Appeal No. UKEAT/0051/20/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 & 25 September 2020

Before

HIS HONOUR JUDGE BARKLEM

(SITTING ALONE)

MS K KALER — APPELLANT

INSIGHTS ESC LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT
FULL HEARING

APPEARANCES

For the Appellant	MS K KALER (The Appellant in Person)
For the Respondent	MS A MACEY (of Counsel) Instructed By: Webster & Co 5 Chancery Lane London EC4A 1BL

SUMMARY

Disability Discrimination

The Appellant claimed, among other things, disability discrimination. She represented herself throughout. She was in the course of a process leading to a potential diagnosis of Autism / Aspergers Syndrome but had been told that there was a lengthy wait for the final stage. Directions were given as to medical evidence not being required at a hearing when both parties were unrepresented.

What was due to be a full merits hearing turned into a preliminary hearing as to disability. The Claimant was unsuccessful in establishing disability, the ET commenting on the lack of medical evidence.

Shortly after the hearing, and unexpectedly, she was offered an appointment for an assessment by a newly appointed clinical psychologist. She was diagnosed with Autism.

The EAT held that, in the particular circumstances of the case, and in line with the Ladd v Marshall principles the matter should be remitted to the same ET for consideration of new evidence, alternatively by a newly constituted ET to redetermine the issue.

HIS HONOUR JUDGE BARKLEM

1. This is an appeal against the Judgment on a preliminary issue by an Employment Tribunal ("ET") sitting at London Central, Employment Judge Elliott sitting with members Mr S Ferns and Ms O Stennett. The Hearing took place on 8 and 9 July 2019. In this Judgment I shall refer to the parties as they were below.

2. The hearing was originally intended to be for five days and was expected to deal with all merits issues arising from the Claimant's claims of automatically unfair dismissal for whistleblowing, disability discrimination and breach of contract. The ET decided at the outset of the Hearing (against the Claimant's wishes – see paragraph 12 of the Reasons) that it would deal with the issue of disability first.

3. In the event, the ET found that the Claimant had not met the definition of disability and, at her request, the hearing on the remaining issues was postponed to be relisted. It is against that finding that the Claimant appeals, relying on new evidence in the form of a report from a clinical psychologist which confirmed that, following assessment on 12 August 2019, the Claimant had been diagnosed with Autism Spectrum Disorder.

4. Following a hearing under Rule 3(10) the appeal was permitted to proceed to a Full Hearing by His Honour Judge Auerbach on two grounds. First, that it is arguable that the new evidence was such as to justify allowing appeal on the basis that it arguably supports the Claimant's case that she was a disabled person at the relevant time and, second, that the ET arguably erred in law in not considering that the deficiencies in her social skills did not amount to normal day-to-day activities; see paragraph 48 of the Reasons. That is a brief summary from

HHJ Auerbach's judgment, a transcript which Ms Macey tells me was not received by her until after she had prepared her skeleton argument.

5. Two Preliminary Hearings had been held. At the first, on 18 July 2018, (at which the Claimant represented herself) Employment Judge Wade noted that the Claimant's case was that she was discriminated against due to her Asperger's Syndrome. As the Judge noted, "She said she also has the mental health impairments of depression and anxiety which can interconnect with the Asperger's, but these are not central to her claims." Directions were made for the provision of relevant GP Notes, specialist reports and an impact statement.

6. The second hearing was on 17 September 2018. The Claimant again represented herself, whilst the Respondent, which is a school, was represented by its Principal, Ms Quartey. Employment Judge Norris advised both parties as to how a Full Hearing would be conducted and encouraged the Claimant to contact sources of potential assistance. The document setting out the course of that hearing notes, at paragraph 6, that the issue of disability was disputed. It was agreed that no further medical or expert evidence would be required, the parties being content for the ET to determine the question of whether the Claimant had a disability at the material time by reference to the documents disclosed and her disability impact statement.

