Neutral Citation Number: [2023] EAT 113

Case No: EA-2020-000983-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 August 2023

Before:

HIS HONOUR JUDGE WAYNE BEARD
MRS RACHAEL WHEELDON
MRS E LENEHAN

- -

Between:

MS F HABIB **Appellant**

- and –

DAVE WHELAN SPORTS LIMITED
T/A DW FITNESS FIRST **Respondent**

- -
- -

EDWARD KEMP (instructed by **Advocate**) for the **Appellant**
TIM DRACASS (instructed by **Preston Redman Solicitors**) for the **Respondent**

Hearing date: 7 June 2023

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JUDGMENT

SUMMARY

Ground 8 of the appeal succeeded and as this meant that the case would need to be re-heard all other grounds which would involve comment on the evidence were not considered. Ground 8 related to the fairness of proceedings, the Claimant is dyslexic, the ET drew conclusions about the Claimant's credibility which were related to factors which could arise from dyslexia. This was done without apparent reference to the ETTB and/or the Presidential Guidance on vulnerable witnesses. The ET's deliberation on credibility did not show an analysis which took account of guidance and why it had reached conclusions despite the guidance. In addition the Claimant was never have been made aware of the concerns of the ET as to the extent of the effects of dyslexia until the reserved judgment was delivered.

HIS HONOUR JUDGE WAYNE BEARD:

PRELIMINARIES

1. We shall refer to the parties as they were before the Employment Tribunal (ET) as Claimant and Respondent. The Claimant had, in two separate claim forms, brought claims of direct discrimination because of age, sex and religion or belief, harassment related to age and sex, less favourable treatment as a part time worker and victimisation. This is an appeal against the decision of Employment Judge C Lewis and members, in a reserved Judgment sent to the parties on 19 October 2020, rejecting all of the Claimant's claims. During the course of proceedings case management was undertaken and orders made. The Claimant was unrepresented for the preparation period but had representation from counsel for at least one case management hearing and certainly for the final substantive hearing. The ET hearing took place during March 2020, but the decision was made in a meeting of the ET in chambers on 14 July 2020.

2. The Claimant was represented by Mr Kemp of counsel, acting under the auspices of the Advocate organisation. He did not appear in the case before the ET. We are very grateful for the able assistance he has provided, *pro bono,* in this case. The Respondent was represented by Mr Dracass, whose submissions were equally helpful to the Appeal Tribunal in our consideration of the issues.

3. The appeal was considered by HHJ Tayler at a joined preliminary and rule 3 (10) hearing. The result of that hearing was that 8 grounds of appeal were permitted to advance to this full hearing. Mr Kemp indicates that the Claimant no longer pursues the appeal in respect of grounds 2, 4 and 5 and the arguments are confined to the remaining five grounds. The decision we have reached on the appeal is unanimous. As will become clear, because of the conclusions we have reached in respect of ground 8, we do not deal with the remaining grounds of appeal.

4. Ground 8 sets out that the ET failed to provide the Claimant, a disabled litigant, with a fair hearing: the sub-paragraphs of that ground assert that there was a failure to refer to and apply the Presidential Guidance on vulnerable witnesses and the relevant sections of the Equal Treatment Bench Book. In addition it is contended that the ET failed to make three specific adjustments which would have enabled her to fully participate in the hearing; which were (i) not allowing the Claimant's bundles of documents to be adduced (ii) refusing to allow the Claimant the assistance of an intermediary and (iii) not allowing the Claimant to be recalled to adduce medical records. It is further contended that the ET, unfairly, made negative findings about the Claimant's credibility as a result of her "performance" when being cross-examined because it did not consider (i) whether those performance concerns were linked to disability; (ii) medical evidence and/or the Presidential Guidance and/or the Equal Treatment Bench Book ("the ETBB"); (iii) without giving the Claimant an opportunity to respond to their very serious finding; or (iv) that such findings were perverse or not Meek compliant.

