Neutral Citation Number: [2025] EAT 22

Case No: EA-2022-000693-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 11 February 2025

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

IMPACT RECRUITMENT SERVICES LTD

Appellant

- and -

MS I KORPYSA

Respondent

- -
- -

Mr E McFarlane (Peninsula Business Legal Services Ltd) for the **Appellant**
The Respondent did not appear and was not represented

Hearing date: 11 February 2025

- -

JUDGMENT

SUMMARY:

UNFAIR DISMISSAL

Where a tribunal finds that the employer has engaged in conduct amounting to a dismissal because the person who decided upon that conduct genuinely, but mistakenly, believed that the employee had resigned, that belief is the reason for dismissal.

In such a case that reason may constitute a substantial reason of a kind such as to justify the dismissal, falling within section 98(1)(b) **Employment Rights Act 1996**, and so the tribunal should consider whether the employer has shown that it does.

If so, the tribunal should consider whether the dismissal is fair or unfair applying section 98(4) of the **1996 Act**. That may need to include a consideration: of whether the person who decided upon the conduct that amounted to a dismissal, at the time reasonably (though mistakenly) believed that the employee had resigned; and of whether they had taken the steps that any reasonable employer would take to ascertain whether the employee had in fact resigned, prior to acting upon that belief.

HIS HONOUR JUDGE AUERBACH:

1. This appeal concerns the approach which an employment tribunal should take, when deciding whether a dismissal was fair or unfair, in a case where the dismissal has come about because the employer has acted upon a genuine, but mistaken, belief that the employee has resigned.

2. The claimant in the employment tribunal was formerly employed by Impact Recruitment Services Limited, an agency, which supplied her services to Howden Joinery Limited. As did the tribunal, I will refer to them respectively as "Impact" and "Howdens".

3. The claimant brought a claim complaining of unfair and wrongful dismissal against Impact and of age discrimination against both Impact and Howdens. The matter was heard by Employment Judge Alliott, Ms A Carvell and Ms S Williams, sitting at Watford, via CVP. By a majority consisting of the two lay members, the tribunal held that the claimant was both unfairly and wrongfully dismissed by Impact. The tribunal unanimously dismissed the complaints of age discrimination. Impact appealed against the decision upholding the complaint of unfair dismissal. No appeals or cross-appeals were advanced by the other parties.

4. At a preliminary hearing in the EAT, I dismissed Howdens as a second respondent to the appeal and I directed Impact's appeal to proceed to a full appeal hearing.

5. In correspondence with the EAT, the claimant, a litigant in person, indicated that she did not wish to appeal and she agreed with the tribunal's decision. She asked whether she was required to participate in the EAT proceedings. The administration replied that it was for her to decide whether she wished to do so, but if she did, she would need to put in an Answer and apply for an extension of time to do so. Otherwise, the appeal would proceed without her participation, and she might also be debarred from defending it. A further letter from the EAT indicated that as the

claimant had not put in an Answer, she would not be permitted to participate in the appeal.

6. In these circumstances, at today's hearing I have heard only from Mr McFarlane who represents the Appellant, Impact. Notwithstanding the non-participation of the claimant, the onus of course remains on Impact to satisfy me that its appeal is meritorious.

7. A summary of the relevant factual background, which I take from the tribunal's reasons, is this.

8. From 8 January 2018 Impact placed the claimant with Howdens as a warehouse operative. Following the announcement of the national lockdown on 24 March 2020, the majority of the agency staff were told that Howdens would be shutting down. Although some agency staff were requested to continue working, the claimant was not among them. She was among those who, to use the tribunal's expression, were "laid off" by Howdens.

9. The tribunal was of the view, from all the evidence before it, that thereafter there was considerable confusion in the claimant's mind as to her employment status. The basis of the claimant's tribunal claim, which was correct as such, was that she had been employed by Impact, but some emails suggested that at the time she considered herself to have been employed by Howdens. The tribunal observed that this confusion may have been exacerbated by language problems. There was also a contemporaneous email in which the claimant referred to having been dismissed from work one day after her shift on 24 March 2020.

