Appeal No UKEAT/0148/19/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 January 2020

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESDIENT)

(SITTING ALONE)

MR C DAVIES — APPELLANT

DL INSURANCE SERVICES LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR SAUL MARGO (of Counsel) Direct Public Access
For the Respondent	MISS RACHEL WEDDERSPOON (of Counsel) Instructed By: Pinsent Masons LLP 3 Hardman Stret Manchester M3 3AU

SUMMARY

REDUNANCY

The Claimant was unfairly dismissed for redundancy. The Tribunal failed to order re-engagement after accepting the Respondent's evidence that the Claimant was not the best person for an available job which he contented he could do. The Tribunal thought there was insufficient information to identify a job that he could do. The Tribunal assessed compensation by deducting gross mitigation earnings from the net sum that would have been earned had he not been dismissed and applied a 50 % **Polkey** reduction. The Claimant appealed.

Held, allowing the appeal, that the Tribunal failed to apply the provisions of s.116(3) of the **Employment Rights Acts 1996,** which required the Tribunal to take into account whether it was practicable for the Respondent to comply with the Order for re-engagement. In circumstances where there was some evidence that the Claimant could do the available role, albeit with some training, the fact that he may not have been, in the Respondent's view, the best candidate for the role did not mean that it was not practicable for the Respondent to comply with the Order. By deducting gross mitigation earnings from net sum that would have been earned, the Tribunal assessed compensation on a basis that did not reflect the loss sustained, as required by section123 of the **1996 Act** the **Polkey** deduction of 50 %, which was based merely on the fact on the fact that only two remained in the pool at the time the decision to dismiss, was taken, was inconsistent with the Tribunal's clear finding that on an objective basis, the Claimant was the better candidate.

The matter would be remitted to the same Tribunal.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESDIENT)

1. I shall refer to the parties as the 'Claimant' and 'Respondent', as they were below. This appeal concerns three aspects of the Liverpool Employment Tribunal's ("the Tribunal's) Judgment on remedy ("the Remedy Judgment"). The Claimant contends that the Tribunal, having concluded that he had been unfairly dismissed for redundancy, erred in failing to order his re-engagement, in calculating his compensation and in assessing the **Polkey** reduction at 50%.

Background

2. The Claimant was employed as a Claims Inspector Area Manager in the Respondent's counter fraud department at the time of his dismissal. In 2013 there had been a redundancy exercise that had resulted in the reduction of the number of Area Managers from five to four. The Claimant was not selected for redundancy on that occasion.

3. In 2016, there was a further business reorganisation which resulted in the reduction of the number of Area Managers from four to three. The Claimant accepted that there was a redundancy situation. The decision as to which of the four Area Managers was to be made redundant was taken by the Claimant's manager, Mr Chiappino.

4. One of the Area Managers, Miss Hutchin, was removed from the pool at an early stage for what the Tribunal termed to be "geographical reasons." A further manager, Mr Leech, was subsequently taken out of the pool because he was acting up in the role of National Manager at the time. The Tribunal found that both of these removals from the pool were unfair to the remaining area managers, namely the Claimant and Mr Lake. However, the Tribunal also

found that the Respondent's actions in removing those two managers ultimately made no difference as both Ms Hutchin and Mr Leech scored better than the Claimant and Mr Lake in the selection and would have survived the redundancy process.

5. Once there were only two people remaining in the pool, Mr Chiappino applied the performance criteria and decided that they both scored the same. The Tribunal however concluded that this exercise was flawed. At paragraph 62 of the Judgment on liability ("the Liability Judgment") the Tribunal stated as follows:

> **"62. We heard much during the course of the hearing (indeed we went back into the Tribunal room to hear more evidence) about the way in which Mr Chiappino scored Mr Lake and the claimant. His explanation was unconvincing and did not make sense. Mr Chiappino himself accepted that the claimant scored higher than Matthew Lake in fraud identification, and that Matthew Lake scored slightly higher in terms of productivity. That should have been the end of the process. On an objective basis Mr Davies was the better candidate".**

6. Also, at paragraph 76 the Tribunal said this:

> **"Although we were given a large amount of data with regard to the performance of both Mr Lake and Mr Davies, it was not clear to us, and the burden was upon the respondent to prove this, as to why Mr Lake should prevail with regard to performance. Indeed, over two years, the data demonstrated that, with regard to fraud referral percentages, it was the claimant who was the better performer rather than Mr Lake. For a reason known only to Mr Chiappino, he limited his analysis of the data to a very short period in 2016 rather than looking over a longer period. Mr Chiappino could not explain to us why he had done that".**

7. Mr Chiappino then went on to assess the two individuals on the basis of what the Tribunal found to be "*a host of criteria that were largely subjective*." The Tribunal found the application of the subjective criteria to be unfair and lacking in transparency. Accordingly, the Tribunal concluded that the Claimant's dismissal for redundancy was unfair.

