employment Tribunal.

22. The Respondent's response to that point was that it did not have a copy of the ET1 served by the Employment Tribunal. The Employment Judge rejected that as mere semantics. The Respondent had had a copy of the ET1 sent to it from the Claimant; it plainly had sufficient to draft its response by 1 October but simply did not submit it. The Employment Judge also noted that the application had been made late and in breach of the order of EJ Henderson on 21 September; it would have needed to be made within 14 days of the judgment in default or by 4 October. In these circumstances, the Employment Judge considered that he had no discretion under rule 33(2). He did not therefore find the cases of **Pendragon plc v Copus** [2005] ICR 1671 or **Kwik Save Stores Ltd v Swain** [1997] ICR 49 EAT helpful. He recited the arguments that had been made to him regarding the application of the overriding objective, but that did not alter his reading of rule 33(2) and, in any event, he would not see it as inconsistent.

23. Having made clear that he considered that he had no discretion in the matter, the Employment Judge then reflected on various factors that might suggest that the balance would tip against the Respondent in any event. These included the fact that an application had been made that was defective and contrary to the Rules and the Order of EJ Henderson, that the Respondent had been professionally represented and known of the case against it since early August and had been in a position to respond but had failed to do so.

24. Having decided that the application for a review of the default judgment should not be granted, the Employment Judge went on to consider the Claimant's application to amend her first claim but decided that it was out of time, opportunistic and should not be allowed.

25. To complete the narrative, there was a remedy hearing in this matter on 1 February 2013 before the London (Central) Employment Tribunal (Employment Judge Norris, sitting alone), at which the Respondent was permitted to participate.

The appeal and cross-appeal

26. In the meantime, the Respondent has pursued its appeal to the EAT. The proposed appeal was considered by HHJ David Richardson at a preliminary hearing, when the matter was allowed to proceed to a full hearing on the basis of an Amended Notice of Appeal. The Claimant presented an Answer and cross-appeal, albeit that the grounds of cross-appeal really challenge the Employment Tribunal's findings rather than a judgment (the judgment being in the Claimant's favour on this point). What the Respondent's Answer and cross-appeal really seeks to do is to provide alternative grounds on which to uphold the Employment Tribunal's finding and seeking to pin down the reasoning provided, as set out below.

27. First, referring to paragraph 10 of the Employment Tribunal's reasoning, and the apparent "finding" that "proper service had not occurred", the Claimant makes the point that the question is not one of service but simply whether the ET1 had been *sent* for the purposes of rule 33(1). The issue of whether or not the ET1 had been *received* could be relevant at the next stage – the exercise of the Tribunal's discretion - but the real issue before the Employment Judge was actually as to whether or not the Respondent had submitted a valid application for review for rule 33(2) purposes. The finding as to "proper service" was just simply irrelevant for the exercise the Employment Judge had to undertake.

28. Secondly, in relation to paragraph 6 of the Employment Tribunal's reasons, the reference in the last sentence to:

> **"Perusing the letter of 2 August, it does not seem to me that any such copy was sent on that occasion or indeed or on any other occasion prior to 17 October."**

could only be referring to the Employment Tribunal's failure to send out the ET1 on or after 2 August. The Employment Tribunal had already found that the ET1 was sent out on 10 July (see paragraph 3 of the Reasons).

29. Finally, looking at the formal judgment of the Tribunal at point 1, that must have been a typographical error as the points made in that first clause simply did not relate to this claim.

<u>The relevant legal principles</u>

30. The relevant provisions of the legislation are to be found in the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**. Rule 2(2) provides:

> **"If the Secretary accepts the claim or part of it, he shall –**
>
> **Send a copy of the claim to each respondent and record in writing the date on which it is was sent..."**

And rule 4(1):

> **"If the respondent wishes to respond to the claim made against him, he must present his response to the Employment Tribunal Office within 28 days of the date on which he was sent a copy of the claim. The response must include all the relevant required information. The time limit for the respondent to present his response may be extended..."**