7. At the Full Merits Hearing the Claimant remained unrepresented while the Respondent was represented by counsel, Ms Anna Macey, who also represented the Respondent in the hearing before me. The hearing was held remotely, with short breaks from time to time to allow the Claimant, who again represented herself, to collect her thoughts. I am grateful to them both for the succinct way in which they presented their submissions as well as for their skeleton arguments.

8. In its written reasons sent to the parties on 9 July 2019 the ET noted that it heard from the Claimant but also had regard to documents sent on the evening of day one and the morning of day two "because the Claimant is a litigant in person and was finding things difficult"; Reasons paragraph 16. It also noted that it clarified with the Claimant that the disability issue was not about whether she had informed the Respondent about the disability she relied on, but rather whether she met the definition of disability at the relevant time, namely between 1 January 2017 and early January 2018.

9. Given the scope of the appeal, it will be helpful to set out a number of references which the ET made to the state of evidence before it:

> **"35. We saw that the claimant had historically not sought a diagnosis. In paragraph 12 of her main witness statement she said that she had always considered herself to have Asperger's but until this year (meaning 2018 when she signed that statement) she had chosen not to get a diagnosis.**
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> **36. From the documents we saw, it was clear that in 2018 post-dismissal and in the light of these proceedings, the claimant had sought a diagnosis of this condition. She said that nevertheless she disclosed the condition to her employer and they were aware of it. She submitted that just because she does not have a diagnosis, does not mean that she does not have the condition.**
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> **37. In her disability impact statement (third paragraph unnumbered on the first page) the claimant said she found it difficult to separate Asperger's from her other mental health issues such as depression, stress and extreme anxiety.**
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> **38. The claimant sought a diagnosis in mid-2018 through the Richmond Wellbeing Service (page D23). In a letter from a CBT therapist, Ms Powell, dated 11 June 2018, the therapist recorded that the claimant said that she believed that she had symptoms of Asperger's. This was not the therapist saying as much.**
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> **39. The claimant was booked on to a course on Overcoming Low Mood (page D23 - letter 11 June 2018). On 15 June 2018 she was referred to the Richmond Autism Spectrum Disorder Service for an assessment of 'possible autism spectrum disorder (ASD)' (page D21). She was asked to fill in some questionnaires. Although we had the questionnaires that she completed for an Asperger's assessment in 2013, we were not provided with the questionnaires that she completed in 2018.**
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> **40. About a month later, on 16 July 2018 Dr J Woollatt, a Locum Registered Clinical Psychologist, said that there was 'sufficient evidence to suggest the need for a full autism assessment' (page D20). We find this was the psychologist recommending a full assessment and not making a diagnosis. The claimant was placed on their waiting list. To date she does not have a diagnosis. The claimant said she was awaiting the final assessment.**
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> **41. We saw a letter from a Psychological Wellbeing Practitioner dated 28 January 2017 saying that the claimant had attended an initial assessment with a CBT therapist, presenting with moderate depression and mild anxiety. She had agreed to attend an introductory session and a low mood course starting in February 2017.**
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> **42. The letter said she did not attend and she informed the Practitioner that she no longer required support and did not wish to attend any treatment. She reported feeling much better and had secured new employment and asked to be discharged. We find, based on this letter,**

that the claimant was managing any mental health condition well and it was not having a substantial adverse effect on her ability to carry out normal day to day activities. She declined further treatment. The practitioner said: 'There are no current risk concerns' (page D49).

43. As mentioned above, the claimant completed some multiple-choice tick box questionnaires in 2013, called an AQ test. She scored 39 (page D48). The documents showed that the official criteria for Asperger's Syndrome is an AQ score greater that 32. The claimant's evidence was that she does not as yet have a diagnosis.

48. The claimant agreed that she could communicate well and lead and run a class. She said she could communicate to do her job and agreed that anyone who worked as a teacher had to be able to communicate well. She said her social communication was what was difficult, for example the 'office politics' and if people did not communicate well with her. She agreed she could write emails, make phone calls and interact with children, staff and parents. She said she did have the ability to communicate well, but this did not mean that her body 'was not about to explode'.