10. What the tribunal described as "the key communication" was a telephone call between the claimant and Sebastian Filipski on 1 April 2020. Mr Filipski was Impact's on-site account manager, based at the premises of Howdens where the claimant worked. The claimant texted Mr Filipski asking him to call her, which he then did. The tribunal observed that Mr Filipski has Polish as his first language and they spoke in Polish, which suggested that "any misunderstanding

due to language problems was not in play".

11. Mr Filipski's evidence was that the claimant asked for all her holiday pay to be paid and requested her P45. She said to him that she had been offered a new job and was starting on 2 April. There was a second call later on 1 April in which, according to Mr Filipski, the claimant asked when she would receive her P45. The claimant's evidence was that she had asked for her holidays to be paid and to receive a copy of her contract of employment, but she had *not* asked for her P45. She had wanted to see her contract to check her notice period.

12. There was a related factual dispute as to whether the claimant had in fact had another job offer as of 1 April. The claimant's case was that, as of 1 April, she had applied for, but not yet been offered, another position through another agency. That position was, on her case, only offered to her on the morning of 2 April.

13. The tribunal referred to the evidence it had of the conflicting accounts, which each of the claimant and Mr Filipski gave in the course of a later internal grievance investigation, in particular as to whether, on 1 April, the claimant had or had not requested her P45. It also referred to an email which Mr Filipski had sent to colleagues on 1 April stating that he had had a call from the claimant confirming that she wanted her holiday pay and her P45, as she had found another job elsewhere.

14. The tribunal described further communications by telephone and by email over the course of the next few days, some between the claimant and Mr Filipski, and some between her and Gary Brown, Impact's contract manager, also based at the Howdens site. These included an email from the claimant to Mr Brown on 7 April asking to be told the reason for her "immediate dismissal" and why she was no longer working for Howdens. According to Mr Filipski's evidence, there was a call between him and the claimant that same day, in which she was told that she would be paid

four weeks' notice despite her leaving and terminating her contract on 1 April 2020.

15. On 7 April 2020 the claimant received her payslip for the week ending 5 April, including seven days' holiday pay. The tribunal stated that the respondent pleaded that she received her P45 on 8 April 2020.

16. In relation to the complaint of unfair dismissal there was a split between the employment judge in the minority and the lay members in the majority.

17. The judge found that the claimant did not fully understand at the time that her contract was with Impact, not with Howdens. She considered that when she was laid off by Howdens on 24 March 2020 without being offered any further shifts, she had been dismissed, and so she began to look for another job. However, she had not been dismissed at that point. She remained employed by Impact. The judge found as a fact that, in the telephone call with Mr Filipski on 1 April 2020, the claimant requested her P45 and asked for all her outstanding holiday pay to be paid. She did so because in her mind she no longer had a job and she needed her P45 for the next job, which she had been offered to start the next day. The judge concluded that in requesting her P45 and stating that she was starting a new job the next day, the claimant clearly and unequivocally resigned her employment. That was not in response to any repudiatory breach on the part of the respondent. The effective date of termination was 1 April 2020.

18. The lay tribunal members, in the majority, found that, having been laid off by Howdens, the claimant had been given authority by Impact to look for work elsewhere while remaining employed by it. At [78] they said:

> **"We accept the claimant's evidence that she did not request her P45 in the 1 April 2020 call with Mr Filipski and that he is mistaken on this point. We find that the claimant merely requested a copy of her contract of employment. We find that Mr Filipski mistakenly thought the claimant had resigned."**

19. The majority held that requesting a copy of her contract and an advance of holiday pay did not amount to a clear and unequivocal resignation. So Impact was wrong to think that the claimant had resigned. The majority then said this:

> **"80. Given that both the claimant and the first respondent were mistaken, we find that a reasonable point at which she was dismissed was when she was sent her P45 on 8 April 2020. Accordingly, we find that that was the effective date of termination.**
>
> **81. We find that the reason for dismissal was a mistaken belief that she had resigned. We find that that is not a potentially fair reason and that the dismissal was both procedurally and substantively unfair."**

20. There is no challenge by this appeal to the majority's findings of fact, nor to their conclusion that, in fact and law, the claimant's employment had ended not by resignation but by dismissal. In summary, it is contended that the majority erred by concluding that dismissal for the factual reason found by them was, as they put it, not for a "potentially fair reason" and "was both procedurally and substantively unfair". Alternatively, the appeal contends, these conclusions were stated but unexplained, and the reasons are not *Meek* compliant.