THE CASE BEFORE THE EMPLOYMENT TRIBUNAL

5. On 31 October 2019 there was a preliminary hearing before Employment Judge Jones. The record of that preliminary hearing shows that it was intended to consider an equal pay issue and a strike out application, however the first of those matters had become irrelevant and the other was not pressed and so the hearing dealt with case management. The paragraphs in the minute of that hearing which are relevant to our decision are as follows:

At paragraph 6:

> **There have been issues with the process of disclosure in this claim. The Claimant is dyslexic…**

At paragraph 19

> **The Claimant is dyslexic. Also, English is the Claimant's third language – (t)he Claimant does not need an interpreter for the final hearing but, it was noted that during cross examination, she would need questions to be asked in a way that took into account those particular characteristics. The Claimant has also had significant health issues in 2018 including migraines; anxiety and depression, from which she is still recovering. It is noted that the Claimant may require breaks during her cross examination and at other times during the hearing when the evidence might be difficult for her.**

At paragraph 21

> **The Claimant also suffers from migraines so she may need breaks particularly during cross examination to allow her to be able to concentrate and respond to questions asked. The Tribunal conducting the final hearing will need to be aware of this issue.**

At paragraph 22

> **No specific adjustments were requested today but the Tribunal conducting the final hearing will be apprised of these matters and will take them into account during the final hearing to ensure that it is in keeping with the overriding objective and that a fair hearing takes place.**

The Orders made following this were to take account of the Claimant's difficulties as outlined providing for the sending of bundles and exchange of witness statements on dates well in advance of the final hearing.

6. The final hearing began on 3 March 2020. It seems apparent that just a week before the hearing the Claimant instructed counsel to represent her. The Respondent had prepared a bundle, as ordered by Employment Judge Jones, but the Claimant objected to that bundle and had a bundle of her own running to five lever arch files, whereas the Respondent's bundle was contained within two. Both parties accept that the ET was aware that the sending of the Respondent's bundle to the Claimant and the exchange of witness statements had happened later than had been ordered, with the bundle sent five days before the hearing and the witness statement the night before the first day [1]. The ET decided to work from the Respondent's bundle but to allow the Claimant to add to it such documents

[1] There was some disagreement as to why the order was not complied with, which we are not in position to, nor do we need to resolve for the purposes of this judgment.

as were relevant. The Claimant's own witness statement was deemed to be inadequate, and she was allowed days 1 and 2 of the hearing to resolve this by writing a new statement. It was not until day 3 of the hearing that evidence began.

7. The Claimant applied that she be allowed a intermediary Ms O'Reilly, whilst giving her evidence. The application was based on dyslexia and the Claimant relied upon the difficulties negotiating the bundle would present her along with her, on occasion, not being able to find the correct words to say; the ET refused this application. The basis for refusing was that there was no medical or other expert evidence that a intermediary was required. The ET indicated that Ms O'Reilly sat next to the Claimant's Counsel and they permitted her, during the Claimant's evidence, to indicate when a question was not being understood by the Claimant or when she needed assistance. It would appear that this proved insufficient, because during the course of the Claimant's evidence Ms O'Reilly moved to sit next to the Claimant to assist in finding page numbers. The ET observed that the Claimant "*exhibited considerable difficulty in finding relevant pages and on focusing on the content"* the ET considered that, having focused on the content, the Claimant was able to read it.

8. At the end of day seven, the Claimant's counsel applied to recall the Claimant in order to introduce medical evidence. The ET refused the request. The ET's reasons revolved around the overriding objective, the time already used in the hearing, the possibility of new evidence begetting a need for the Respondent to introduce further evidence, that time had been given to the Claimant at the outset of the hearing and that the Claimant had failed to disclose medical evidence at that time, finally that at least some of the evidence the Claimant wished to introduce was not relevant.

9. The ET then went on to deal with each of the allegations that the Claimant had made dismissing them all individually. During the course of the Claimant's evidence another witness was interposed. The ET went on to make these observations about the Claimant's evidence relevant to her credibility in paragraphs 201 to 207 which we consider important to set out in full:

201 On one occasion after a short break when it was put to the Claimant by Mr Self that her behaviour was inconsistent the expressed behaviour on the first day that she gave evidence the Claimant became upset but having taken the pause to compose herself indicated that she was prepared to carry on. During her Counsel's cross-examination of the Respondent's witnesses she was constantly referring to the documents and highlighting passages and passing notes to her Counsel.