31. I observe that the focus of rules 2 and 4 is on the Employment Tribunal's sending of the ET1, not on its receipt by the Respondent. There may well have been good reasons for that; no doubt it was seen as giving clarity to the process. I also observe that it has been held that there

is no power in the Employment Tribunal to resend an ET1 (see **Bone v Fabcon Projects Ltd** [2006] ICR 1421 EAT (HHJ Burke QC). So if the ET1 is held to have been sent (as in this case), but it is also apparent that it was never received, the matter cannot simply be remedied by the Employment Tribunal sending out a further copy of the ET1. On the other hand, once the default judgment has been entered, it is open to a Respondent to apply for a review of that judgment (see rule 33, which I come on to below) and the fact of the non-receipt of the ET1 would then be relevant. I make that observation because that is a matter which seems to have caused some confusion in the Respondent's mind, and quite some time has been spent seeking to clarify that point.

32. Rule 10 of the **Employment Tribunals Rules 2004**, dealing with the general power to manage proceedings, provides generally:

> **"10.—(1) the Employment Judge may at any time either on the application of a party or on his own initiative make an order in relation to any matter which appears to him to be appropriate. Such orders may be any of those listed in paragraph (2) or such other orders as he thinks fit. Subject to the following rules, orders may be issued as a result of an Employment Judge considering the papers before him in the absence of the parties, or at a hearing...**
>
> **(2) Examples of orders which may be made under paragraph (1) are orders —**
>
> > **(a) as to the manner in which the proceedings are to be conducted, including any time limit to be observed;"**

33. That power gives Employment Judges the general ability to extend time where a proper exercise of judicial discretion would suggest that was appropriate and in accordance with the overriding objective.

34. Rule 33 of the 2004 Rules deals with the way in which a party could apply to have a default judgment set aside, it provides as follows:

> **"(1) A party may apply to have default judgment against or in favour of him reviewed. An application must be made in writing and presented to the Employment Tribunal Office within 14 days of the date on which the default judgment was sent to the parties. The 14 day time**

limit may be extended by an Employment Tribunal Judge if he considers that it is just and equitable to do so.

(2) The application must state the reasons why the default judgment should be varied or revoked. When it is the respondent applying to have the default judgment reviewed, the application must include with it the respondent's proposed response to the claim (where that has not been received the Employment Tribunal Office) an application for an extension of the time limit for presenting the response and an explanation of why rules 4(1) and (4) were not complied with.

...

(4) The Employment Judge may –

(a) refuse the application for a review;

(b) vary the default judgment

(c) revoke all or part of the default judgment;

(d) confirm the default judgment;

and all parties to the proceedings shall be informed by the Secretary in writing of the Employment Judge's judgment on the application.

(5) ... An Employment Judge may revoke or vary all or part of a default judgment if the respondent has a reasonable prospect of successfully responding to the claim or part of it.

(6) In considering the application for a review of a default judgment the Employment Judge must have regard to whether there was good reason for the response not having been presented within the applicable time limit.

(7) If the Employment Judge decides that the default judgment should be varied or revoked and that the respondent should be allowed to respond to the claim the Secretary shall accept the response and proceed in accordance with rule 5(2)."

35. It is to be noted that an application for an extension of time for presenting the response will not be assumed but can be implied from an application for review for rule 33(2) purposes (see **Bournemouth BC v Leadbeter** UKEAT/0010/11/SM).

36. For good measure, I also refer to rule 34 of the 2004 Rules, which provides at (3):

"...decisions may be reviewed on the following grounds only --

(a) the decision is wrongly made as the result of an administrative error

(b) a party did not receive notice of the proceedings leading to the decision.

...

(e) the interests of justice require such a review."