8. The Remedy Hearing took place on 18 December 2018. By that stage the Claimant had applied unsuccessfully for a number of roles within the Respondent, including a role as a Project Manager. The Claimant sought reinstatement or re-engagement as well as compensation.

9. At paragraph 4 of the Remedy Judgment, Employment Judge Robinson, sitting with members, held as follows:

> **"4. With regard to re-engagement, we do not feel that we have been given enough information in order to identify a particular job in the respondent's organisation that the claimant could do. The jobs that the claimant has applied for were not suitable for him. We accepted the rationale given to us by the respondents as to why the claimant was not taken on for any of those roles. We needed to identify a role which gave the claimant, so far as reasonably practicable, terms as favourable as the ones which would have been given to him if he had been re-instated in his old role. We were not able to identify those terms or that role for Mr Davies".**

10. That was the sole paragraph dealing with the question of re-engagement. A re-engagement order was not made. The Tribunal went on to calculate compensation. In doing so, it applied a 50% chance that the Claimant would have been dismissed for redundancy had a fair procedure been followed.

11. The summary of its calculation is set out at paragraph 11 of the Remedy Judgment where it said as follows:

> **"11. There must have been a 50% chance of Mr Davies being made redundant at that point and the compensation must reflect that percentage chance and therefore we have to reduce the £73,018.48 by half, giving a figure of £36,509.24. We then have to deduct from that sum £25,293. That is the balance of the monies over and above his redundancy pay - the claimant's enhanced redundancy pay. The final compensation figure that the respondent must pay, forthwith, to the claimant is £11,216.24".**

That is the Judgment being appealed against.

Legal framework

12. Section 116 of the **Employment Rights Act 1996** ("the 1996 Act") sets out the provisions regulating the matters to be taken into account by a tribunal in determining whether to order reinstatement or re-engagement. So far as relevant, s.116 provides as follows:

> **"116 Choice of order and its terms.**
>
> **(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—**
>
> **(a) whether the complainant wishes to be reinstated,**

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account—

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement..."

13. These provisions have been interpreted so as to require the Tribunal to make an express determination on the evidence as to whether it is practicable for the employer to comply with an order for re-engagement. That obligation arises from the wording of the provision which is in the mandatory form, "*shall take into account*": see **Port of London Authority v Payne** [1994] ICR 555 at 569 A to B.

14. In **Coleman v Magnet Joinery Limited** [1975] ICR 46, the Court of Appeal, in considering the predecessor provisions, held that the term "practicable" in this context means not merely "*possible*" but "*capable of being carried into effect with success*": per Stephenson LJ at 52 B to C. In assessing practicability, the matter is to be judged as at the time the order is made; **Rembiszewski v Atkins Limited** UK EAT/0402/11/ZT at 39, and due weight should be given to the commercial judgment of management: see **Port of London Authority v Payne** at 574 D to F.

15. The Claimant, as I have said, brings his appeal under three broad headings: re-engagement, compensation and **Polkey** deduction. I deal with them in that order.

Re-engagement

16. The Claimant relied upon three grounds of appeal under this broad heading:

> **"Ground 1. The ET erred due to inadequacy of reasons as set out in paragraph 4 of the Judgment and failure to explain why it reached the decision.**
>
> **Ground 2. The ET erred in failing to apply the correct legal test under section 116 of the 1996 Act in that it failed to consider properly or at all the practicability of complying with an Order for re-engagement.**
>
> **Ground 3. The ET erred by making an identification of a specific or particular role, a condition for the grant of an order for reinstatement."**

Submissions

17. The Claimant, who was unrepresented at the hearings below, is represented this morning by Mr Margo of counsel. Mr Margo submits that there were roles here that it would have been practicable for the Claimant to do, and that the Tribunal simply failed to apply the statutory test. It failed to direct itself properly or at all as to the relevant test under section 116, thus casting serious doubt on whether it had that test properly in mind.