202 It was apparent to the Tribunal, and remarked upon by Mr Self who put it directly to the Claimant, that there was apparently a marked difference between the Claimant's ability to follow questions and documents when she was at the witness table to when she was sitting next to her Counsel while was cross-examining the Respondent's witnesses when she had no difficulty in reading documents and passing notes, whilst at the same time keeping up with the course of the evidence. The Claimant also displayed an inconsistent inability to understand particular words, for example the word 'escalate', in cross-examination she disputed understanding what it meant and was vague in her answers in respect of the use of that word in a particular email, but it was noted that she had used that same word (appropriately) in her own documents elsewhere. She also used the word 'vague' in her own evidence and had no difficulty using it in context however disputed understanding what it meant when it was used in cross-examination.

203 The Tribunal took into account that English was the Claimant's third language, but she was also at pains to point out on numerous times that she had completed an MBA (in English) and told us she achieved the highest mark in her year.

204 The Tribunal also took into account that giving evidence is a stressful experience. There were no medical reports to explain the variance in the Claimant's behaviour. Whilst we note that sitting next to Counsel is not as stressful as giving evidence, it is still a relatively high-pressure environment. Having given careful consideration to how the Claimant behaved before us we accept Mr Self's submissions that the difference in the Claimant's behaviour was so marked it is hard to escape the conclusion that there was an element of performance and exaggeration in the Claimant's difficulties. Mr Self submitted that her conduct was consistent with how she behaved towards the Respondent and those who tried to manage her, which displayed elements of manipulation or attempting to manipulate dealings. We found during the hearing that the Claimant was reluctant to cooperate when things were not being done to her own agenda and attempted to slow things down to a point where she was given her own way, for example with the production of documents and her own set of bundles. The Claimant rarely answered a direct question unless pushed to by Counsel. There was an obvious distrust of anything that was coming from the Respondent, for instance the list of issues had been agreed by her then representative following various emails exchanges with Mr Self: the Claimant refused to accept the wording in that list of issues and insisted on referring to her own list on each occasion the list of issues was mentioned, despite it being confirmed a number of times by the Respondent's Counsel and also by the Tribunal that the words used were the same.

> **205 Mr Self pointed to the parallels between the Claimant's conduct in the Respondent's processes in pursuing her grievances and appeals and wanting to have control of those processes, only cooperating if they were done on her terms. Mr Lusandisa gave evidence to the Tribunal in which he explained that he found the Claimant difficult to manage and observed that some of her behaviour exhibited through the Tribunal hearing was an illustration of the difficulties that he had faced.**
>
> **206 Despite having instructed Counsel a week before the hearing, on the last day of the hearing (a Tuesday - the Tribunal sitting Tuesday to Friday of each week) the Claimant had sent further documents directly to the Tribunal and to Mr Self apparently for submission in the proceedings, which her Counsel had not had an opportunity to see; they had not been sent to anybody over the weekend or even on the Monday when the Tribunal was not sitting. Once Mr Davey had had an opportunity to read those documents he did not seek to rely on any of them. The Claimant also sought to rely on documents in the proceedings that she had accessed on the Respondent's system that related to somebody else's performance and training record and saw no difficulty or issue with having either accessed those documents or printing them for her own purposes.**
>
> **207 Having heard the Claimant gave evidence we were drawn to the conclusion that she on some issues it was clear that she was not being entirely truthful in her account and on others that her recollection was unreliable. Having considered the evidence as a whole we have found that the Claimant's recollection of events was in many instances of a self-serving nature, in that she chose to recall what suited her and what put her in the best light and chose not to recall what other people had said or done at the time that might put them in a favourable light. For example, the Claimant flatly denied that Mr Lusandisa had sought to comfort her when he found out she had suffered a bereavement. We find her denial illustrates her inability or unwillingness to recall anything that puts their relationship in a better light than she is trying to paint, or is now prepared to acknowledge. Similarly in relation to Boogie Bounce, she flatly (and we consider unreasonably) refused to accept that anyone else had made any contribution to the success of the event.**

