Appeal No. UKEAT/0114/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 September 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MS A MORGAN APPELLANT

ABERTAWE BRP MORGANNWG UNIVERSITY LOCAL HEALTH BOARD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ALLAN ROBERTS (of Counsel) Instructed by: Royal College of Nursing Legal Services 58-62 Hagley Road Birmingham B16 8PE
For the Respondent	MR JULIAN ALLSOP (of Counsel) Instructed by: Hugh James 2 Central Square Cardiff CF10 1FS

SUMMARY

PRACTICE AND PROCEDURE – Admissibility of evidence

The Claimant has an underlying long-term mental health disability. It has for long periods been controlled by medication. However, there were periods during her employment with the Respondent when it became symptomatic in a way which affected her fitness to work. In early 2011, at a time when she was off sick, an OH doctor advised that the deterioration in her mental health was caused by aspects of her working environment in her current role, and that she was not fit to return to that role, but would be fit to return to a different role, which he recommended should be found for her. The Tribunal found that the Respondent could and should then have redeployed her to another suitable role that she was fit to perform, in the period from April 2011. However, it did not do so and that was found to amount to a failure to comply with the duty of reasonable adjustment.

By August 2011 the Claimant's mental health had deteriorated to the point that she had become unfit for any role, and the Tribunal found that there was no failure to comply with the duty of reasonable adjustment thereafter. Her unfitness led to her dismissal. The Tribunal found the dismissal to be fair. The dismissal was not found to be an act of unlawful discrimination.

For the purposes of remedy for the failure to comply with the duty of reasonable adjustment, the Claimant contended that, had the Respondent complied with its duty and redeployed her, in the relevant time window, her mental health would, or might, not have then deteriorated to the point when she became unfit for any role; and her employment would, or might, not have ended when it in fact did. She applied for permission to adduce expert evidence in that connection. The Tribunal directed that, for her application to be considered, she needed to obtain and table an expert report, based solely on a review of the existing medical records. The Claimant having

done so, the Tribunal, on the basis of an appraisal of that particular report, refused her application.

Held: The Tribunal had correctly adopted the test, in **CPR 35**, of whether expert evidence on the issue was reasonably required. But it should have decided, first, whether, in principle, expert evidence should be permitted on the issue, applying that test. If the answer to that was "yes", it should then have gone on to give appropriate directions in respect of such expert evidence, taking account of the guidance in **De Keyser v Wilson** [2001] IRLR 324. That might have included the obtaining of a joint report, or those of experts on both sides, based on the expert(s) seeing the Claimant, as well as reviewing historic records, and the opportunity for questions to be raised of the expert(s). The Tribunal's approach resulted in unfairness, because it proceeded in the wrong order, based its decision on its appraisal of a more limited report, and pre-empted the task of assessing the actual full expert evidence, which should have fallen to the full Tribunal at the Remedy Hearing itself.

In any event the Tribunal wrongly concluded wrongly that the limited report, and any future report, could not be of *any* assistance on this issue, so that the "reasonably required" test was not met. The nature of this issue in this case is such that the only proper conclusion was that expert evidence *is* reasonably required in relation to it, and, having been requested, should have been permitted, in principle, with directions to follow. **Royal Bank of Scotland v Morris** UKEAT/0436/10 considered.

Accordingly, the appeal was allowed, and a decision that expert medical evidence be permitted on this issue was substituted.

HIS HONOUR JUDGE AUERBACH

Introduction and the Employment Tribunal's Decision

1. This is the Claimant's appeal. She was employed by the Respondent as a psychiatric nurse therapist from January 2007. She has a long-standing history of mental ill-health described in the claim form as a depressive illness. It has never been disputed that this illness, however described, amounts in law to a disability. She was off sick because of it for four months in 2008 and then from mid-July 2010. Save for a couple of days worked in a different role in July 2011, she did not return to work prior to her dismissal on 15 December 2011. Thereafter, the Claimant presented claims which came to a full Liability Hearing before Employment Judge Beard, Mrs Palmer and Mr Lloyd, in January and February 2013.

2. In a reserved Decision, the Tribunal dismissed a claim brought under the **Disability Discrimination Act 1995**. It upheld various claims brought under the **Equality Act 2010**. It dismissed a claim of unfair dismissal. The Respondent appealed parts of that Decision. The appeal was partially successful. Some matters were remitted to the same Employment Tribunal ("the ET"). The Claimant unsuccessfully appealed that Decision to the Court of Appeal. That led to a second Hearing before the same ET, which promulgated a second reserved Decision in February 2015. The Respondent appealed that Decision to the Employment Appeal Tribunal ("the EAT") and then to the Court of Appeal without success.

3. The Court of Appeal's Decision was handed down on 28 March 2018. The net effect of those Decisions up to that point was that the following claims were upheld, the Tribunal having also determined that it was just an equitable to extend time in respect of them: (a) that the Claimant had been subjected to harassment related to her disability, in particular, at a meeting

in February 2011; and (b) that the Respondent had failed to make reasonable adjustments between April and August 2011, specifically by failing to re-deploy the Claimant to a role that was suitable and that she would have been capable at that time of carrying out. However, it was also concluded that, by August 2011, the Claimant's health had so deteriorated that she was no longer fit for work in any capacity, so there was no breach of the duty to make reasonable adjustments after that date. This remained the position until the Claimant was dismissed. The Tribunal also recorded that she is in receipt of a full NHS ill-health retirement pension.