18. He further submits that the Tribunal erred by focusing on whether there was a particular job that the Claimant could do, and in doing so lost sight of the fact that the focus should be upon the nature of the proposed employment rather than upon the particular job. In support of that contention Mr Margo relies upon a passage in the Judgment of HHJ Butter QC in **Rank Xerox (UK) Limited V Stryczek UK** [1995] IRLR 568, where it was said (at paragraph 16 of the Judgment) that, "*...it is, in general, undesirable for an Industrial Tribunal to order re-engagement in respect of a specific job, as distinct from identifying the nature of the proposed employment*".

19. Furthermore, it is submitted by Mr Margo that the Tribunal erred in accepting the Respondent's rationale in considering that the Claimant had applied for jobs that were not

suitable for him. The question was not whether or not the employer had a rationale for not re-engaging the employee, but whether or not it was practicable for the employer to comply with an order for re-engagement.

20. I was taken to evidence that was before the Tribunal which appeared to show that there were some concession on the part of the Respondent's witnesses that the Claimant had some limited Project Manager experience in respect of a temporary role; that he would need training to do the job he was seeking; that he did have transferable skills but that the Respondent considered that it had the right to choose the best person for the vacancy. Mr Margo submits that none of that material was expressly considered by the Tribunal and it does not in any event show that re-engagement would not have been practicable. It is also submitted that the Tribunal erred in paraphrasing the requirements of s.116(4) in the final sentence of paragraph 4 of the Remedy Judgment, and that this further demonstrates that the Tribunal failed to consider the practicability of an order for re-engagement.

21. As to the inadequacy of reasons, Mr Margo submits that whilst it might in some cases be enough simply to state that the evidence of one side is preferred, in this case some further explanation for accepting the employer's rationale should have been set out. That was especially so given that the Claimant had asserted during the evidence that he could do one of the roles.

22. The Respondent is represented this morning, as it was below, by Miss Wedderspoon of counsel. She reminds me that the determination of whether or not reinstatement or re-engagement is to be ordered is a question of fact for the Tribunal: see **British Airways Plc v Valencia** UKEAT/0056/14 per Simler J (as she then was), at paragraph 7. She submits than in

order for the Tribunal to be able to engage meaningfully with the issue of whether it was practicable to comply with an Order for re-engagement, there must be some evidence of a job role which the Claimant could undertake upon such an engagement. If that were not the case then it would not be able to say whether the proposed re-engagement was something that was "*capable of being carried out into effect with success*": see **Coleman v Magnet** at 52 A to H.

23. Viewed in these terms, submits Miss Wedderspoon, the Tribunal's Judgment is clearly adequately reasoned. She submitted that the making of an Order for re-engagement where the Claimant might not be the best candidate for a role, or where he needed to be skilled up in some way, would be to interfere with the employer's commercial judgment, and that, in the present case, it was simply not enough to say that the Claimant had some skills so as to make it impracticable for the employer to comply with an order for re-engagement.

Discussion

24. The Tribunal did not set out the terms of the test it was applying. That would not itself mean that there was a misdirection in law if, on analysis, it is apparent that the correct test was being applied. In the present case, in my judgment, even on a generous interpretation of paragraph 4, which is the only passage dealing with re-engagement in substance, I am unable to conclude that there was a proper self-direction. I say that for the following reasons:

a. As well as the absence of any reference to s.116(3) or its terms, there is the rather odd final sentence at paragraph 4, which appears to elide ss.116(3) and 116(4). That sentence does not properly recognise the distinct stages that are to be followed in assessing whether an order for re-engagement is to be made. It is only once one has decided that a re-engagement order should be made that one gets to s.116(4) and a consideration of the terms in which that order should be made;

b. The other sentences in paragraph 4 do not adequately demonstrate to my mind that the test of practicably was one that the Tribunal had in mind. In the first sentence the Tribunal said that there was no information as to any jobs which the Claimant could do. However, it is clear from the evidence before the Tribunal, and which is referred to in the notes of evidence, that the Claimant's case was that he *could* do the Project Manager job that was available. Whilst the Respondent contended that he might need some training and that he was not the best candidate for the job, that does not necessarily mean that compliance with a re-engagement order was not practicable. As has been clearly established by authority, practicability in this context means more than merely possible. The Tribunal must be satisfied that an order for re-engagement would be capable of being carried into effect with success. Capability in this context would take some account of the size and resources of the Respondent. It might be said that the Respondent was capable of carrying a re-engagement order successfully into effect, even if it did require some training to be applied to the candidate. To the extent that the Tribunal rejected that possibility, it did not explain why.

c. I do not accept Miss Wedderspoon's submission that an Order for re-engagement ought not to be considered practicable where the Claimant is demonstrably not the best candidate for the job or needs some skilling up. She submits that that would be to interfere with the employer's commercial judgement. However, an Order for re-engagement would, as Mr Margo submitted in response, almost inevitably mean requiring the employer to do something it would rather not do or which it thinks might not be the ideal solution for its organisation. The Order may still be made if it would be practicable for the employer to comply with it. The employer's desires or

commercial preferences are of little relevance, save to the extent that these might impinge on the question of practicability;

d. An order for re-engagement is to be considered without reference to the fact that the employer has engaged a replacement. That seems to me to be a further indication that the statutory scheme, and its emphasis on practicability of compliance, is not trumped by what the employer might prefer as a matter of commercial judgement.