10. We have also seen the ET's notes of the Claimant giving evidence, after returning to the witness box from which the following can be seen. The Claimant was asked about a difference in the ability that she demonstrated when giving evidence and her apparent ability to give instructions to Mr Davey in real time when the witness was interposed. Her response was to explain that it was the impact of pressure and the effects of dyslexia, she also explained that whilst giving evidence her heart was racing.

GUIDANCE ON VULNERABLE WITNESSES

11. Employment Tribunals are required to have regard to Presidential Guidance and all courts, which includes the Employment Tribunal, should pay regard to the Equal Treatment Bench Book (ETBB). The purpose of both documents is to provide Judges with the tools which assist in ensuring a fair hearing when dealing with, amongst others, vulnerable witnesses. The following extract from the Practice Guidance issued by the ET President on 22 April 2020 is of relevance to the Claimant's circumstances. Although the guidance post-dated the hearing its contents could have been taken account of during the deliberations which took place in July 2020. At paragraph 11 in setting out the background; the guidance provides:

> *Particular difficulties may arise when giving evidence in the tribunal. Legal language or terminology can create barriers to understanding the tribunal process. Vulnerability can be both cause and/or effect in understanding questions asked during a hearing – for example, in cross-examination. This can impact negatively upon their conduct and demeanour in the hearing room and to their exclusion and disadvantage.*

This practice guidance goes into significant detail as to what steps might be taken and makes it clear at paragraphs 30 to 33 that although the Equality Act does not apply to judicial functions making adjustments may be necessary because of rule 2 of the Employment Tribunal Rules 2013 requiring cases to be dealt with fairly and justly, the requirements of articles 6 and 14 of the European Convention on Human Rights, that the common law has justice and fairness as core concepts and the UK's obligations under article 13 of the UN Convention on the Rights of Persons with Disabilities. The guidance then refers to the importance of paying regard to the ETBB's guidance and good practice, noting that **Rackham v NHS Professionals Ltd** UKEAT 0110 15 (see below) amongst other cases provides authority for this.

12. The ETBB under the heading “Dyslexia” provides:

> *“Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See ‘Introduction’ within this Glossary.”*

It then asks what Dyslexia is and provides the answer that it is the most common of a family of related conditions known as Specific Learning Difficulties. Having set out that it can manifest as difficulty with reading, writing and spelling it points out that core elements are difficulties with processing language-based information and with short term and working memory following this up with a list of common difficulties. That list includes mistakes with routine information, e.g., giving the names of their children, difficulty remembering what they have just said, difficulty presenting information in a logical sequential way, difficulty distinguishing important information from unimportant details and word-finding problems involving lack of precision in speech, misunderstandings and misinterpretations. In particular, dealing with a poor working memory it points out that there is an inability to retain information without notes, hold on to several pieces of information at the same time and cope with compound questions. In dealing with the problems this can present in the circumstances before a court; the guidance sets out:

> *“People with SpLDs will be concerned about how their behaviour might be perceived: inconsistencies could imply untruthfulness. Failure to grasp the point of a question could come across as evasive. Lack of eye contact could be misinterpreted as being ‘shifty’ and an over-loud voice might be regarded as aggressive. The overriding worry is that a loss of credibility occurs when they do not ‘perform’ as expected”.*

It is of particular note that this is set out as to the reassurance that should be provided to someone with a specific learning difficulty:

"Misunderstandings on their part will not be treated as evasiveness and inconsistencies will not be regarded as indications of untruthfulness."

THE LAW

13. In **Rackham** Langstaff J sitting with members indicated that there was no dispute that there was a duty upon the ET to make reasonable adjustments for a disabled party. The case also demonstrates that employment tribunals should make use of guidance in the ETBB. The purpose of adopting this approach is said to be in order to ensure effective access to justice and to "*enable the party to give the full and proper account they would wish to give to the Tribunal, as best as they can be helped to give it*".

