Neutral Citation Number: [2023] EAT 46

Case No: EA-2020-001041-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 March 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT)

- -

Between :

ROLEC (ELECTRICAL AND MECHANICAL SERVICES) Ltd

Appellant

- and -

MRS J GEORGIOU **Respondent**

- -
- -

Mr Marc Jones (instructed by Marjon Law) for the **Appellant**
No appearance or representation by or on behalf of the **Respondent**

Hearing date: 15 March 2022

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – APPARENT BIAS

Interventions by the Employment Judge during the course of the evidence were such as would cause the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility of bias (***Porter v Magill*** [2001] UKHL 67, applied). The appeal would be allowed and the decision of the Employment Tribunal set aside.

THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT):

Introduction

1. This appeal raises the question of apparent bias arising from the conduct of the hearing below by the Employment Judge ("EJ"). In giving this judgment, I refer to the parties as the claimant and the respondent as they were before the Employment Tribunal ("ET"). This is the full hearing of the respondent's appeal against a judgment of the Watford ET, EJ Kurrein sitting alone, remotely by video link, on 7 and 8 September 2020, by which it was held that the claimant had been unfairly dismissed by the respondent.

2. The claimant, who acted in person in the ET proceedings, was represented by her husband at the ET hearing, and has acted in person on the appeal. She has not attended today's hearing for reasons explained in her correspondence with the Employment Appeal Tribunal ("EAT") but she has provided a short skeleton argument and I have taken that into account in reaching my decision on the appeal. Mr Jones, solicitor, has represented the respondent throughout these proceedings, both before the ET and in the EAT.

3. Due to the continuing need to mitigate the risk of transmission of the Corona-virus, this hearing has taken place remotely by MS Teams. No issues of connectivity or audibility have arisen during the hearing.

The Factual Background

4. I take my summary of the relevant background from the ET's findings of fact. I am aware that some of these are disputed by the respondent.

5. The respondent specialises in providing electrical and mechanical services by acting as a sub-contractor to housebuilders. It employs 20 employees. At the relevant time, one of the services offered by the respondent was installation and maintenance of home alarm systems.

6. The claimant, who had commenced her employment with the respondent on

15 February 2011, was employed as an office administrator but was also known as the alarms/CCTV supervisor, albeit the ET found that did not account for the majority of her work. The claimant had been given a written statement of terms and conditions when she started work but had not signed it.

7. In March 2018 the respondent's managing director, Mr Barrett, had mentioned to the claimant that he intended to sell the alarms business. He did not say anything to her about her position or the effect on her of such a sale.

8. The relevant history then moves to the latter part of 2018. For the staff Christmas celebration that year, the respondent had organised a party at an Indian restaurant for 7 December. Earlier that day, at about 4.00 pm, a director of the respondent, Mr Sharp, came up to the claimant and said:

> "I've been watching you. What do you do? Why are you still here?"

9. Later, outside the restaurant at about 11.30 pm, an incident took place where Mr Sharp twice said to the claimant, "*You're sacked*," although another director, Mr Armstrong, removed Mr Sharp from the scene and told the claimant that he would sort this out. When the claimant had objected to the way Mr Sharp had spoken to her. Mr Armstrong raised his hand near the claimant's face and said, "*You're not listening*."

10. The following day, the respondent's operations director, Mr Tuffnell, invited the claimant to a meeting with Mr Sharp and Mr Armstrong, when they apologised if they had done anything to offend her. The ET accepted that neither could recall what had taken place the previous evening as they had both had too much to drink. The claimant was unimpressed and made clear she would see what took place in the future.

11. On 18 January 2019, the claimant emailed Mr Armstrong, copied to Mr Barrett and Mr Tuffnell, to ask that she be given a contract that reflected her actual hours, something she said she had raised previously. Mr Armstrong replied on 21 January to say he had no problem with the

claimant or her work and thought they had a healthy working relationship. He declined to discuss the suggestion made by the claimant, that other staff members' contracts had been sorted, but said he would be happy to discuss any of this as required.

12. On 22 January 2019, Mr Barrett told the claimant that the alarms department would be transferred to another company on 1 February and gave her a long list of tasks to facilitate the transfer. I pause to note that the respondent objects that it was only transferring the alarm's maintenance business, and that that was not due to take place until 1 March 2019. In any event, the ET found that when the claimant asked where this left her, she was told that would be worked out when the tasks had been completed.