21. Sections 98(1) and (4) **Employment Rights Act 1996** provide as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> > **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> >
> > **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

22. The predecessor provisions of section 57 **Employment Protection (Consolidation Act)**

1978 were in the same terms.

23. Mr McFarlane relied on **Ely v Y.K.K. Fasteners (UK) Limited** [1993] IRLR 500, a decision of the Court of Appeal. Waite LJ gave the only reasoned speech, with which Simon Brown and Neill LJJ concurred. The factual background and decision of the tribunal in that case were captured by Waite LJ in the following passage:

> **"3. This is an employee's appeal from the dismissal by the Employment Appeal Tribunal on 28th February 1991 of his appeal from the decision of an Industrial Tribunal on 28th April 1989 rejecting his complaint of unfair dismissal. It arises from a case of disputed resignation, and the sole question raised by the appeal is whether an Industrial Tribunal is entitled to find that a set of facts known to an employer is capable of constituting a "reason for dismissal" in a case where the dismissing employer is not in his own mind purporting to act by way of dismissal at all but insists (albeit in error) that the employee has already terminated the contract of employment by resignation.**
>
> **4. The appellant, a long standing employee of the English branch of an international company, told his employers that he was proposing to give up his job in this country and take up employment with one of the group's companies in Australia. When they asked him, two months later, to give a firm date for his departure, he said he had changed his mind. The employers, who had by then started to make arrangements to appoint his successor, replied that he was too late; and that, so far as they were concerned, he had resigned already. That response was held by the Industrial Tribunal to have been mistaken in law; the employee's earlier intimations of an intention to resign had not amounted to a formal notice of termination of his employment contract, and he had never therefore resigned. The Industrial Tribunal held further that the employers' insistence upon treating him (erroneously as the Tribunal had found) as a resigning employee amounted in law to a dismissal. Neither side has appealed from those findings.**
>
> **5. The Industrial Tribunal then went on, however, to hold that the reason for the dismissal had been the appellant's late notification of his change of mind, and that this represented a substantial justifying reason, which the employers had acted reasonably in treating as a sufficient reason for dismissing him."**

24. Upon appeal it was contended for the employee that the tribunal had erred in finding that there was a reason for dismissal. It was argued that because the employer had not been purporting to dismiss the employee at all, they could not have had any reason for dismissal in mind. Waite LJ responded as follows:

> **"20. I am unable, for my part, to accept those submissions. It may indeed by illogical, when the words of the section are literally construed, to say that anyone can have a 'reason for dismissal' when he is engaged in what he regards as the acceptance of a resignation and is persisting in the firm belief that no question of dismissal arises at**

> **all. It would be even more illogical, however, and contrary to the underlying objective of a statute designed to achieve a fair and workable system of industrial practice, to adopt an interpretation of s.57 which would result in dismissals which have occurred through an erroneous insistence upon a supposed resignation being placed in a category of their own – in which every such dismissal, regardless of the merits, would be rendered automatically unfair because the employer could not supply a reason for it. To outlaw such dismissals from the ordinary rules as to fairness affecting all other forms of dismissal (including constructive dismissal) would in my view, far from having the advantages contended for by Mr Wood, introduce an unnecessary complication into employment relations which would be more likely to confuse than to clarify resignation procedures in the workplace.**
>
> **21. The Employment Appeal Tribunal was right, in my judgment, to regard the Abernethy case as applying by analogy. I resort can be had to a state of facts known and relied on by the employer at the time, for the purpose of substituting a valid reason for any invalid or misdescribed reason given by the employer through misapprehension or mistake, there seems to me to be every justification for extending that principle to enable resort to be had to a state of facts known to and relied on by the employer, for the purpose of supplying him with a reason for dismissal which, as a consequence of his misapprehension of the true nature of the circumstances, he was disabled from treating as such at the time.**
>
> **22. It has not been suggested at this appeal hearing that the employee's late notification of his change of mind was incapable (on grounds other than those already dealt with) of qualifying as some other substantial reason for dismissal, or that the Industrial Tribunal was in error in holding that the dismissal was fair in all the circumstances of the case. The sole ground of appeal relied on in this Court fails for the reasons I have stated, and I would dismiss the appeal."**

25. **Ely** thus establishes that in a case where the employer is found to have dismissed the employee by certain conduct, in circumstances where the individual concerned did not believe themselves to be dismissing, there is still a factual reason for dismissal, being the factual reason for the conduct which amounted to a dismissal.