14. **Anderson v Turning Point Eespro** [2019] EWCA Civ 815 deals with the duty of the ET when a party is represented. Giving the lead Judgment with which the other members of the court agreed. Underhill LJ said this at paragraph 27:

> *In the generality of cases it is entirely appropriate for a tribunal to leave it to the professional representatives of a party who is under a disability, or indeed otherwise vulnerable, to take the lead in suggesting measures to prevent them suffering any disadvantage. The representatives can be expected to have a better understanding than the tribunal of what the party's needs are, and access to appropriate medical advice; and there is also a risk that if the tribunal itself takes the lead in seeking to protect a party (or witness) it may give the impression of taking their side. This involves no abdication of responsibility by the tribunal. Of course it retains ultimate responsibility for seeing that a disabled*

> *party receives a fair hearing, and I do not rule out the possibility that there may be cases where a tribunal should take steps for which the party's representative has not asked; but those will be the exception, and the default position is that the tribunal can expect a party's interests to be looked after by his or her representatives.*

However, at paragraph 32 he went on to say:

> *The foregoing should not be regarded as qualifying the importance, as expounded in such cases as* **Rackham** *and* **Galo***, of tribunals making whatever adjustments are reasonably required to ensure that vulnerable parties or witnesses are enabled to present their case and/or give their evidence effectively, or of their ensuring that they have the appropriate information for that purpose. That follows from the basic common law duty of fairness and is reinforced, where the vulnerability is the result of disability, by the various international instruments referred to in* **J v K** *(although, as there stated, it is not clear that they add anything to the common law position)*

15. It is tolerably clear from the case law that a tribunal should rely on a representative to inform as to the appropriate adjustments to assist them in conducting a fair hearing. However, ultimately the duty falls upon the employment tribunal to ensure that a hearing affords a disabled individual effective access to justice. This must apply to the process of the hearing and in our judgment must equally apply to the analysis and deliberation by the employment tribunal in reaching its conclusions. If that were not so the effectiveness would be undermined.

16. There was for a time some uncertainty as to the approach to be taken in cases where the tribunal had failed in the duty to make appropriate adjustments. In the **Rackham** decision there is an indication that a proportionality test should be applied to consider whether the decision as to adjustments was fair, however in Leeks **v Norfolk and Norwich University Hospitals NHS Trust** [2018] ICR 1257 it was suggested that the ET be subject to challenge in respect of these issues on Wednesbury grounds only. HHJ Auerbach's decision in **Phelan v Richardson Rogers Ltd.** [2021] ICR 1164 resolves this uncertainty deciding that case management decisions of the ET would subject to challenge on Wednesbury grounds only, whereas proportionality would be considered when the substantive hearing was in question. This uncertainty has been further resolved by the decision of HHJ Tayler in **Buckle v Ashford & St. Peter's NHS Hospital Trust & Anr.** UKEAT/0054/20/DA where at paragraphs 22 and 23 he sets out:

> *22. The approach to be adopted in considering appeals against decisions about medical issues, and adjustments, depends on the nature of the decision taken. At one end of the spectrum a decision whether to postpone a hearing because of the ill-health of a Claimant is a case management decision that may only be challenged on Wednesbury grounds:* **Phelan v Richardson Rogers Limited***: UKEAT/0169/19/JOJ*
>
> *23. Conversely, there may be circumstances in which a party requires an adjustment that is of such fundamental importance that without it being made there cannot be a fair hearing. In such a case it is for the appellate court to determine as a matter of substantive fairness whether the adjustment requested was such that the failure to make it rendered the hearing unfair because the*

> *party was not able to sufficiently participate in the hearing and so was not given a fair trial, just as would be the case if the hearing was improperly conducted in the party's absence.*

The question we must answer is whether the approach taken by the ET meant that there was substantive unfairness because the participation of the Claimant in the process meant that the trial was unfair. For that to be the case the failure to adjust must amount to a matter which is so fundamental that the absence of the adjustment means there cannot be a fair hearing.