37. As it is something that has concerned the Respondent at various times in this matter, I also refer to rule 61, which provides:

> **"Any notice given or document sent under these Rules shall, unless an Employment Tribunal or Tribunal orders otherwise, be in writing and may be given or sent**
>
> **(a) by post...**
>
> **(2) Where a notice or document has been given or sent in accordance with paragraph (1), that notice or document shall, unless the contrary is proved, be taken to have been received by the party to whom it is addressed --**
>
> **(a) in the case of a notice or document given or sent by post, on the day on which the notice or document would be delivered in the ordinary course of post..."**

38. Where an Employment Tribunal is exercising its discretion to permit a Respondent to enter a Notice of Appearance out of time, then it is obliged to take account of all relevant factors including the explanation or lack of explanation for the delay but also the respective prejudice to the parties and the merits of any defence (see **Kwik Save Stores Ltd v Swain & Ors** [1997] ICR 49 EAT). This will be so when considering the application for a review of a default judgment under rule 33 of the 2004 Rules. Rule 33(6) requires the Employment Tribunal to have regard to the explanation given or not given by the Respondent. That is prescriptive, so it is a factor to which the Employment Tribunal *must* have regard. The provision is not, however, exhaustive, and the other factors set out in **Kwik Save v Swain** are also to be taken into account (see **Pendragon plc v Copus** [2005] ICR 1671 EAT (Burton J presiding)).

The parties' submissions.

39. For the Respondent, it was submitted that it should have been held that the Respondent had rebutted the presumption of service under rule 61(2) and rule 33(6) should have been found to have been satisfied. More generally, the Respondent relied on the fact that it had made not just one but two applications for review and the Employment Judge should have considered the second review application, which was compliant with rule 33(2), and, by failing to do so, he thereby erred in law in failing to exercise his discretion.

40. For the Claimant it was conceded that, although the Employment Judge plainly focussed on the first application for review, by the time of the hearing, there was a draft response, although even then that had not been made using the appropriate form ET3. Although there may have been a fettering of discretion - in that the Employment Judge considered that he was dealing with an application that did not comply with rule 33(2) and, therefore, that he had no discretion - the EAT should find that there were sufficient findings in the judgment to conclude that the application for review must have failed in any event.

Discussion and conclusions

41. For convenience, I deal first of all with the cross-appeal. First, there does indeed appear to have been an error in the first clause of the formal judgment in the Tribunal's judgment in this matter. It seems to me to have been a typographical error. It plainly should not have been there, as it bears no relation to this case. It could have been dealt with, perhaps, under the slip rule or by way of review, but I can understand how it was convenient to address it in responding to this appeal. That paragraph should plainly be deleted and, to the extent it is necessary to uphold the cross-appeal in that regard, I would do so.

42. As for the reference at paragraph 10 to the apparent finding that "proper service had not occurred", I agree with Ms Webb that that was not the real question for the Employment Tribunal. The question was not about service but simply whether the ET1 had been sent. I further agree that the finding of the Employment Tribunal is clear: the ET1 was sent. Equally, however, it is clear that the Employment Judge found that the Respondent had not received it. That was relevant to the question whether the Tribunal should extend time for the Respondent's application, assuming it was validly made. That is a point to which I will return. In respect of the last sentence of paragraph 6, again I agree this was poorly drafted. It

must have been looking at events on and after 2 August 2012. It does not relate back to the finding that had already clearly been made that the ET1 had been sent out on 10 July.

43. Given my determination of the appeal in this matter, I do not consider I have to formally allow the cross-appeal in those respects, but I have included my views on the matters raised so those points are clear for anyone else having to consider this judgment, to see how I have read the judgment below and how I have understood the findings made.

44. I then turn to the appeal. It seems to me that the first question was whether the ET1 in the second claim was sent. The Employment Judge, as I read paragraph 3, concluded that it had indeed been sent. The Employment Judge also concluded that it was not received by the Respondent. The non-receipt did not establish that it was never sent. It simply provided good grounds for failing to submit a response at that point in time.

45. On this latter point, the Employment Judge plainly considered that the Respondent's position was less than meritorious on this question because it had been sent a copy of the claim by the Claimant. However, the Respondent held fast to its position that it was entitled to wait until it received the ET1 from the Employment Tribunal itself because only then could it be sure that it had the correct ET1. If, as the Employment Tribunal found had happened here, an ET1 is sent out, then there is no power in the Employment Tribunal to re-send (see **Bone v Fabcon Projects Ltd**). So the ET1 in the second claim was sent out by the ET on 10 July 2012. There was no response from the Respondent because it never actually received it. Under the way in which the rules were structured, the Respondent then had to wait for the judgment in default before it could take any step to remedy that position. Judgment in default was entered on 20 September 2012.