26. Mr McFarlane acknowledged that in **Ely** the only issue was whether the employer could assert a reason for dismissal at all. As Waite LJ recorded in his conclusion, that question having been answered in the affirmative, there was no distinct challenge in that case to the tribunal's findings that the factual reason amounted to a substantial reason within the meaning of what is now section 98(1)(b), nor to its conclusion that the dismissal in that case was, in all the circumstances, fair.

27. Mr McFarlane acknowledged that he could not therefore rely upon **Ely** as authority for the proposition that a dismissal for the factual reason that the employer acted on the genuine but mistaken belief that the employee had resigned must always, necessarily, as a matter of law, be a fair dismissal. However, he submitted that **Ely** supported Impact's case that the majority of the tribunal had erred by failing to consider whether the dismissal of the claimant in this case, for the factual reason found by them, was or was not for a substantial reason of that kind, and if it was for such a reason, whether it was or was not fair in all the circumstances of the case. The majority, he argued, had wrongly assumed that, in light of the facts they had found, the answer to both questions must inevitably be "no"; or, if they had considered these matters, they failed to provide any reasoning explaining their conclusions.

28. Mr McFarlane also referred to **Klusova v London Borough of Hounslow** [2007] EWCA Civ 1127; [2008] ICR 396. In that case the tribunal found that the employer had dismissed the employee because it believed that her immigration status was such that she was not able lawfully to work. However, the tribunal found that was incorrect. So the employer's contention that the dismissal was for the reason that the employment could not continue without contravening an enactment and, hence, for a reason falling within section 98(2)(d), failed. The tribunal had also held that the dismissal was unfair because of a failure to follow the mandatory statutory procedures that applied at that time.

29. The Court in **Klusova** held that the tribunal had not erred in finding that section 98(2)(d) did not apply, as the employee's continued employment would not in fact have been unlawful. However, it also held that, on the evidence before it, the tribunal ought to have concluded that the reason for dismissal was that the employer genuinely, albeit mistakenly, believed that it would contravene statutory restrictions to continue the employment. It was perverse not to have so found. The Court of Appeal also agreed with the EAT that the factual reason amounted to a substantial

fair reason falling within section 98(1)(b). Nevertheless, the Court of Appeal concluded that the failure to follow the statutory procedures meant that the dismissal was, for that specific reason, unfair.

30. Mr McFarlane submitted that **Klusova** establishes that an erroneous but genuine belief in a state of affairs which, had it in fact existed, would have been a fair reason for dismissal, could itself be a substantial reason for dismissal falling within section 98(1)(b). He contended that it must follow that an erroneous but genuine belief that the employee had resigned must also at least be capable of being a substantial reason falling within section 98(1)(b). He argued that this supported his submission that the present tribunal in its majority decision had at least erred by simply treating the factual reason found by them as intrinsically not a potentially fair reason, or by not explaining how they had reached that conclusion.

31. Mr McFarlane also contended that the tribunal majority had erred in finding that the dismissal in this case was also in any event procedurally unfair. The statutory procedures which had applied at the time of the dismissal in **Klusova** have long since been repealed. Once the employer has shown that the reason falls within section 98(1)(b), then the fairness or not of the dismissal depends simply on the application of section 98(4) to the facts of the case. There is no provision in section 98(4), nor any other rule of law, to the effect that a failure by an employer to follow a particular procedure prior to dismissing must *necessarily* always render the dismissal unfair; and there can be cases where, despite such a failure, the dismissal can still be properly held to be fair in all the particular circumstances of the case.