4. Following the Court of Appeal's Decision in early 2018, the next stage was, and is, for the ET to determine remedy in respect of the successful complaints. In that regard, I note that the Court of Appeal, (Leggatt LJ, Bean LJ concurring), included the following end note in its Decision:

> **"34. At the end of his judgment in the EAT, HHJ Shanks expressed the hope that the parties can now rapidly proceed to a remedies hearing. He said that it seemed to him "just unacceptable that a case like this should take more than four years to reach a resolution." With that sentiment one can only agree, while noting that the Board's unsuccessful appeal to this court has added another two years to the inordinate length of these proceedings. At any remedies hearing the only questions will be what compensation the Claimant is entitled to receive for (a) her treatment by Ms Keighan and (b) the Board's failure to make reasonable adjustments for her disability by finding a suitable alternative role for her in the period between April and the end of July 2011.**
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> **35. The treatment by Ms Keighan found by the tribunal to have amounted to harassment is plainly at the lower end of the scale that applies in awarding compensation for injury to feelings. On the face of it, the appropriate amount of compensation for the failure to make reasonable adjustments would be any difference between (a) the amount of sickness pay which the Claimant in fact received and (b) the amount of pay which she would have received if she had been redeployed to another job from the date when such redeployment would have taken place if the Board had complied with its duty to make adjustments until the date (taken by the tribunal to be 1 August 2011) when the Claimant became too ill to work at all. Any such amount is likely to be very modest. It was therefore a matter of surprise to be told at the hearing of this appeal that the amount of compensation which the Claimant is seeking is some £450,000. This sum is apparently claimed on the footing that, if the Claimant had been redeployed to another suitable post between April and August 2011, she would not have suffered the deterioration in her condition which led to her being unfit to work in any capacity thereafter and would instead have continued in her employment into the far future.**
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> **36. Such a claim is in principle possible but it is necessary to keep in mind that the burden of proof is on the Claimant to prove her loss. Given the complex aetiology of depressive illness, it is difficult to envisage how it could conceivably be established by evidence that, if only the Claimant had been moved to another post at some point between April and August 2011, her illness would not have progressed as it in fact did. At this stage of these protracted proceedings a sense of reality is required to bring them to an appropriate conclusion."**

5. However, it is indeed the Claimant's case that, had the Respondent re-deployed her to a suitable role between April and August 2011, her health would not have deteriorated in the way that it did, and her employment would not have ended when it did. Therefore, she argues that the chances of that alternative scenario having unfolded must be factored into the assessment of the loss which has flowed from the failure to comply with the duty of reasonable adjustment.

6. Following the resolution of the appeal to the Court of Appeal, she, accordingly, applied to the Employment Tribunal for permission to adduce expert medical evidence in relation to that issue. That was considered, first, at a Preliminary Hearing on 31 August 2018. Employment Judge Beard ordered:

> **"1.1. There is a relevant continuing dispute in relation to the probability of loss arising from the acts of discrimination, which relates to whether the Claimant's health would have deteriorated to the extent that she would not have been able to work from August 2011 had there been no acts of discrimination. The Claimant has, if so advised, permission to obtain (but not to rely upon without further order) an expert report from a psychiatrist who must not have been involved in the Claimant's treatment and must be able to prepare a timely report, and in any event to produce such a report by no later than 26 November 2016.**
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> **1.2. The Claimant shall disclose any report obtained to the respondent within 14 days of receipt of that report."**

7. The Judge directed that there be a further Preliminary Hearing on 17 December 2018. No written Reasons were provided for the 31 August 2018 Decision. At the Preliminary Hearing on 17 December 2018, a report had indeed been obtained, exchanged and tabled, from Dr Alfred White, a consultant psychiatrist. The Judge gave further directions for preparations for the Remedy Hearing. A separate minute promulgated in January 2019 recorded his decision with Reasons to refuse the Claimant's application to be permitted to adduce medical evidence. Those Reasons run to six paragraphs and it is most convenient to set them out in full.

> **"1. On 31 August 2018 I gave the Claimant permission to obtain a medical report. The reason for allowing this was that there was a dispute with regard to the probability of loss relating to the acts of discrimination which have been found against the respondent and in the Claimant's favour. I specifically reserved the position as to reliance on that report. That report has been obtained and disclosed. The Claimant seeks to rely on that report and to seek an update on the report based on an interview with the Claimant as the original report had, as I had envisaged when making my initial order, relied on existing material as to the Claimant's health at the relevant time.**

2. I was provided with a copy of the report dated 12 November 2018 prepared by Dr Alfred White a consultant psychiatrist. The report sets out the history of the Claimant's condition and recognises that the issue to be dealt with is whether, if the respondent had made adjustments between April and August 2011 the Claimant would have been able to maintain employment with the respondent. Dr White states that he has been asked to assess the probability that the decline in the Claimant's mental health to the point where she was no longer capable of working at all may have been reversed, halted or slowed by the adjustment of redeployment.

3. His opinion following a review of the medical records and some other documents sets out the following:

> **3.1. That from the records her specific psychiatric diagnosis is uncertain, but that his knowledge of the clinic where the Claimant was an inpatient was that it dealt with those with neurotic or personality difficulties which affected them to the extent that they could not function at home or work. His conclusion overall was that the Claimant suffers from an obsessive-compulsive personality disorder.**
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> **3.2. Based on this putative diagnosis he indicates that some of the characteristic markers of this disorder are excessive doubt, preoccupation with detail, perfectionism interfering with task completion, preoccupation with productivity over pleasure and relationships, pedantry, rigidity and stubbornness.**
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> **3.3. With these elements in mind he refers to the need for the Claimant to have a structured work environment and not one where there was regular change hour by hour or day by day. He further indicates that the Claimant would not cope well where management made criticisms of her work.**
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> **3.4. Dr White states that he is *"of the impression"* that an offer of alternative work following a recommendation made on 3 February 2011 the Claimant "*may have been able to get back to work"*. He sets out that there was evidence of implied criticism of the Claimant's health declaration made in 2006 and that with *"encouragement---- it would have been possible for her to return to the workplace"* (my emphasis in bold). Dr White does then also go on to state that he thought it unlikely that the Claimant would have been able to continue working until the age of 60 because of the severity of her problems and this *"I clearly cannot say with any certainty how long she would have actually worked but I think there is probably a greater than 50% chance that she would have worked half this time, in other words that she would have continued working to 2014. It is clearly possible that if a very structured job without change had been found for her that she could have continued working until the age of 60 or, alternatively, if there had been a great deal of flux/change at the hospital that she would not have lasted as long".***

4. In the courts permission to rely on expert evidence should be granted when it is reasonably required to resolve the proceedings (Rule 35;1 Civil Procedure Rules). The tribunal is of course a less formal forum than the courts and is not bound by the CPR but nonetheless, in my judgment, that does not imply that a less stringent test should be applied. Therefore, I ask myself is the evidence likely to be necessary to resolve the issue it intends to address or helpful in doing so.