17. There is a further element of the **Buckle** judgment which we consider informs the approach we should take, that is that there needs to be evidence that the adjustment would alleviate the disadvantage caused by the disability.

18. The decision of the Supreme Court in **Serafin v Makiewicz & Ors.** [2020] 1WLR 2455 makes it clear that there is only one outcome if a hearing is found to be unfair. At paragraph 49 Lord Wilson, with whose judgment the other members of the court agreed said:

> *What order should flow from a conclusion that a trial was unfair? In logic the order has to be for a complete retrial. As Denning LJ said in the Jones case, cited in para 40 above, at p 67,*
>
> *"***No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it***."*
>
> *Lord Reed observed during the hearing that a judgment which results from an unfair trial is written in water. An appellate court cannot seize even on parts of it and erect legal conclusions upon*

them. That is why, whatever its precise meaning, it is so hard to understand the Court of Appeal's unexplained order that all issues of liability had, in one way or another, been concluded. Had the Court of Appeal first addressed the issue of whether the trial had been unfair, it would have been more likely to recognise that the only proper order was for a retrial. It is no doubt highly desirable that, prior to any retrial, the parties should seek to limit the issues. It is possible that, in the light of what has transpired in the litigation to date, the Claimant will agree to narrow the ambit of his claim and/or that the defendants will agree to narrow the ambit of their defences. But that is a matter for them. Conscious of how the justice system has failed both sides, this court, with deep regret, must order a full retrial.

SUBMISSIONS

19. We deal with the submissions only as far as they relate to ground 8 of the Appeal. The Claimant argued for three adjustments to the hearing that were refused by the ET which, in addition drew conclusions based on the Claimant's "performance" in giving evidence. The arguments in respect of the trial process were that the Claimant had identified dyslexia, there was some evidence to support this in the documents before the tribunal of this condition, along with information relating to this and other conditions mentioned by EJ Jones. The Claimant further submitted that there is clear guidance as to the approach to persons with dyslexia in the ETBB which the ET should follow, if it does not have good reason not to, because of the Presidential Guidance and the weight of authority. The guidance was in place prior to the deliberations by and conclusions drawn by the ET, and should have been considered. The ET not only failed to inform the Claimant as advised in the ETBB that *"misunderstandings on their part will not be treated as evasiveness and inconsistencies will not be*

regarded as indications of untruthfulness." but actually used the fact that the Claimant did not perform as expected to impugn the Claimant's credibility.

20. Mr Kemp argued that it was remarkable, given its prominence in respect of the Claimant's condition, that the ET did not make any reference to the Jones case management order. He argued that the provision of the bundles and witness statements at a late stage, whatever the reason, pointed to fundamental unfairness in not allowing the Claimant access to the bundles she was familiar with and that would have been no difficulty in her being examined on two sets of bundles, this was demonstrated because she was "lost" in the Respondent's bundles.

21. Mr Kemp contended that not allowing an intermediary who could have assisted with communication had an impact on the approach to credibility taken by the ET. He argued that although there was no medical evidence, in the light of **Anderson, the** Claimant's counsel had requested an adjustment, and the ET should have recognised that he was in the best position to identify the Claimant's need for an adjustment.

22. In respect of the third adjustment, it was argued that this was connected to the failure to make the first adjustment in that the Claimant needed to be recalled because requiring her to identify documents from her bundle and not just use her own bundle placed the Claimant in difficulty in finding them.

23. In respect of the general position Mr Kemp submitted that during the cross examination, which the tribunal referred to and relied upon in respect of the Claimant's credibility, the Claimant gave dyslexia, a disability related explanation for the differences put to her. There is no indication from the judgment that the ET considered those responses, and in particular that it approached them in the light of the guidance. He contended that in those circumstances the judgment was, at the very least not **Meek** compliant and at worse perverse.