49. We were taken to K109 a reference from Beachcroft School for the claimant from her period of employment from October 2011 to February 2012. She was rated excellent for interpersonal skills and ability to work in a team. She said that she did have excellent interpersonal skills when the person she was working with cared and was not like the respondent. She said communication became difficult when the other person did not want to communicate. She said that it depended on the circumstances. There was no qualification placed on her communication or interpersonal skills in either of the references we saw. She said generally she had excellent interpersonal skills.

50. We saw a further reference on page K110, dated 3 February 2013. The reference said that the claimant had excellent interpersonal skills and that she built strong relationships with challenging students and with staff colleagues.

51. We therefore saw three references showing that she had excellent communication and interpersonal skills. The claimant explained this as her being very 'high functioning' and when she works in a school that is 'as it is supposed to be' she does well, but not when there are no systems in place.

52. The claimant said her condition was life-long. She said it was impossible due to her condition for her to lie. She admits that she has a conviction for fraud in 2007 which she blamed on the Benefits Agency and said she would never claim benefits again. She said in evidence that she asked her GP to give her a certificate of unfitness for work in early 2018 after her dismissal (page D103), because she was thinking of claiming benefits. It was hard to reconcile these two statements.

56. The claimant also told the tribunal that her condition caused her to have 'meltdowns' and become rude and aggressive. We saw no evidence of the claimant being treated for this.

Conclusions on the disability issue

61. There is was at the date of this hearing no diagnosis for the claimant of Asperger's Syndrome. We are not qualified to make that diagnosis. We have not been given the benefit of expert medical evidence or a medical report or a letter, for example from the claimant's GP.

62. The parties agreed before Employment Judge Norris on 17 September 2018 that they did not require this. They were both content for the tribunal to determine the question of whether the clamant was disabled by reference to the documents she had disclosed and her disability impact statement (Case Management Order paragraph 6.2).

65. There is no diagnosis of Asperger's Syndrome. Pending such a diagnosis we can only regard the condition as self-diagnosed by the claimant. We noted that she was seeking a diagnosis in 2013 as set out in her email of 10 June 2013 (page D45) telling the respondent that she was currently going through the process of being diagnosed. Six years later, she did not have a diagnosis of this condition.

69. We cannot and do not diagnose the claimant with Asperger's Syndrome. We have considered whether the claimant has or had at the material time a mental impairment sufficient to meet the definition in section 6 EqA, regardless of the label. We had limited contemporaneous medical evidence to assist us on this, or any medical report covering the relevant time.

> **72. In relation to paragraph D3 of the Guidance, the matters dealt with by the claimant included having a conversation and we have found, based on the references and her description of herself as 'high functioning', that her communication skills were very good. The claimant said that the social elements of conversation were difficult, such as office politics and small talk. We do not consider the need to engage in office politics as falling within the category of normal day to day activities. Not everyone enjoys or wishes to take part in small talk. She agreed she could write emails, make phone calls and interact with children, staff and parents. We find that her condition did not have a substantial adverse effect on her ability to carry out this type of activity.**
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> **76. We find that the claimant has not discharged the burden of proof in establishing that she met the legal definition of disability during the period 1 January 2017 to early January 2018. In making this finding we do not say that the claimant has had no mental health condition(s), our finding is that she has not proven that she met the definition at the material time."**

10. As is clear from the passages of the Reasons which I have quoted, the ET was aware that the Claimant was in a process that was hoped to lead to a diagnosis. As has since been explained, the Claimant was under the impression that a full diagnosis can take some years due to the large backlog. She had routinely written to the appropriate authority seeking to chase but no progress has been made.

11. She has explained that shortly after the ET Hearing, she was contacted and offered an assessment by Mr Parkes who had only recently been recruited to deal with the backlog. She had been in Paris at the time and returned to London to have the assessment. She had not approached Mr Parkes, neither did she "chase the matter more urgently" as the Respondent suggested, though Ms Macey, in the course of argument.