46. Under the Rules, and indeed pursuant to the direction of EJ Henderson, the Respondent then had 14 days to then make an application for review in the correct form for rule 33 purposes. It failed to comply with those requirements. That gives rise to the second question before the Employment Tribunal: whether the Respondent had made an application for review of the default judgment in accordance with rule 33.

47. In my judgment, the Employment Judge was correct to consider that rule 33(2) was mandatory in form. When making an application for a review of a default judgment, rule 33(2) required: (1) the provision of an explanation as to why the default judgment should be revoked or varied (provided); but also (2) a response to the claim. No response to the claim was provided by the Respondent until the evening before the hearing: i.e., 29 October. Its first application for a review of the default judgment was, therefore, out of time and defective. Its second application (or amendment of the first), received after business hours on 29 October, was out of time but otherwise complied with rule 33(2).

48. The reason why that second application was out of time was stated to be because the Respondent had still been waiting to receive the ET1 from the Employment Tribunal. That explanation may well give rise to a number of questions: if that were so, then why would it not have been provided nearer the time when, on anybody's case, the Respondent had received the ET1? Equally, if the Respondent wished to protect its position, it could have served a response in answer to the ET1 it had received from the Claimant some time previously but reserved its right to amend its response upon receipt of the official sending out of the ET1 by the Employment Tribunal. Had the Respondent really felt unable to submit a response to support its application for a review, why had it been able to draft the response (ultimately relied on) on 1 October? The question for me, however, is not what view I would form of this matter, but to scrutinise what view the Employment Judge formed.

49. Before addressing the detail of the Employment Judge's approach, I note in passing that he did not seek to exercise his discretion under rule 34 of the 2004 Rules, which it was arguably open to him to do so and would have avoided the more technical difficulties as to whether or not the Respondent had made a valid application under rule 33. I have not, however, been addressed on rule 34 and it has not been part of the Respondent's appeal before me that the Employment Judge erred in law in failing to exercise that jurisdiction.

50. Turning to the approach adopted by the Employment Judge, it seems to me that matters in this case became terribly confused. That is in part because of the way the 2004 Rules were drafted. As I have already said, the Employment Judge was, in my judgment, correct about the mandatory nature of rule 33(2). On anybody's case, however, the Respondent did subsequently lodge a correctly drafted application, albeit the evening before the hearing of the review application itself. Whether that was to be treated as a separate, second application or as an amendment of the first, that did include a response and otherwise met the requirements of rule 33(2), save that it was out of time. The correct approach would, therefore, have been for the Employment Tribunal to see that it had a properly constituted, but out of time, application before it. It should not have been hidebound about treating this as one application and it should have considered whether it could be implied that it included a request for an extension of time (see **Bournemouth BC v Leadbeter**). Doing so would have made clear that this was a situation in which the Employment Judge had to exercise his discretion.

51. The approach adopted by the Employment Judge, however, led him to conclude that he simply had no discretion. Thus, at paragraph 11, he states:

> **"Under Rule 33(2) I do not appear to have any discretion. … In this case the application does not comply with the rules. It is defective. It does not comply with Judge Henderson's order either. In those circumstances I am bound to refuse the application to review..."**

52. In my judgment, that fettering of discretion was an error of law in this case. The Employment Judge should have approached this as one where the question before him was whether or not the application for review should have been allowed to proceed, albeit out of time. That would have involved him considering the various matters set down in the **Kwik Save** case and would have permitted a broad judicial exercise of discretion in this matter.

53. Does my finding mean that I need equally to find that the Employment Judge would have allowed the application? Not necessarily. There was obviously some consideration of other matters. The Employment Judge referred to the merits of the case and did not find the proposed response to be unarguable or entirely without merit. Equally, the Employment Judge noted that the Respondent could have dealt with the substance of the claim at an earlier stage, when the Respondent had been sent the ET1 from the Claimant and certainly within 14 days from the issuing of the default judgment. This was simply a claim for unfair dismissal and holiday pay; the Employment Judge could well have taken the view that the Respondent had no good reason for failing to make the application for review earlier.