5. I concluded that the evidence of Dr White would not be necessary or be likely to be helpful. On the specific issue of whether, in 2011, the Claimant's condition was such that an adjustment would have meant that she carried on being able to work, the report is not expressed in terms of probability; Dr White refers to possibilities. The issue is one of causation, it is for the Claimant to establish that a particular loss arose from the discrimination. The tribunal would not be assisted in making such a decision based on the report. Although in the latter part of the report probability is dealt with, in my judgment the context refers to a situation where the Claimant had been placed in alternative employment and deals with the impact of her disability on the length of time she could expect to work given particular working conditions. It does not, in my judgment, supplement the earlier paragraph dealing with matters of causation. If the report (or any subsequent report) cannot assist on the key issue of causation then I ought not order that expert medical evidence be relied upon.

6. The overriding objective applies to this decision also. The expense of a further report and the cost to the respondent of instructing its own expert is significant. A decision to permit medical expert evidence would further delay the end of a case which has been before the

tribunal since 2012. In my judgment the tribunal is able to approach the matters of the Claimant's loss without expert evidence and it would not be in keeping with the overriding objective to allow such evidence in the circumstances. The Claimant's application is refused."

The Appeal

8. The Claimant appealed that Decision. The Notice of Appeal set out four grounds. When it was considered on paper by the President, Choudhury J, he considered grounds three and four (which related to a reconsideration Decision and concerned whether the original Decision gave sufficient reasons), not to be arguable. The Claimant did not seek to pursue those grounds further before the EAT. Grounds one and two he considered to be arguable, and the Full Hearing of them has come before me today. Grounds one and two are as follows:

> **GROUND 1 – MISDIRECTION/MISAPPLICATION OF THE LAW REGARDING PERMITTING EXPERT EVIDENCE**
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> **1.1. The tribunal misdirected itself or misapplied the law when considering whether to grant permission to rely upon expert evidence. The correct approach is set out *De Keyser Ltd v Wilson [IRLR 324] (at paragraph 36)* and analogous to Part 35 of the Civil Procedure Rules 1998. In particular, the tribunal should assess whether expert evidence is "*reasonably required to resolve [the issue]*". The tribunal, having set out the correct test, substantively rephrased the test and asked whether expert evidence was "*necessary*". Further, the tribunal materially adopted the wrong approach in that: the tribunal first required the Claimant to obtain an "e*xploratory*" medical report (as described by the Judge at the hearing), stated, in preparing this report, the expert should not see the Claimant and the assessed the application by reference to the evidential strength of that report, compared with what would be required at trial.**
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> **GROUND 2 – REACHED A DECISION ON PERMITTING EXPERT EVIDENCE WHICH WAS PLAINLY WRONG**
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> **1.2. The tribunal was wrong to reject the report of Dr White on the grounds the report addressed the question of causation in terms of possibilities, not probabilities (paragraph 5). This is plainly wrong as Dr White's conclusion was based expressly on the balance of probabilities (namely greater than 50%) and did so setting out the competing possibilities in relation to the roles the Respondent might have offered (this being the sole question of causation).**

9. The Respondent subsequently filed an amended Answer resisting both live grounds of appeal.

Arguments

10. At both the Hearings before the ET in 2018, the parties were represented by the same counsel who have appeared again before me today: for the Claimant, Mr Allan Roberts, and for

A the Respondent, Mr Julian Allsop. I have had the benefit of reading their respective skeleton arguments and hearing their oral agreements this morning. I have considered them all, and what follows is only a summary of the main points.

B

11. At the heart of Mr Roberts' case is the following proposition. An issue with which the Tribunal will have to engage, in order to determine remedy in respect of the reasonable adjustments claim, is whether, had the Respondent complied with its duty and redeployed the C Claimant in the relevant time window in 2011, to a suitable role that she was fit to do, the deterioration in her health would, or might, have been reversed, slowed or halted, such that she would or might have remained employed longer than she, in fact, was. That is a question, he D says, which is plainly suitable for expert medical opinion and cannot be fairly determined without it. The Tribunal was therefore wrong not to permit the Claimant to adduce such evidence.

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12. Mr Roberts, more specifically, argues that the Tribunal applied the wrong test for determining whether expert evidence should be permitted. It applied a test of necessity, but the appropriate test following **De Keyser Limited v Wilson** [2001] IRLR 324, and by analogy with F the approach taken in **CPR** Rule 35, is one of whether such evidence is reasonably required. It also, he says, wrongly took the approach that the Claimant required permission to obtain Dr White's report. She did not. It also wrongly determined whether, in principle, expert evidence G should be permitted, by reference to an analysis of Dr White's report. Had expert evidence been permitted, as it should have been, the evidence prepared for the Remedy Hearing would not have been restricted in the way that particular report was; and the assessment of that H evidence would, and should, in any event, have been left to the Tribunal at the full Remedy Hearing.

13. Finally he submits, as to ground two, that the Judge's critique of Dr White's report as offering no assistance was, in any event, also wrong. In particular, contrary to the Judge's view, Dr White had properly addressed the issues that he was asked to address, and he had not merely spoken of possibilities, but had expressed his opinion helpfully in terms of probability.

14. Mr Allsop argued that the Judge had taken the correct approach to the test of whether Dr White's evidence should be admitted. He asked whether it was necessary to resolve the issue in question, or helpful in doing so. His self-direction was consistent with **De Keyser** and the approach of **CPR** 35, including considering the question in light of the overriding objective. The previous Order of 31 August 2018, which, observed Mr Allsop, had not itself been challenged by way of appeal or application for reconsideration, provided relevant context. The Judge had not, as alleged in the grounds of appeal, required the Claimant to obtain an "exploratory" report, but a forensic report based on existing medical evidence. The Judge then, at the later Hearing, properly had regard to that report and fairly assessed its contents.