25. Mr Margo also submitted that the Tribunal's focus on whether there is a particular role into which the Claimant would be engaged was an error, and, as I have mentioned above, reliance is placed on the **Rank Xerox** case. However, the view expressed by HHJ Butter QC in the **Rank Xerox** case, namely that it is generally undesirable for an Industrial Tribunal to order re-engagement in respect of a specific job as distinct from identifying the nature of the proposed employment, does not mean that the Tribunal will be in error if it considers whether there is a specific role into which the Claimant could be redeployed. There will generally need to be some evidence of a job or jobs being available and which the Claimant has some prospect of being able to do if the question of making a re-engagement order is to get off the ground. If there are no roles available at all, or none which the Claimant would be remotely capable of fulfilling, then that might lead the Tribunal to conclude that it would not be practicable for an employer to comply with the order.

26. In the present case, the Tribunal, in my judgment, not only failed on the face of it to ask itself the correct question, it does appear to have considered that it is enough to avoid making an order for the employer merely to say that the Claimant was not the best candidate. In my judgment, that is not the correct approach under s.116(3). The Tribunal has therefore erred in law and this question must be remitted for the matter to be considered again.

27. In coming to this conclusion, I recognise that the question of whether or not an order should be made is a question of fact. However, where that issue of fact is decided without the right statutory question being asked then it becomes an error of law and may be set aside.

Compensation

28. I turn therefore to deal with the next issue which is compensation. Section 123(1) of the **1996 Act** provides:

> **"…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".**

29. The short point made here by Mr Margo is that the Tribunal erred in that it deducted the Claimant's gross earnings in self-employment since dismissal from the net loss of earnings figure based on what he would have earned from the date of dismissal from to the date of the hearing. Mr Margo submits that that clearly amounts to a failure to make an award based on the actual loss sustained and is neither just nor equitable.

30. Miss Wedderspoon submits that the award was within the scope of the Tribunal's broad discretion in relation to compensation, although she very fairly recognised that a more consistent approach could have been taken.

Discussion

31. Although the Tribunal has a broad discretion in relation to compensation, that discretion is to be exercised in accordance with s.123 of the **1996 Act**. That means that the Tribunal must have regard to the loss sustained by the Claimant and make an award that it considers just and

equitable. By deducting the gross earnings in mitigation from the net sum that would have been earned, it seems to me that the Tribunal has not calculated the award by reference to the loss sustained, but by reference instead to a lower figure arrived at by taking an inconsistent approach to loss of earnings and to earnings in mitigation. Given the conclusion on re-engagement and the need for the matter to be remitted, it may be that this issue will not, in the event, arise again, but if it does, I find that the approach taken by Tribunal was not correct.

Polkey reduction

32. The Claimant makes three points under this head:

a. The first is that the assessment of a **Polkey** reduction of 50% appears to be based solely on the fact that there were just two people remaining in the pool and thereby fails to take account of the Tribunal's finding in the Liability Judgment that "*on an objective basis Mr Davies was the better candidate*".

b. The second is that the Tribunal failed to take into account that the burden of satisfying the Tribunal that the Claimant would or might have ceased to be employed if the fair procedures had been followed fell on the Respondent;

c. The third is that the Reasons were not **Meek**-compliant: **Meek v City of Birmingham District Council** [1987] IRLR 250.

Submissions

33. Miss Wedderspoon submits that although the Tribunal did appear to conclude in the Liability Judgment that the Claimant was the better candidate, that was not its final determination of the matter, and that it clearly went on to consider other criteria applied by the Respondent and the views of Mr Brown, another manager. In doing so, the Tribunal, in her

submission, left the position open to be considered at the Remedy Judgment, and that the assessment that it subsequently made was one that was open to it to make.