32. Mr McFarlane cited by way of example **Gallacher v Abellio Scotrail Limited** UKEATS/0027/19. In that case the EAT upheld the decision of the tribunal that a dismissal by reason of a breakdown in relations between the employee and her manager, without any procedure having been followed, was fair in all the very particular circumstances of that case.

33. Mr McFarlane submitted that if a conscious decision to dismiss taken without following any procedure could conceivably be fair, it must follow that a dismissal in relation to which the employer did not follow a procedure because it did not believe itself to be dismissing at all, could potentially be fair. On this point, he submitted the present tribunal had, in its majority decision, once again erred by assuming that, even if this dismissal had been for a substantive fair reason, the facts found pointed *necessarily* to the conclusion that the dismissal was still procedurally unfair; or, once again, at the very least, the majority's decision was not *Meek*-compliant on this point.

34. My conclusions are as follows. First, in light of **Ely**, the tribunal majority was, as such, in light of their factual findings, correct to proceed on the basis that the factual reason for dismissal was Mr Filipski's genuine but mistaken belief that the claimant had resigned. That was in particular what, according to the majority, had caused him to arrange for the claimant to receive her P45, which, according to their unchallenged finding, was the thing that effected the dismissal.

35. Secondly, however, I agree with Mr McFarlane that, in a case of this type the factual reason of the mistaken belief is potentially capable of being treated as a substantial reason of a kind falling within section 98(1)(b). But Mr McFarlane has not invited me to hold that such a factual reason must necessarily always be regarded as amounting to such a substantial reason.

36. As to that, I observe that the fact that a factual reason falls into a *category* of reasons that are capable of amounting to such a substantial reason does not necessarily mean that it will do so in every case. The authorities do, however, tend to suggest that the threshold for what counts as a substantial reason for these purposes is relatively low. Nevertheless, as the authorities, for example on business-related reasons, show, there may be cases where the tribunal properly concludes that the *particular* reason relied upon in the given case, though of a kind that could

potentially meet the definition, fails to qualify as substantial in that case. I am inclined to think that, in general, where the kind of reason relied upon, and found, is a genuinely mistaken belief that the employee has resigned, that ought to be regarded as qualifying, unless the tribunal considers that the belief was truly capricious, or lacking any possible rational basis, or something of that sort.

37. But, as Mr McFarlane did not urge the point, I have not heard contested argument on it, and it is not necessary to my decision; I do not need to decide that. I do not say that there could never be a case in which the tribunal could possibly find that a dismissal by reason of such a mistaken belief did not, in the circumstances of that particular case, amount to a dismissal for a substantial reason falling within section 98(1)(b).

38. In any event, in the present case, I do conclude that the tribunal majority certainly did err on this point. It appears to me that in stating that the factual reason that they had found is "not" what they called a potentially fair reason, they erred by assuming that it was intrinsically not capable of amounting to a reason falling within section 98(1)(b), and, specifically, on account of that wrong assumption, by failing to consider and decide whether this dismissal *was* for a substantial reason of that kind. It appears to me that the majority did not examine that possibility at all, given the way they expressed themselves at [81]. That impression is reinforced by the later observation of the tribunal, in the context of its consideration of an age-discrimination claim relating to the dismissal, at [109], that "the majority decision is that the dismissal was due to a mistaken belief that the claimant had resigned and therefore unfair".

39. In any event, if, contrary to my impression, the majority did reflect upon this question, the decision is certainly not *Meek*-compliant in that regard, as it does no more than state the majority's conclusion.

40. I also agree with Mr McFarlane that the tribunal majority erred by concluding that, in light of its findings of fact, the dismissal was, effectively in the alternative, in any event procedurally unfair. I agree with his overarching submission that this is because the majority failed to consider whether, if, contrary to its view, the reason amounted to a section 98(1)(b) reason, the dismissal would then have been fair or unfair in all the circumstances of the case, applying section 98(4). Again, that appears to me to have been an error of substance, because the majority assumed that, on the facts found, the dismissal was necessarily what it called "procedurally unfair", rather than considering and applying the words of section 98(4). Again, if, contrary to how I read it, the majority did consider the section 98(4) test, their decision is certainly not *Meek*-compliant in that regard either.