24. Mr Dracass asked us to consider what the ET did to provide adjustments to the Claimant. He listed them as follows: the Claimant and her counsel wereallowed the assistance of Ms O'Reilly; the Claimant was given two days of hearing time to submit a further witness statement; with this time also providing an opportunity for the Claimant to go through the bundles with her counsel; Ms O'Reilly was invited to intervene as necessary; Ms O'Reilly was also allowed, at a later stage, to assist the Claimant with finding pages; regular breaks were taken during the Claimant's evidence; the Claimant was allowed further time with her counsel after her evidence to provide instructions before the Respondent's witnesses were cross-examined. He made the point that the arguments as to bundle preparation were a departure from the grounds of appeal.

25. Referring specifically to the bundle, he made the point that the adjustment that was made was significant, the Claimant was supported by both Ms O'Reilly and the Claimant's counsel in dealing with the bundles and her witness statement over two days. It was submitted that this was allowing the Claimant to participate in the hearing effectively.

26. In dealing with the ET's approach to the use of an intermediary he made the point that there was very limited evidence. In particular there was no evidence of the specific expertise of Ms O'Reilly. The ET would have no indication, beyond the existence of dyslexia, to know the severity of its effects on the Claimant and consequently whether Ms O'Reilly would be in a position to assist.

27. In respect of the application to recall the Claimant he argued that the ET had considered the application with care and given cogent reasons for deciding not to allow this. He asks us to remember a fair hearing means fair for both parties. It was not an unreasonable decision and certainly not sufficient to render the proceedings unfair. This was a case management decision which means the EAT should approach the decision on the Wednesbury basis, and as such it clearly was not unreasonable.

28. In respect of the aspect of the appeal dealing with how the ET had approached credibility he argued that counsel for the Respondent had put the point squarely to her in cross examination and that she had a full opportunity to deal with it. He argued that this does not get into the territory of a failure to conduct a fair hearing because the Claimant was able to fully participate in the case with the adjustments that were made.

29. Both counsel accepted that if we were to find the hearing had been unfair, in the light of the decision in **Serafin** the matter would have to be remitted to a different tribunal panel.

CONCLUSIONS

30. We do not consider that the three adjustments relied upon as part of ground 8 are reasons by which we could conclude that the ET had failed to make appropriate adjustments. Whilst all of the adjustments were not made the ET accepted that support was required. The attempts the ET made to provide support were reasonable in the circumstances. The ET had limited information on the extent of the Claimant's difficulties arising out of dyslexia and the other medical conditions. However, in a similar way, we cannot say whether those adjustments it did make were appropriate or inappropriate in the circumstances. This is because before the ET and before us there was little evidence, medical or otherwise, beyond the label of dyslexia being applied to the Claimant, as to the extent of the Claimant's difficulties. An employment tribunal to comply with its duties to ensure a fair hearing must make an adjustment which would allow effective participation. In order to do that it must be able to identify the specific barriers which a condition or disability causes. In order to make such an identification it must have some evidence, which is not necessarily, but may be, expert evidence, to assist it in understanding the barriers. A tribunal can only operate on the evidence before it.

31. In some respects, it could be argued that this demonstrates a failing at the case management stage to identify adjustments. However, the Claimant was represented and had not identified specific

adjustments at that case management hearing. The expectation was that adjustments would be considered and made at the hearing as appropriate. If the Claimant had been represented consistently through the process of preparing for the case and not just at hearings no doubt the representative would have been in a position to identify certain aspects where adjustments would be appropriate. It is unlikely in those circumstances that there would have been a difficulty with the witness statement and bundles. It is in that light we consider that where there is an unrepresented party, or a party with intermittent representation, it would be useful for the case management order to make clear that, if the status of a witness, their condition or disability is something that will require adjustments to be made to the usual procedure, that evidence will need to be produced. That evidence could, for instance, take the form of part of the witness statement of the person for whom the adjustments are necessary or perhaps documentary disclosure of medical information. It is not necessary for an expert evidence order in all cases.