Discussion

34. In **Software 2000 Limited v Andrews & Ors** [2007] ICR 825, Elias J (as he then was) set out (at paragraph 54) a summary of the principles to be applied in assessing compensation where a **Polkey** deduction is being considered. It should be noted that this case was decided at a time when s.98A(2) of **the 1996 Act** was in force. That provision was of course repealed in 2012 and so those parts referring to s.98A(2) no longer apply. However, the remainder of the summary of the principles remains relevant:

> **"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.**
>
> **(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).**
>
> **(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.**
>
> **(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.**
>
> **(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative…"**

35. It is clear therefore that the burden does lie on the Respondent; that at this stage it is inevitable that there is a speculative element to the exercise which the Tribunal has to undertake; and that the Tribunal should have regard to all relevant facts and matters in coming

to its conclusions. Where the Remedy Judgment is separate from the Liability Judgment, the Tribunal should take into account matters that are relevant from the Liability Judgment.

36. In the present case, the Tribunal does appear to have disregarded its own finding as to the proper outcome of the selection exercise, which was the Claimant was, on an objective basis, the better candidate. That emerges both from paragraph 62 and from paragraph 77 of the Liability Judgment. I cannot accept Miss Wedderspoon's argument that the Tribunal had not reached any final conclusion in that regard. Whilst it is correct that at this stage of the Liability Judgment the Tribunal had not made any final assessment of the chance that the Claimant would have been made redundant even if a fair process had been followed, it is clear that on the basis of its findings an application of objective criteria would have been likely to result in the Claimant being retained. At least that is one reading of the relevant paragraphs.

37. It may be that the Tribunal fell into error in this regard because it failed to bear in mind that the burden lay on the Respondent. The Respondent does not appear to have adduced any evidence at the Remedy Hearing to undermine the conclusions at the Liability Judgment to which I have referred about the Claimant objectively being the better candidate. The other criteria which the Tribunal considered were found to be subjective and which, in the event, led to the conclusion, at least in part, that the dismissal for redundancy was unfair.

38. There was no evidence, as far one can tell, other than that relating to the application of subjective criteria, to undermine the conclusion that the Claimant was a better candidate. There is nothing to indicate that the Tribunal approached its analysis on any basis other than that there were two people left in the pool, thus giving rise to a 50% chance of dismissal. However, that approach, it seems to me, fails to take account of the guidance in **Software Limited v Andrews**

A that all facts and matters should be taken into account in coming to the assessment. Insofar as there was some evidential basis for concluding that the reduction should be 50% as opposed to something more favourable to the Claimant, that conclusion was not explained.

B **Conclusion**

39. For these reasons the grounds of appeal relied upon by the Claimant are upheld and the appeal is allowed.

C

40. That leaves the question of remission. Mr Margo submitted that remission should be to a different tribunal and set out various reasons, based on the principles established in **Sinclair**

D **Roche and Temperley & Ors v Heard & Anor** [2004] UKEAT/0738/03/2207, as to why that should be. In my judgment, this is clearly a case that should be remitted to the same Tribunal. This is not a case where the Judgment was wholly flawed; in fact, the Claimant relies upon and maintains that the Tribunal was correct to conclude that he was unfairly dismissed and that

E finding is not challenged by the Respondent. If the 'totally flawed' requirement in **Sinclair Roche and Temperley** were to be applied whenever there was a clear error in respect of a particular aspect of a judgment, then cases would very rarely be remitted to the same tribunal.

F It seems to me that the 'totally flawed' requirement must reflect a wholesale flaw in a tribunal's judgment such as to undermine any confidence in that tribunal dealing with the matter again.

G 41. As to the other points, which are practical points raised by Mr Margo, namely that there would in effect be a second bite at the cherry and that there has been considerable delay since the hearing, it seems to me that those two factors would not make this an appropriate case to be

H remitted to a different tribunal. The delay is significant but no more than in many appeals brought before the Employment Appeal Tribunal.

A

42. In addition, the suggestion that the factual findings would have become somewhat stale falls away rather, in particular in relation to the re-engagement issue. As discussed earlier in the course of submissions this morning, it is clear that if the Tribunal is satisfied that a re-engagement order ought to be made, that judgment would have to be made on the basis of the information available to it as at the date of any remitted hearing. There would have to be fresh findings of fact in relation to that issue.

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43. As to the other issues to be considered, if they do arise, then the delay since making the relevant findings would not be such as to make it difficult for this Tribunal to consider them again, having regard to the points made in this Judgment. I do note that Employment Judge Robinson has retired, but I understand he is still sitting as a fee paid Judge, so unless the Employment Appeal Tribunal is informed of any other practical reason why this matter cannot be remitted to Employment Judge Robinson and the relevant members, I direct that it be remitted to that Tribunal.

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