15. This, he continued, was an exercise of case-management discretion; an appellate court may only interfere with the exercise of such a discretion if the Judge has erred in principle, left a relevant matter out of account, taken an irrelevant matter into account, or otherwise approached the balancing exercise in a way that is plainly perverse or unfair. See **Roberts v Skelmersdale College** [2003] ICR 1127 at paragraph 29. This Decision, he said, did none of those things; the Judge went about the task in a permissible way.

16. Ground two, said Mr Allsop, also advanced no good basis to interfere with this exercise of discretion. The Judge's view of the utility of the report was a permissible one. In particular,

he was entitled, in paragraph 5 of his Reasons, to focus on the lack of any assessment by Dr White, of the probability of the Claimant having returned to work in a redeployed role. The Judge also properly had regard to the overriding objective, and, in particular, the expense and delay that would be generated by permitting expert evidence. Mr Allsop also cited **Barings Plc v Coopers & Lybrand (No 2)** [2001] EWHC 17 at paragraphs 23 and 45, for the proposition that a report which amounts to expert evidence may, nevertheless, not be admitted, if it is not relevant, in the sense of helpful to the determination of any issue which the Court has to decide. He described that as a residual discretion to exclude.

The Law

17. The **Employment Tribunal Rules of Procedure 2013** do not contain any specific Rules concerning expert evidence. Nor have earlier versions, over the years, done so; although, the additional Rules, which apply specifically to equal value claims, do contain such provisions. In **De Keyser** at paragraph 36, however, the EAT give the following guidance:

> **"36. We must not be thought to be encouraging the use of expert witnesses; their instruction might be thought by some to militate against the inexpensive, speedy and robustly "common-sensical" determinations by the "Industrial Jury" which Employment Tribunals were called into existence to provide. However, there plainly are cases where one or both parties or the Tribunal itself see experts to be necessary or desirable. We wish to procure that where they are necessary the arrangements for them are as economical and effective as is consistent with fairness and convenience. Our guidelines (and they are only that) are for guidance until more formal rules, including provisions as to the costs involved, emerge. They are as follows: -**
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> > **(i) Careful thought needs to be given before any party embarks upon instructions for expert evidence. It by no means follows that because a party wishes such evidence to be admitted that it will be. There are valuable observations about expert evidence in Whitehouse -v- Jordan [1981] 1 WLR 246 at 256H, H.L.(the expert's evidence should be and be seen to be the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation); Midland Bank -v- Hett, Stubbs & Kemp [1979] 1 Ch 383 at 402 c-e per Oliver J. (doubts as to the use of expert evidence when it strays beyond describing accepted standards of conduct within particular professions) and Re M and R (minors) [1996] 4 All ER 239 at 251-254 C.A. (the need for the Tribunal to keep in mind that the ultimate decision is for it) - see also the very recent cases of Barings plc -v- Coopers & Lybrand, The Times 7th March 2001 and Liverpool Roman Catholic Diocesan and Trustees Inc -v- Goldberg, The Times 9th March 2001. Although the Employment Tribunals' practices and rules differ from those of the High Court, guidance may be found on several subjects by way of analogy from the provisions of the Civil Procedure Rules 35.1 to 35.14 and the associated Practice Direction. A prudent party will first explore with the Employment Tribunal at a Directions Hearing or in correspondence whether, in principle, expert evidence is likely to be acceptable;**

(ii) Save where one side or the other has already committed itself to the use of its own expert (which is to be avoided in the absence of special circumstances) the joint instruction of a single expert is the preferred course;

(iii) If a joint expert is to be instructed the terms which the parties will need to agree will include the incidence of that expert's fees and expenses. Nothing precludes the parties agreeing that they will abide by such view as the Tribunal shall later indicate as to that incidence (though the Tribunal will not be obliged to give any such indication) but the Tribunal has for the time being no power as to costs beyond the general provisions of Rule 12;

(iv) If the means available to one side or another are such that in its view it cannot agree to share or to risk any exposure to the expert's fees or expenses, or if, irrespective of its means, a party refuses to pay or share such costs, the other party or parties can be expected reasonably to prefer to require their own expert but even in such a case the weight to be attached to that expert's evidence (a matter entirely for the Tribunal to judge) may be found to have been increased if the terms of his instruction shall have been submitted to the other side, if not for agreement then for comment, ahead of their being finalised for sending to the expert;

(v) If a joint expert is to be used, Tribunals, lest the parties dally, may fix a period within which the parties are to seek to agree the identity of the expert and the terms of a joint letter of instruction and the Tribunal may fix a date by which the joint experts' report is to be made available;

(vi) Any letter of instruction should specify in as much detail as can be given any particular questions the expert is to be invited to answer and all more general subjects which he is to be asked to address;

(vii) Such instructions are as far as possible to avoid partisanship. Tendentiousness, too, is to be avoided. Insofar as the expert is asked to make assumptions of fact, they are to be spelled out. It will, of course, be important not to beg the very questions to be raised. It will be wise if the letter emphasises that in preparing his evidence the expert's principal and overriding duty is to the Tribunal rather than to any party;

(viii) Where a joint expert is to be used, the Tribunal may specify, if his identity or instructions shall not have been agreed between the parties by a specified date, that the matter is to be restored to the Tribunal, which may then assist the parties to settle that identity and those instructions;

(ix) In relation to the issues to which an expert is or is not to address himself (whether or not he is a joint expert) the Tribunal may give formal directions as it does generally in relation to the issues to be dealt with at the main hearing;

(x) Where there is no joint expert the Tribunal should, in the absence of appropriate agreement between the parties, specify a timetable for disclosure or exchange of experts' reports and, where there are 2 or more experts, for meetings (see below);

(xi) Any timetable may provide for the raising of supplementary questions with the expert or experts (whether there is a joint expert or not) and for the disclosure or exchange of the answers in good time before the hearing;

(xii) In the event of separate experts being instructed, the Tribunal should encourage arrangements for them to meet on a without prejudice basis with a view to their seeking to resolve any conflict between them and, where possible, to their producing and disclosing a Schedule of agreed issues and of points of dispute between them;

(xiii) If a party fails, without good reason, to follow these guidelines and if in consequence another party or parties suffer delay or are put to expense which a due performance of the guidelines would have been likely to avoid, then the Tribunal may wish to consider whether, on that party's part, there has been unreasonable conduct within the meaning of Rule 12 (1) (as to costs)."