13. On Wednesday 23 January 2019, Mr Barrett emailed the claimant to say they would discuss the situation on Friday afternoon. On Friday 25 January 2019, however, the claimant waited anxiously for Mr Barrett to contact her but when she still heard nothing, she went to his office at 3.40 pm and asked if they could have their meeting then, only to be dismissed by his responding:

> "I'm too busy. It will have to wait until Monday."

14. The claimant was visibly upset after that exchange. When she returned to work, on Monday 28 January 2019, she handed in her resignation.

15. The respondent initially insisted that the claimant's resignation could not take immediate effect until it was dealt with as a grievance, and a grievance meeting was held the next day. On 30 January 2019, the claimant was then told she did not have to work her notice and could leave immediately. She was subsequently paid £1,534.29 in arrears.

The Proceedings Before the ET and the ET's Findings

16. By her claim presented to the ET on 21 March 2019, the claimant complained she had been constructively unfairly dismissed. She was subsequently given permission to amend her claim to also add a complaint that the respondent had failed to provide her with an appropriate contract and

had deprived her of holiday pay. By the time of the ET hearing, however, the claimant had accepted that the payment that had been made to her after her resignation covered her outstanding holiday pay entitlement.

17. The claimant gave evidence on her own behalf and the respondent called six witnesses: Mr D Barrett, Managing Director; Mr P Armstrong, Director; Mr G Tuffnell, Operations Director; Mr M Tuffnell, Health and Safety Manager; Mr J Rooms, Office Administrator; and Mr D Tyler, HR Consultant. The EJ found the claimant's evidence had been clear but in contrast:

> "[9] I did not find the Respondents' witnesses at all impressive. They were often hesitant in their replies and gave some contradictory answers, particularly in respect of the events of 7 December 2018."

18. More generally, the EJ concluded, in relation to the comparative credibility of the witnesses:

> "[13] Overall, I concluded that the Respondent's witnesses were endeavouring to toe the Respondent's line and, on 7 December 2018, were very much the worse for drink. I could not rely on their powers of recall.
> [14] (…) where there was a conflict between the Claimant's evidence and that on behalf of the Respondent, particularly in respect of the events of 7 December 2018, when the Claimant, being teetotal was sober, I prefer the evidence of the Claimant."

19. The ET accepted that the deferment or cancellation of the meeting on 24 January 2019 amounted to a repudiatory act on the part of the respondent, as it was in breach of the implied term of trust and confidence. It found that the claimant had been on tenterhooks concerning her future, since the conduct of her managers and directors on 7 December 2018, when she had clearly been told she was being sacked; that had then continued when she was told of the sale of the alarm business. Even if a deferment or cancellation of the meeting was not of itself sufficient to amount to a repudiatory breach, it was part of a course of conduct that, taken cumulatively, had amounted to such a breach. The ET therefore accepted that the claimant had been constructively dismissed.

20. As the respondent had not put forward any potentially fair reason for the dismissal, the ET further found that this had been unfair.

21. On the question of compensation, the ET concluded that the respondent had failed to

demonstrate that the claimant had not taken reasonable steps to mitigate her loss. She had been unemployed from late January until March 2019, when she obtained employment at minimum wage levels; the ET recorded that this had been a time of uncertainty due to COVID 19.

22. In respect of the claim of a failure to provide an accurate contract, the ET did not agree, finding that claimant had been given an accurate contract but the respondent had failed to pay her holiday pay based on her normal hours of work.

The Grounds of Appeal

23. The respondent's appeal was permitted to proceed to a full hearing on the following grounds (I summarise): (1) (originally ground 2), the ET failed to consider relevant matters which ought to have gone to the claimant's credibility; (2) (originally ground 3), the ET made findings that were unsupported by the evidence, including a finding that the claimant's attempts to mitigate her loss, were at a time of uncertainty due to COVID 19 when that was not the case; (3) (originally grounds 5 and 6), the ET had demonstrated pre-determination and/or the appearance of bias.

24. The grounds of appeal were accompanied by a statement from one of the respondent's witnesses present at the hearing, Mr Tyler. Pursuant to the direction of the EAT, further evidence was then submitted from Mr Jones, the respondent's solicitor, and from the claimant, and a statement was provided by the EJ.

25. Having considered this material, in allowing the appeal to proceed on the initial paper sift, HHJ Auerbach observed that, save for what was obviously an error relating to the potential relevance of COVID 19 in the early part of 2019, grounds 2 and 3 were essentially parasitic on grounds 5 and 6. Adopting the approach thus foreshadowed by HHJ Auerbach, I have considered first the questions raised by grounds 5 and 6, before turning to grounds 2 and 3.