12. The Claimant sought a reconsideration of the ET's Decision. The Tribunal responded by letter dated 21 August 2019. As far as relevant the letter stated:

> **"By email dated 22 July 2019 the Claimant made an application for Reconsideration of the Tribunal's judgment dated 9 July 2019 together with a number of other applications. In support of that application 14 August 2019 the Claimant submitted an email from a Chartered Clinical Psychologist saying that he concluded that the Claimant has Autism/Asperger's. The Psychologist said he would be writing up a report. This was based on an assessment 2 days earlier on 12 August 2019.**
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> **The lack of a diagnosis was not the only reason why the Tribunal found that the Claimant did not meet the section 6 definition of disability.**
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> **The Tribunals finding at paragraphs 22 and 65 was that the claimant said on 10 June to 2013 that she was in the process of being diagnosed. She has not explained why this diagnosis was**

> **capable of being obtained within such a short space of time following the hearing and was not sought or obtained in time for that hearing.**
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> **The Tribunal had a number of reasons (not just the lack of diagnosis) for its findings which are setting out in the Reasons given orally and sent to the parties on 9 July 2019. Under rule 72 the Judge considers that there is no reasonable prospect of the original decision being varied or revoked and the application for Reconsideration is refused."**

13. The law in relation to the reopening a case with fresh evidence is of considerable antiquity. It is often referred to as the rule in **Ladd v Marshall** [1954] 1 WLR 1489, although that case refers to much older authorities and to the starting point that there should in general be finality in litigation. However, the issue is, for the purposes of the Employment Appeal Tribunal ("EAT"), codified in the **2018 Practice Direction** paragraph 9. That paragraph provides as follows:

> **"9.1 Usually the EAT will not consider evidence which was not placed before the Employment Tribunal unless and until an application has first been made to the Employment Tribunal against whose judgment the appeal is brought for that Tribunal to reconsider its judgment. Where such an application has been made, it is likely that unless a judge of the EAT dismisses the appeal as having no reasonable prospect of success the judge will stay (or sist) any further action on that appeal until the result of the reconsideration is known. The Employment Tribunal as the fact-finding body, which has heard relevant witnesses, is the appropriate forum to consider 'fresh evidence' and in particular the extent to which (if at all) it would or might have made a difference to its conclusions. When deciding if an Employment Tribunal erred in law when deciding on an application to reconsider an earlier decision, the EAT will have regard to any evidence placed before the Employment Tribunal in relation to the application to reconsider.**
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> **9.2 Subject to paragraph 9.1, where an application is made by a party to an appeal to put in, at the hearing of the appeal, any document which was not before the Employment Tribunal, and which has not been agreed in writing by the other parties, the application and a copy of the document(s) sought to be admitted should be presented to the EAT with the Notice of Appeal or the Respondent's Answer, as appropriate. The application and copy should be served on the other parties. The same principle applies to any oral evidence not given at the Employment Tribunal which is sought to be adduced on the appeal. The application to consider Fresh Evidence must explain what that evidence is, and how it came to light. Generally, a witness statement detailing this should be filed with the EAT and served on the other parties when the application is made.**
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> **9.3 In exercising its discretion to admit any fresh evidence, the EAT will only admit the evidence (in accordance with the principles set out in *Ladd v Marshall* [1954] 1WLR 1489 and having regard to the overriding objective), if all of the following apply:**
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> **9.3.1 the evidence could not have been obtained with reasonable diligence for use at the Employment Tribunal hearing; and Employment Appeal Tribunal – Practice Direction 2018 13**
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> **9.3.2 it is relevant and would probably have had an important influence on the hearing; and**
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> **9.3.3 it is apparently credible."**

14. The procedure set out in that paragraph has not been followed in this case. The ET had not seen the report which Mr Parkes subsequently prepared nor the letter which Mr Parkes wrote to the EAT on 12 December 2019, which explained the delay in the Claimant receiving an assessment and pointed the difficulties which many people face in obtaining assessments due to the variability in services. He also pointed out that the inception of local ASD assessment services was a relatively new development. These documents were first seen by HHJ Auerbach at or shortly before the Rule 3(10) stage.