18. It needs to be borne in mind that, in respect of a given claim or issue, the ET may be called upon to adjudicate different types of question concerning expert evidence. Two, in particular, need to be distinguished. The first is whether, in principle, expert evidence will be permitted to be adduced in relation to a given issue in the case at all. If the answer to that question is yes, then, as a distinct matter, the Tribunal will need, secondly, to consider the form which that evidence will take, what steps the parties should be taking in relation to its preparation and disclosure, how it will be presented at the Hearing, and so forth.

19. As **De Keyser** explains, the **CPR** do not apply to litigation in Employment Tribunals as such. Nevertheless, in this area, the provisions of **CPR 35** and the associated **Practice Direction** may provide a useful source of guidance by way, at least, of analogy. The opening section within paragraph 36 in **De Keyser**, and the discussion there under sub point (i), make clear that in the ET, as in the Civil Courts, permission is, in principle, required for expert evidence to be adduced. That is, in essence, because it is opinion evidence rather than evidence of fact. However, the discussion in the remainder of that paragraph in **De Keyser** is largely devoted to the second of the two types of question that I have identified. It does not specifically explore, in any detail, the first of those questions, namely, what the threshold test is for it to be appropriate, in principle, to admit expert evidence in relation to a given issue.

20. As to that, counsel before me agreed, rightly, that the position under the **CPR** is clear. **CPR** 35.1 states: "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings." The "reasonably required" formulation is also repeated, I observe, in paragraph 1 of the **Practice Direction**.

21. I also observe that the **White Book** commentary cites a number of authorities which have addressed particular, specific problems and scenarios, but the "reasonably required" test is a constant mantra. References, for example, to what is, "Necessary to ensure fairness" or "Necessary to resolve the proceedings justly" do not, in my view, signify a different test, but merely express in different words, or flesh out, the same test.

22. The authorities also, unsurprisingly, indicate that whether expert evidence is, "reasonably required" should be approached consistently with the overriding objective. However, that is not a separate or additional test. It merely informs the overall assessment of whether expert evidence is reasonably required. In my judgment, the starting point is to consider such matters as the degree to which the issue in question inherently turns on expert evidence, the likely significance of the contribution that expert evidence may make, and/or the importance of the issue itself in the context of the overall issues in the case. If the overall contribution of expert evidence by reference to such criteria would be low or marginal, then that might be outweighed by the cost, time, and/or complication that would be involved in obtaining it, when judging whether it is reasonably required. However, if the contribution of expert evidence would, on any view, be appreciably significant, then such considerations ought not ordinarily to tip the balance against allowing it to be adduced.

23. As the authorities establish, in some areas not otherwise covered by express provision in the **Employment Tribunal Rules of Procedure**, there are good reasons for ETs to follow their own distinctive approach from that taken by the **CPR**. However, in this particular area, both counsel agreed before me that the Tribunal was right to take the **CPR** approach as its guide. I see no good reason why an ET should not also apply the "reasonably required" test, informed by the overriding objective in the form in which it appears in the ET's own Rules. That is

consistent with the approach already designated in the additional Rules, which specifically apply in equal value cases (where the need for expert evidence is generally taken as a given). In addition, the fact that the test is what is reasonably required enables Tribunals to determine this question in a way that is sensitive to the distinct characteristics of this jurisdiction, both procedurally and as to the types of issue that typically give rise to consideration by ETs of the need for expert evidence.

24. Turning to the second of the two types of question that I have mentioned, that is the main subject of the above guidance given in **De Keyser** at sub points (ii) through to (xii). It remains invaluable and should always be consulted; I cannot improve upon it. But it is worth restating that it remains guidance and is not a rigid template. The Tribunal always retains the flexibility to tailor its particular directions to the particular case, so long, of course, as its approach to that is fair. As to that, a number of particular scenarios are considered in other authorities, but I do not need to explore them for the purposes of deciding this appeal.

25. In some cases, other questions may sometimes arise further down the line. Where expert evidence has been permitted, directions have been given, and a report or reports have been obtained, there may, potentially, then be a challenge as to whether a particular report, or all of it, should be admitted into evidence at the Hearing of the issue in question. Such challenges, however, should not be mounted or acceded to, in advance of the Hearing, save where there is a clear-cut basis for them. That might arise if, for example, there was a clear procedural basis for a challenge, perhaps because a report had plainly strayed into issues other than those in respect of which expert evidence had been permitted. However, where the challenge is as to the substantive contribution which the content of the particular report makes to the issue in question, caution is required. Unless it is plainly obvious that the actual content

of that report, as it turns out, could be of no possible assistance to the Tribunal, so that the report in question is, in effect, plainly irrelevant, generally such questions should be left to the appreciation of the Tribunal which decides the substantive issue itself.

26. I add that, when considering the first of my above two questions, the starting point should be to identify and, as necessary, clarify with precision, the particular issue or issues in the case in relation to which expert evidence is sought to be adduced. That will give the Tribunal the essential foundation it needs in order to decide, first, whether expert evidence should be permitted; and, if it is, it will provide a clear point of reference for instructions and/or questions to the expert(s). In disability discrimination claims, for example (although not in this case), there may, at the liability stage, be multiple issues in relation to both the definition of disability and the types of discrimination claimed. In such a case, the Tribunal would need clearly to address which particular issues, if any, expert evidence is to be permitted to cover.

27. Further, generally, the foregoing is the logical order in which the Tribunal should take the fences, even if, as will often be the case, the first two questions are considered and determined on the same occasion. Further, in most cases, at the point when the Tribunal has to engage with the first and then possibly the second question, neither party will yet have obtained any expert report specifically for the purposes of the litigation. Litigation in ETs is, in this respect, different from that of some types of claim in the civil jurisdiction, in respect of which certain types of medical evidence may sometimes be required to be tabled from the outset. Further, even if, in a Tribunal claim, a party has already obtained a report on which they hope to be permitted to rely, the order of business should generally still be the same.