41. Mr McFarlane confirmed that he did not argue that, if a dismissal by reason of a mistaken belief in resignation is found to be for a section 98(1)(b) reason, it could then never be found to have been unfair pursuant to section 98(4) by reason of a failure to take some procedural step prior to acting on that belief. Nor do I think that is the law. In every case, the tribunal must consider whether the dismissal was fair or unfair, applying the section 98(4) test to that particular case.

42. The fact that the employer was acting on a genuine, albeit mistaken, belief would obviously be relevant to the tribunal's consideration of whether it acted reasonably in taking the steps it did, when it did, that resulted in dismissal. But, in a given case, arguments might be raised, for example, as to whether the employer had failed to take some step that any employer acting reasonably would have taken, to investigate and establish whether the employee had indeed resigned, before acting on a report that they had done so. It might, in a given case, for example, also be relevant to consider whether the belief that the employee had resigned was reasonably open to the manager concerned, on the information available to them, again applying a band of "reasonable responses" approach. Conversely, I agree with Mr McFarlane that there is no rule

that certain minimum procedural steps must be taken in every case in order for section 98(4) to be satisfied.

43. In any event, for reasons I have given, the majority did err by treating as automatic the conclusion that section 98(4) could not have been satisfied in this case. Had the factual reason been found by them to be a substantial reason falling within section 98(1)(b), they would then have need to consider how matters stood, applying the test in section 98(4) to the facts of this case. That would include whether, in light of his conversation with the claimant on 1 April 2020 – from which the majority found Mr Filipski came away with the mistaken impression that the claimant had requested her P45, leading to his mistaken view that she had resigned – Mr Filipski acted reasonably or unreasonably in acting on that understanding at that point in all the circumstances of this case, including the case being one in which, as the majority also observed at [80], the claimant herself was also in some respect mistaken.

44. I therefore allow the appeal and quash the majority conclusion that the dismissal was unfair. The matter must now be remitted to the tribunal to decide afresh whether, in light of the facts found, Impact has shown that the reason for dismissal was a substantial reason within section 98(1)(b), and, if so, whether the dismissal was, in light of the facts found, fair or unfair, applying the test in section 98(4). Mr McFarlane accepted that, in reaching that fresh decision, the tribunal will be bound by the facts found in the Alliott tribunal's decision which is the subject of this appeal, both unanimously, and, in relation to factual points on which there was divergence, by the majority. Mr McFarlane therefore submitted that the matter should be approached upon remission to the tribunal on the basis purely of further submissions as to the correct answer to those questions, correctly applying the law to the facts that have been already found. I agree.

45. Mr McFarlane also invited me to direct that the matter be remitted not back to the previous panel of three, but to a different judge sitting alone or, alternatively, a different panel of three.

While he made the point that, as the age-discrimination complaint has been disposed of, there is no need for a panel of three at this point, it would still be an option for the further decision on remission to be taken by a panel of three; and Mr McFarlane indicated that he would not object to my directing that that option should be left open for further consideration.

46. However, he did invite me to direct that, whether by a judge alone or a panel of three, the further decision on remission should not be sent back to any of the same tribunal panel. In particular, he expressed the so-called "second bite of the cherry" concern, that there might at least be the impression that the respective panel members might be disposed, even if unconsciously, to reach the same respective conclusions again, by a different route. He also expressed concern, given how busy the Watford tribunal still is, that there would be significant delay if the matter was directed to be remitted to the same panel of three; and he reminded me that this case is already approaching five years old.

47. I am, on balance, persuaded by these arguments that remission should be to a different judge or panel to decide whether, on the facts found in the Alliott tribunal's decision, Impact has shown that the factual reason for dismissal was a substantial reason falling within section 98(1)(b), and, if so, whether it was fair or unfair. I consider that it should be left open to decision by the Regional Employment Judge, as to whether those matters should be considered and determined by a judge or a panel of judge and two lay members. That will allow the claimant, who is not here today, as well as Impact, to make submissions to the tribunal as to whether either of them is seeking a determination by a judge alone or by a three-person panel, before the REJ decides what to do.