32. However, if there is an obvious difficulty demonstrated by a witness, there is still an onus on the ET to explore the difficulty. In this case part of ground 8 refers to the approach the ET took to the credibility of the Claimant. This is what has caused us the greatest concern. As we have already indicated a fair hearing includes the approach taken to deliberations and conclusions. In this case the ET had some evidence, at the very least from the Claimant's assertion that she is dyslexic, that this was potentially a disability. The preliminary hearing had set out the need to provide allowances due to dyslexia and in the course of the proceedings the Claimant had indicated that dyslexia was the specific cause of her acting in particular ways. The tribunal also had some acceptance of the existence of specific difficulties because it allowed Ms O'Reilly to assist the Claimant with locating pages. This placed an onus on the ET to consider whether this was something that might require further adjustments. This is of particular importance to the application of the usual standards applied to witnesses given the warnings in the ETBB. If the ET was concerned that the existence of the condition was in doubt it could, of course, have sought evidence to confirm or assuage its doubts. If it did not have those doubts, in the absence of medical evidence on the condition it should at the very

least have consulted the ETBB.

33. The ET does not within its reasons make any reference to the Presidential Guidance or the ETBB. That of itself is not specifically important, however it also does not set out anything which would resemble the type of analysis that should be applied to a witness with a specific learning difficulty. Such analysis would be expected if it had done so. Again, taken alone that would not be sufficient to impugn the fairness of a hearing. However, beyond that the ET appears to rely on specific elements of the way in which the Claimant's evidence was given as a basis for deciding and impugning credibility. There is always a danger in relying, simply, on demeanour as a guide to the truthfulness or not of evidence. Cultural and other differences can make the reliance on such factors unreliable. This is all the more important in circumstances where the tribunal is aware of a condition that might affect demeanour or the manner in which evidence is given. Paragraphs 201-207 of the ET Judgment are headed "Observations of the Claimant's conduct during the hearing relevant to her credibility". Within this section of the Judgment the ET makes explicit and detailed findings impugning the Claimant's credibility based upon her behaviour during the hearing, with no reference to the ETBB. This is of particular importance when the bulk of this case was about which of two witnesses were telling the truth about particular events.

34. The ET set out that the Claimant displayed an inconsistency in being able to follow proceedings along with an inconsistent inability to understand particular words. The ET stated that there was no medical evidence, but that it had give careful consideration to how the Claimant behaved before it. It came to the conclusion that the difference in the Claimant's behaviour was so marked that there was an element of performance and exaggeration in the Claimant's difficulties. The ET then went on to consider that this was similar to the Respondent's descriptions of the Claimant. Given what we have set out above as to the ETBB indications on dyslexia, it would appear that the ET was relying on the very matters that might arise from the condition as reasons to doubt the Claimant's evidence. We should emphasise that the ET would be perfectly entitled to come to such a conclusion,

however, we would expect that conclusion to be analysed and explained.

35. The Claimant was never made aware that the existence or extent of her dyslexia was in issue. The case management hearing had accepted the existence of the condition, and until an, apparently, off the cuff element of cross examination, the Respondent had never made this an issue in the case. Without giving the Claimant an opportunity to present medical or other evidence about dyslexia, the ET could not, fairly, come to a conclusion that the Claimant was or was not dyslexic. Further, the ET could not say, one way or the other, what the specific aspects of dyslexia were or were not in her case without such evidence. In those circumstances it would be reliant on the broad general guidance in the ETBB. On that basis, we consider that any explanation by the tribunal as to why it had come to the conclusions it had should engage squarely with that general guidance. There was no such engagement or explanation. This is sufficient for us to say that the reasons are not **Meek** compliant. However, as uncomfortable as it is, we are drawn to the conclusion that this hearing, by approaching the matter without reference to the ETBB and the Presidential Guidance was unfair. Without, the ET approaching deliberation making that adjustment to its analysis there is such a fundamental failing as to make the hearing unfair. Further the Claimant would never have been made aware of the concerns of the ET as to the extent of the effects of dyslexia until the judgment.

36. The appeal is allowed on ground 8. Given that this means that the entire case must start afresh we consider it would be imprudent for us to offer opinions as to the law applied to factual findings which are no longer extant. This is because we are loathed to influence any decision now to be made by a new panel.