Discussion and Conclusions

28. I turn, then, to my conclusions in relation to the appeal in this case. First, I note that, in the minute of the 31 August 2018 Hearing, the Tribunal identified the issue in respect of which the Claimant was seeking permission to adduce expert evidence. It was described there as, "whether the Claimant's health would have deteriorated to the extent that she would not have been able to work from August 2011 had there been no acts of discrimination."

29. Though it could perhaps have been set out more fully there, that fairly encapsulates the issue, and covers the more detailed set of questions which, as the Tribunal records at paragraph 2 of its Reasons emanating from the 17 December 2018 Hearing, Dr White identified that he was specifically asked to address. That, I add, indeed appears from page 3 of his report. In particular, he wrote:

> **"I am asked to make an assessment of the probability that the decline in her mental health to the point where she was no longer capable of working at all may have reversed, halted or slowed had the UHB complied with its duty to make reasonable adjustment, particularly to have redeployed her between April and August 2011, it is an assessment of the probability we seek a view on.**
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> **In summary, I am asked to give an opinion whether there was a chance that, had Miss Morgan been redeployed by the UHB in the period of April 2011 to August 2011, the decline in her mental health to the point where she was no longer capable of working at all could have been reversed, halted or slowed. Secondly, what do I believe was the percentage probability that her mental health decline would have been reversed, halted or slowed and whether I believe that if UHB had complied with its duty, Miss Morgan would nevertheless have retired through ill-health prior to reaching either 60 or 65. Query, if so, at what age do I believe she would have retired due to ill-health and what do I believe the percentage probability of this may have been?"**

30. As I have noted, that this was an issue at the remedy stage was foreshadowed by the time of the Hearing in the Court of Appeal in February 2018. They recognised in their end note that such a claim was, in principle, possible, whilst expressing their doubts about whether it could be made good by evidence, and, in so many words, exhorting the Claimant to reflect on that. However, what is clear, in any event, and not disputed in the context of the present appeal, is that the Judge correctly identified at the 31 August 2018 Hearing that this was, and is, a live issue with which the Tribunal at the remedy Hearing itself will have to grapple.

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31. Secondly, in the Decision emerging from the 17 December 2018 Hearing, the Tribunal, it seems to me, correctly directed itself, as such, as to the test to be applied when deciding whether expert evidence should be permitted. In paragraph 4 of its Reasons, it referred, correctly, to the test under the **CPR** being whether expert evidence is reasonably required, and it correctly took the approach that the same test should be applied in the ET.

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32. I do not agree with Mr Roberts' submission that, in the final sentence of paragraph 4 of the Reasons, the Judge then misdirected himself and set the bar higher than he should have. As Mr Allsop pointed out, he referred to whether the evidence was likely to be necessary to resolve the issue, or helpful in doing so. That was plainly intended to be just another way of describing the same test. The language used by the Judge at this point indeed echoes that used in some of the authorities on the **CPR** and it does indeed, in my view, come to the same thing. Nor was the Judge wrong, as such, to consider that, in applying that test, regard should be had to the overriding objective.

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33. However, we enter more troubled waters when one turns first to the Judge's approach, while not *ordering* the Claimant to obtain and then table a report, (a) of making it a *condition* of his consideration of her application that she obtain a report in a certain form; and (b) of then deciding that application by reference to that report. Secondly, and, in any event, it is of concern that, when we come to the Judge's reasoning, he is actually seeking to apply the test of "reasonably required" to the contents of *that* report.

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34. Mr Roberts submits that, even if the Judge correctly directed himself as to the approach he *should* take, he failed, in both respects, actually to *follow* the correct approach. As to the first of these, as I have described, rather than simply adjudicate at the August Hearing whether

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A expert evidence on this issue should, *in principle*, be permitted, which was what the Claimant was asking him to do, the Judge instead gave the Claimant permission to obtain, but not rely upon, a report, prepared on a specific basis, with further directions being given for any such report, if obtained, to be disclosed before the next Hearing.

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35. Whilst it is correct that that Decision itself was not the subject of an appeal or application for reconsideration as such, it set the course, and provided the basis, for what happened at the next Hearing, by which time Dr White's report had, indeed, been obtained and tabled. I do not think it matters whether the type of report that the Judge authorised is or was described as exploratory or forensic, or both or neither. What matters is the substance of the ground rules set by the Judge under which it was prepared. As to that, it is clear from the 31 August 2018 Order, the report itself, and the Judge's observations in the Reasons emanating from the December Hearing, that what he had permitted and directed as a condition of further consideration of the application, was a report of an independent specialist, based *solely* on a paper review of the existing contemporaneous medical records – GP, community mental health and occupational health. The Judge confirmed in paragraph 1 of the 31 August Reasons that what he envisaged was, indeed, a report based on *existing* material.

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36. What is less clear is why the Judge elected to take the approach of making the Claimant first obtaining such a report, a condition of further considering the application, and then, at the further Hearing, determining the application by reference to it. We do not have the benefit of written Reasons for the 31 August 2018 Order. However, both counsel, who also participated in both Hearings, informed me that, at the 31 August Hearing, the Judge made observations to the effect that he would have expected the application to have been accompanied by a report, as

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the usual way of doing things. So, he does not appear to have taken this approach because of what he regarded as some unusual or peculiar feature of this particular case.

37. Be that as it may, in my judgment, in taking this approach, and in coming to his decision arising from the December Hearing, on the Claimant's application, on the basis of that approach, the Judge took a wrong turn. The Judge should, first, have decided in principle whether expert evidence in relation to this issue should be permitted. Then, if his answer to that was yes, he should have gone on to give directions, drawing as appropriate on the **De Keyser** guidance, on matters such as whether there should be separate reports or a joint report, the basis on which the report or reports would be prepared, whether questions to the expert or experts should be permitted, whether oral expert evidence should be permitted, and so forth.