15. As mentioned above, I am satisfied from the Claimant's explanation at the hearing, arising from points made on behalf of the Respondent, that the provision of an assessment shortly after the ruling on this issue was an unexpected coincidence arising through Mr Parkes appointment. It was an NHS referral, not a private one, and was not a reaction to the ET's ruling.

16. On behalf of the Respondent, Ms Macey submits that the three limbs which the Practice Direction requires are not met. She says, and I am summarising it briefly, that Mr Parkes' report relies on matters which the Claimant did not put before the ET. She also says that there is no evidence that the Claimant sought to expedite the preparation of the report following the initial notification of the diagnosis. She argues that the diagnosis would not have affected the decision of the EAT because it was irrelevant to the test for disability which the ET had set out in its Reasons.

17. She reminded me of authorities for the propositions (i) that the ruling in **Ladd v Marshall** should not be circumvented by the remission to the ET for a rehearing so the evidence can be heard, **Kingston v British Railways Board** [1984] ICR 781 CA, and (ii) that

is not open for a party to seek to rely on evidence that was available to be adduced but which the party elected not to adduce at the Hearing, **Bingham v Hobourn Engineering Limited** [1992] IRLR 298. She also points to the decision by both parties that no medical report would be required at the Preliminary Hearing on 17 September 2018 and on the Claimant's failure to seek a report privately.

18. As to the second limb, Ms Macey argues that, although relevant to the question of the Claimant's disability status, Mr Parkes' evidence would not have had an important influence on the hearing. She says the diagnosis of Asperger's Syndrome is legally irrelevant, that Mr Parkes relied on reports from former work colleagues which were unreliable and which the Respondent had been unable to challenge, and on evidence from the Claimant herself which would be susceptible to challenge. She says that the report fails to mention the Claimant's mental health issues including her having been sectioned in 2012. Had the report been before the ET she argues and either the Claimant or Mr Parkes challenged in cross-examination, the ET would have been likely to reject the evidence. She mentioned that the report deals with the Claimant as she is today, but the ET must look at the position of the date of the alleged discrimination. These points are reiterated in relation to the third limb that the evidence must be apparent and credible which is accepted to be a low threshold.

19. I have not found this an easy decision. The EAT is looking at material which was not before the ET either at the initial hearing nor when deciding on reconsideration. Ms Macey says that when the full report was made available further reconsideration should have been sought at the ET.

20. It seems to me clear that because of the time that elapsed before the full report and Mr Parkes' letter of explanation was received, the procedure set out above in the Practice Direction could not be followed. Even if it could, I find that it was open to the EAT to direct that the matter be dealt with at a Full Hearing, which is what happened. Having regard to the overriding objective form must give way to substance.

21. I consider it important to bear in mind that the Claimant's has represented herself throughout. Moreover, at the Preliminary Hearing in which the parties agreed not to rely on expert evidence, neither was legally represented. Having heard of her personal circumstances, I am satisfied it was reasonable for her not have sought a private report and that she was simply waiting for the lengthy assessment process to take its course with no expectation that the assessment would suddenly be offered shortly after the hearing.

22. I conclude that the evidence could not have been obtained with reasonable diligence for use at the ET Hearing. It is serendipitous that it was received before the case was concluded. The fact that this was, in the event , a Preliminary Hearing seems to me to be a relevant factor in my balancing exercise.

23. As for limb two, the assessment was plainly relevant as Ms Macey properly concedes. It is the report of a clinical psychologist. The diagnosis of autism spectrum disorder is self-evidently a complex process but there is no reason for me to conclude that the diagnosis was flawed in the manner suggested on the Respondent's behalf. I have taken account of the comments in the letter rejecting the reconsideration request as to the lack of a diagnosis not being the only reason for rejecting the Claimant's claim of disability.

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24. However, I also note the comments in the Reasons as to the absence of diagnosis, which the ET pointed out it was not qualified to make (paragraph 61) the finding that, pending a diagnosis they can only regard the condition as self-diagnosed by the Claimant (paragraph 65), the comment as to the limited contemporaneous medical evidence as to assist them (paragraph 69) and, finally, the conclusion that the ET was *not* saying that the Claimant did not have a mental health condition, but that she had not proved that she met the condition at the material time. Autism is, as the assessment makes clear, a lifelong condition so a diagnosis of any type would be relevant to any earlier period.