54. Can I therefore find that the Employment Judge, had he not fettered his discretion, would definitely not have allowed the application? I do not think I can. The Employment Judge did not say this was a case where there was no merit in the proposed response. That was a very relevant factor. Arguably, there was a real difficulty for the Respondent in responding to an ET1 until it had been received from the Tribunal, and it had been asking for the ET1 from a very early stage. I can see that the Employment Judge addressed some of the other **Kwik Save** points, to some extent - in particular, as to the delay issue, and the reference to the overriding objective - but what the Employment Judge did not do was carry out the balancing exercise required. It is unclear me what would have been his conclusion had he done so.

55. I recognise that – given where this case now is - it is unattractive for this point to be remitted, not least as there has now been a remedies hearing, at which the Respondent was allowed to be heard and where it transpired that the proposed response on the holiday pay claim went nowhere. There remains, however, the Respondent's apparently arguable response to the unfair dismissal claim. The difficulty for me is that the balancing exercise that needs to be carried out should be undertaken by the Employment Tribunal. I do not consider that there are sufficient findings from which I can carry out that exercise in this court. It may be that an Employment Tribunal – considering all the elements - would find that, although there had been an explanation for the original failure to enter a response to the second claim, the application for a review of the default judgment was made out of time and that no extension of time should be granted. On the other hand, that Employment Tribunal might hold that the Respondent's application to set aside the review judgment should be allowed so that it could have its chance to be heard and put its case on the merits. In such circumstances, the Tribunal might conclude that any prejudice to the Claimant - in respect of the Respondent's delay in making the application and/or the way in which it had conducted itself - could be remedied in costs.

56. I mention these as possible outcomes. I do not know what an Employment Tribunal might decide was appropriate and I do not seek to suggest that, in any way, the outcome of this matter is constrained to the possibilities that I have foreseen. This will all be open to the Tribunal considering the application for a review of the default judgment at a fresh hearing.

57. Having given my judgment in this matter, I invited the parties to make further representations on the question of disposal. For the Claimant, it was submitted the appropriate order would be for the matter to be remitted to Employment Judge Charlton. There was no suggestion that he had acted improperly and, although some time had passed, he would still

have his notes and be able to read those and take those into account. For the Respondent, on the other hand, it was urged that I should remit the case to any Employment Judge other than those who have already dealt with this matter. In particular, Mr Horton referred to issues that he said had arisen with Employment Judge Norris, who heard the remedies application. He told me that he had appeared before Employment Judge Norris in another matter, unrelated to this case, where he had felt obliged to ask her to recuse herself because of the background. Although she had declined to do so, part of her reasoning had been because it was a different case to this.

58. I have had regard to the considerations laid down in **Sinclair Roche and Temperley v Heard and Fellows** [2004] IRLR 763. It seems to me that the primary concern is the need for expedition so far as that is possible. The sooner this matter can get back before the Employment Tribunal, for final determination, the better. That aim would be best served by allowing it to be remitted to *any* Employment Judge. In terms of the Employment Judges who have previously dealt with this matter, I see nothing in the judgments of either Employment Judge Henderson or Employment Judge Charlton that would suggest that it would be inappropriate in any way for them to deal with it. As for the submissions that have been made to me in respect of Employment Judge Norris, it would be quite wrong for me to make a finding as to whether or not Employment Judge Norris should recuse herself. I have not been concerned with the remedies judgment. Equally, I have not been concerned with any allegation of bias on the part of any of the Employment Judges who have dealt with this matter. If the matter happened to be listed in front of Employment Judge Norris and the Respondent felt it appropriate to make an application that she recuse herself, that is an application that would have to be made and considered then. It is not something on which I can pronounce on the information I have.

59. For all those reasons, I remit this matter for a re-hearing, to be dealt with by any Employment Judge.