38. I suppose there might be some issues that are so obscure, that a Judge cannot actually decide whether expert evidence would have anything to offer on the underlying issue, without the benefit of expert evidence on that very question. But ETs are unlikely to journey into such outer reaches of scientific knowledge very often, if at all; and this was, in any event, not such an occasion. The Judge, therefore, both could and should have decided, in principle, whether to permit expert evidence on this issue before, if he did so, proceeding to the second stage of considering further directions. If the Judge should, indeed, have permitted expert evidence, then, in the usual way, the expert or experts would, as part of the process, have needed to meet with the Claimant; and, as I have said, consideration at the second stage would have included such matters as whether to allow for questions to be put to the expert or experts, whether, if there were to be two experts, they should be directed to meet and draw up points of agreement and disagreement, and so forth.

39. However, the approach which the Judge in this case in fact took, meant that the Claimant's application was rejected on the basis of a much more limited report, based only on a paper review of existing records. Further, the approach that the Judge took meant that the significance of the expert evidence could not be considered by the full Tribunal which will have the task of deciding remedy, in the context of all the evidence that might be presented to it at the Remedy Hearing, and, as it may think fit, drawing also on previous extant findings of fact and any new findings of fact which it might make.

40. The Judge's approach cannot, I conclude, be sustained, on the basis that it was a proper exercise of a case-management discretion with which the EAT should not interfere, as it was, in principle, wrong and unfair. Nor does the **Barings** case establish that a Court or a Tribunal has a residual discretion to exclude expert evidence which is reasonably required to determine an issue, or otherwise refine or qualify that essential test. Passages in that authority, cited by Mr Allsop, address a different point. That is that the fact that opinion evidence meets the definition, as such, of being *expert* evidence, does not mean that it must necessarily be admitted. That is because it must still be decided whether it is reasonably required to enable the determination of the particular issue in question. That will not be so if the issue is, for example, correctly viewed by the Court or Tribunal as being a pure one of law.

41. However, for reasons to which I will come, this was not a case where Dr White's evidence, or any possible report on the issue in question, was, or would be, so plainly of no assistance and/or irrelevant to the issue, that the possibility of admitting such evidence could and should have been excluded in advance of the substantive remedy Hearing.

42. Further, and in any event, I have concluded that the Judge also erred in his appraisal of the content of Dr White's report and in the way that he based his decision on it. First, the Judge

was of the view (paragraph five of his Decision) that "the report (or any subsequent report) cannot assist on the key issue of causation." As to that, the Tribunal had already found in its Liability Decision that the Respondent would have had at least some available roles that were suitable for the Claimant, and which, as of April 2011, she would have been fit to carry out. It had found that the failure to redeploy her to such a role was a failure to comply with the duty of reasonable adjustment. It was also a given that, had the Claimant been offered such a role, she would have taken it up. That is, no doubt, why the Tribunal spoke of "redeploying" her to such a role, rather than merely offering her such a role; but it is, in any event, clearly part of the premise of their 2015 liability Decision, in particular at paragraphs 6 and 7. The issue for Dr White, or any other expert, was, on the premise that the Claimant had taken up such a role, what would or might have happened over the succeeding weeks, months or years, in terms of the course of her mental health and its impact on her ability to continue to work.

43. After some discussion during oral submissions, I believe that Mr Allsop acknowledged that it was, and is now, a given that the Tribunal must proceed from the premise that the Claimant would have been redeployed to a role that was both suitable and one that, at the time, she was capable of doing; and that the issue is as to what would have happened next.

44. In his Decision, the Judge focused on two successive paragraphs which appear at page 19 of Dr White's report. The Judge appears to have read the first paragraph as addressing the question of whether, if the Claimant had been offered redeployment to such a role, she would have accepted it. On the Judge's reading, Dr White spoke there only of the possibility, not the probability of that happening. The Judge's view was that Dr White's statement in the second of those paragraphs, that there was, "probably a greater than 50% chance that she would have

A continued working until 2014" did not, in the Judge's words, "supplement the early paragraph dealing with causation."

B 45. However, there are two difficulties with that. First, I am not sure that is a correct reading of what Dr White meant by the comment in the first paragraph: "she may have been able to get back to work." But, if that is a correct reading of what Dr White was considering in that paragraph, that was not a question which he needed to consider; it was a given. Secondly, C in any event, Dr White did express the view, at the end of that paragraph, that, on balance, it would have been possible for the Claimant to return to the workplace. Further, he went on, in the next paragraph, to give a clear, reasoned view, on the essential question that he was asked to D address, being that, "there is probably a greater than 50% chance that she would have worked for half this time," that is to say, half the time from 2011 to when the Claimant turned 60 in 2017. He continued: "…in other words, that she would have continued working until 2014."

E 46. This, indeed, is the essence of the causation question for the Tribunal. It is whether the failure to re-deploy the Claimant, as recommended by the OH advisor Dr Tidley, was a material contributing cause of the decline in her health to the point that, by August 2011, she was not fit F to work in any capacity. To answer that question, the Tribunal needs to consider the counterfactual scenario of her having been redeployed to such a role; and how, that having happened, matters then would, or might, have played out, in terms of her mental health, and G hence in turn whether her employment would or might still have ended when it, in fact, did.

47. Mr Allsop, in oral submissions, criticised what he said was the excessively speculative H nature of Dr White's report, speculating, for example, about the past origins and nature of the Claimant's longstanding illness. There are, however, a number of difficulties with those

submissions. The first is that, in his critique, Mr Allsop ranged considerably wider than the Judge did in terms of the material that formed the basis of his Decision. Secondly, it seems to me that any clinician asked to write a report of this sort will want to say something about the history and the nature of the illness, particularly if, as Dr White plainly did, he considers it important to form some view about that before proceeding to the matters in hand. Dr White, it seems to me, was doing his best, given that he only had the existing written materials to go on, and he did not have the benefit of having met with the Claimant.