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25. I note that the diagnosis was not made for the purposes of the ET. That being so, a general comment made in the assessment that autism is a disability for the purposes of the **Equality Act 2010** would not have bound the ET, which is entitled to reach its own conclusion. However, I conclude that a formal diagnosis from a qualified practitioner as to the key issue before the ET, (Asperger's being, as I understand it from the papers before me, a form of autism) would probably have had an important influence on the hearing.

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26. The final limb concerns the apparent credibility of the assessment. I have had regard to the reservations Ms Macey has made as the reliability of the information upon which the assessment has been made. I accept that, were Mr Parkes to be cross-examined, there is the possibility that he may change his view, although I express no view on how likely that is. Suffice it is to say that the low threshold of credibility has been crossed. For these reasons, I consider that ground 1 of the appeal succeeds. The finding that the Claimant was not disabled is therefore set aside.

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27. Ground 2 concerns the finding at paragraph 72 in relation to the Claimant's expressing a dislike for office politics and small talk and the conclusion that such matters did not form part

of day-to-day activities. Ms Macey argues that as this is in essence a perversity ground, the Claimant must surmount the high hurdle imposed by **Yeboah v Crofton** [2002] IRLR 634 CA, and must demonstrate that no reasonable Tribunal could have formed the views it did on the proper appreciation of the evidence and the law. I accept that proposition.

28. The finding at paragraph 72 was specifically in relation to paragraph D3 of the guidance, which the ET set out at paragraph 60 of their Reasons and specifically the inclusion of "interacting with colleagues as part of day-to-day activities." Ms Macey argues that the conclusions of the ET, first, that the need to engage in office politics does not fall within normal day-to-day activities and two, that not everyone enjoys or wishes to take part in small talk are unassailable findings which were open to the ET The Claimant explained to me that, to her "small talk" means all parts of a conversation which are not strictly necessary.

29. Reading the decision as a whole, it is clear that the ET had before it considerable evidence as to the Claimant's interpersonal skills, which were plainly very good. I have particular regard to the evidence set out at paragraphs 46 to 51 of the Reasons. I do not consider that there is any discernible distinction in the external evidence between "conversation skills" and "communication skills". I consider that in paragraph 72 the ET was not deciding that the Claimant was deficient in social skills, rather it considered that the two rather limited aspects of interpersonal skills, of which she alone given evidence, did not taken in isolation amount to normal day-to-day activities for the reasons that they gave. I consider that this was a conclusion which was open to them on the evidence and thus not a perverse finding nor one which demonstrated any other error of law. I would therefore dismiss this aspect of the appeal.

30. Having given the judgment above, I paused to seek submissions from the parties as to disposal. The Claimant raised a number of questions as to what form any subsequent hearing

before the ET would take, which I am not able to answer. After reflection, she indicated that she was content to have the matter considered by the same Tribunal but preferred that the hearing should in effect start again.

31. Ms Macey expressed concern that my decision had been based on material which arose only at the hearing. As mentioned above, this was in response to points raised in her skeleton argument as to which I sought clarification, In relation to disposal she said that the Respondent wished the matter to be heard by the same ET in the interest of the matter being resolved as quickly as possible, that the ET hearing was relatively short, the Claimant alone giving evidence and there having been no reference to case law or the statutory guidance.

32. I have no doubt as to the ability of the same ET fairly to reconsider its decision. Subject to the Respondent's position as to further evidence and possible cross-examination of Mr Parkes and/or the Claimant, the same ET, once convened, could deal with the new evidence relatively quickly. On the other hand, particularly at these difficult times of Covid-19, it is possible that convening the same panel would result in undue delay. Therefore, I direct that is the matter is to be remitted to the same ET for such further evidence as it thinks fits to be heard on the question of disability, unless in the view of the Regional Employment Judge such a course will involve delay in which case the issue of disability should be heard afresh by a differently constituted Tribunal.