48. Thirdly, the questions he was being asked to consider involved a counterfactual scenario. Just as, when an ET is considering a **Polkey**-type question involving counterfactual scenarios, it must, necessarily, to a degree speculate, and is permitted to do so, as long as its speculation is rooted in the available evidence, so, it seems to me, Dr White had necessarily to speculate to a degree, but drawing upon the hard evidence that was available to him in order to do so. This, indeed, it seems to me, is what experts are very often called upon to do.

49. Bearing in mind that Dr White was required to restrict himself to a paper appraisal of existing records, I do not see how the Tribunal could safely or properly conclude that his report could be of no assistance on the causation issue as correctly understood. Nor do I see how it could properly rule out that any subsequent report could be of assistance on that issue. A subsequent report would have the benefit of drawing on an interview with and/or examination of, the Claimant. Further, and, in any event, where there is thought to be some uncertainty or ambiguity about what an expert is saying, and, in particular, how they are pitching their assessment, this is exactly the sort of thing that may be amenable to written questions, dialogue between experts and/or, in an appropriate case, live cross-examination. However, the Judge

A engaged in an interpretation of Dr White's limited report, on which he then based his decision to refuse the application, without the benefit of any of that.

B 50. Mr Allsop referred to the Judge's reliance on the overriding objective. He was entitled, in any event, said Mr Allsop, to take into account the cost and time involved in obtaining an expert report or reports, and it was for the Judge's appreciation whether that counted against the granting of the application. However, the difficulty with that is that the Judge did not say that C he thought that a report or reports could or might help to some degree, but that the cost of obtaining one outweighed that. He said, in terms, that he did not think that this report, or any future report, could help, and only went on thereafter to refer to the overriding objective, and, in D particular, cost and time, as additional considerations.

51. The Judge, for reasons I have given, went about the task in the wrong way, and, in any E event, came to an impermissible view of the contents of the report. For all of those reasons, I have concluded that both ground one and ground two succeed, although it would have been sufficient for ground one alone to do so, and this appeal must be allowed.

F 52. I then have to consider on what basis the matter should be remitted to the Tribunal. In particular, should I remit on the basis that the Tribunal will first need to decide afresh whether, in principle, to permit expert evidence on this issue, and then, only if it does so, then to go on to G consider and give further directions? Can I substitute my own decision on the first question? Against the contingency that I might allow the appeal, and because it, to some extent, overlapped with the issues raised by the appeal itself, I have already heard argument on this point from both counsel this morning. They agreed that, should I allow the appeal, I could go H on to deal with that issue without the need for further submissions.

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53. Applying the guidance in **Jafri v Lincoln College** [2014] ICR 920, this is plainly not a case in which the error could not have affected the result. It follows that I can only substitute my own decision if it is a case in which, had the Tribunal approached the matter correctly, only one outcome was possible, or it is one in which I am in as good a position as the Tribunal would be to take the decision, and the parties have agreed that I should do so.

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54. As to that, Mr Allsop indicated that he considered that, were I to allow the appeal, I could not conclude that only one decision was possible, nor would he, on the Respondent's behalf, consent to me re-taking that decision in place of the Tribunal. Mr Roberts contended that, taking the correct approach in law, there is only one correct decision that the Tribunal could have taken: namely to permit expert evidence to be adduced in this case. I have come to the conclusion that Mr Roberts is right, and that approaching correctly, the question of whether expert evidence on this issue, in this case, should be permitted, only one answer is possible. That is for the following reasons.

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55. While there is no rule of law that an issue of this type can only ever be properly decided with the benefit of expert medical evidence, as the EAT put it in **Royal Bank of Scotland v Morris** [2011] UKEAT/0436/10, particularly in relation to matters to do with mental health, the issues will often be too subtle for the Tribunal to be able properly to resolve them, even if there are contemporaneous medical records, without the benefit of specific expert medical evidence prepared for the purposes of the litigation. I invited submissions this morning on **Morris**. Mr Allsop said that the present case was not analogous as, in **Morris**, the issues concerned were whether the Claimant in that case was disabled as a matter of law. Further, he said, in this case, the Employment Tribunal had and has available to it a very substantial body of existing clinical evidence.

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56. In my judgment, however, there is a strong analogy. The issue in this case is inherently suitable for expert medical evidence because it is, in essence, one which turns on an appreciation of the nature, history, pathology, and aetiology of the Claimant's illness, as the basis from which to engage with the counterfactual scenario. Nor does the fact that the issue involves consideration of a counterfactual, rather than what actually occurred, make it less amenable to such expert evidence. Indeed, I think that it means that the Tribunal is in more need of expert assistance for that reason, because it cannot simply attempt to work from the existing medical records of what has happened. It needs expert assistance in attempting to extrapolate from them and other relevant facts as to what, on the counterfactual scenario, might or would have happened, in terms of the Claimant's ongoing mental health.

57. Whilst, in accordance with the overriding objective, considerations of the cost, delay and possibly greater Hearing time involved in obtaining and considering expert evidence, fall to be taken into account, this is a case in which the significance of that evidence to the fair determination of the issue is such that they cannot properly tip the scales against allowing the application. This will be the major contentious issue for the ET at the Remedy Hearing. I have not seen the latest, detailed schedule of loss or counter schedule. However, it is clear, from everything I have read and heard, and whatever other aspects may need to be factored by the Tribunal into the counterfactual scenario or other future contingencies considered, that the claim that the Claimant would or might have remained employed for longer than she, in fact, was, is clearly being argued as having a considerable financial impact on the remedy.

58. This issue is, at its heart, a medical question. Whilst determination, at the end of the day, of all questions is a matter for the ET which decides remedy, the contribution and assistance of medical evidence is plainly likely to be significant and considerable. Therefore, I

have concluded that the ET cannot properly make a fair decision without permitting it to be adduced. I therefore am in a position to, and do, substitute a decision that expert evidence should be permitted on this issue.

59. Following my oral Decision to that effect, both counsel invited me to give further timetabled directions in relation to such expert evidence, in the form of a draft which they had, in fact, agreed against the contingency that I might so decide. However, it goes beyond the powers of the EAT to do so, and, in any case, the Tribunal itself is best placed to give directions for the conduct of litigation that is proceeding before it. That will, therefore, be its next task.