The Appeal on the Ground of Apparent Bias/Predetermination

26. It is the respondent's case that: (1) the EJ's interventions during the cross-examination of the

claimant suggested pre-judgment and disrupted the fair conduct of cross-examination; (2) the EJ further intervened, in an unfair and hostile manner, during the course of Mr Tyler's evidence, and in the recall and cross-examination of the claimant; (3) the EJ further displayed apparent bias and/or pre-determination in his approach to matters where, it was submitted, the respondent's witnesses had not been challenged.

27. The claimant disputes the respondent's characterisation of the hearing and contends that the respondent's solicitor, Mr Jones, was hostile and aggressive and that the EJ's intervention in Mr Tyler's evidence was warranted in view of his inconsistent stance on the question whether he had kept a minute of what was relied on as a grievance meeting.

The Relevant Legal Principles

28. As cannot be in dispute, the parties before the ET were entitled to a fair hearing before an independent and impartial tribunal. That must mean a tribunal that had not pre-determined the decision it was required to reach (as explained at paragraphs 116 to 117 **R (on the application of) Persimmon Homes Limited and anor v Vale of Glamorgan Council** [2010] EWHC 535) and where the facts were not such as would cause a fair minded and informed observer to consider there was a real danger of bias on its part (see **Porter v Magill** [2002] UKHL 67, [2002] 2AC 357). As Peter Gibson LJ observed at paragraph 25 in **Jiminez v London Borough of Southwark** [2003] EWCA Civ 502, [2003] ILR 477 Court of Appeal, a judicial decision may be vitiated by the appearance of bias no less than actual bias and the appearance of bias may be demonstrated by the manifestation of a closed mind.

29. The task for an appellate tribunal faced with an allegation of bias was explained by the EAT, HHJ Ansell presiding, in **Calor Gas Limited v Bray [2005]** UKEAT 0633 at paragraph 32 where the following propositions, laid down by Simon Brown LJ at page 151(f), **R v Inner West London Coroner, Ex parte Dallaglio** [1994] 4 All ER 139, were cited:

> "(1) Any court seised of a challenge on the ground of apparent bias must

> ascertain the relevant circumstances and consider all the evidence for itself so as to reach its own conclusion on the facts. (2) It necessarily follows that the factual position may appear quite differently as between the time when the challenge is launched and the time when it comes to be decided by the court. What may appear at the leave stage to be a strong case of 'justice [not] manifestly and undoubtedly being seen to be done', may, following the court's investigation, nevertheless fail. Or, of course, although perhaps less probably, the case may have become stronger. (3) In reaching its conclusion the court 'personifies the reasonable man'. (4) The question upon which the court must reach its own factual conclusion is this: Is there a real danger of injustice having occurred as a result of bias? By 'real' is meant not without substance. A real danger clearly involves more than a minimal risk, less than a probability. One could, I think, as well speak of a real risk or a real possibility."

Apparent Bias/Predetermination: My Findings as to the Events Before the ET; Discussion and Conclusions

30. In support of the respondent's case on these points, the grounds of appeal, the evidence relied on, and the skeleton argument, all contain detailed citations of comments made, or said to have been made, by the EJ, with varying degrees of relevance to the questions I am required to determine. Removing myself from the heat of battle, in undertaking my assessment of the question whether there was a pre-determination or the appearance of bias (and duly standing in the shoes of the fair minded and informed observer in this regard), I make the following findings as to what took place at the hearing below.

31. At the outset of the hearing the EJ made the point that the respondent's representative ought to have had "*Solicitor*" on his on-screen title. The instructions for attending the hearing via Cloud Video Platform had apparently included the direction that attendees should state their title, their name, and capacity in which they were attending, when they logged in. There were some ten attendees present many of whom who had failed to comply with those instructions. Informed as to that background, the EJ's observation - made to a professional representative who might reasonably have been expected to comply with the ET's directions - was unobjectionable.

32. Turning then to the course of the evidence before the ET. The claimant had the burden of proving that she had been dismissed and accordingly gave her evidence first. During the cross-examination of the claimant, the EJ interrupted at various points, observing that the respondent's representative was being "*pedantic*" and there was no need to cross-examine in minute

detail. After some two hours of cross-examination, the EJ intervened to impose a time limit on further questions of one hour, although he did not in fact actually stop the cross-examination. An informed observer would, however, understand that it is the EJ's obligation to case manage the hearing, to ensure cross-examination is kept to that which is relevant, and to seek to ensure the case keeps to the listed time. This was a three-day listing, to determine all questions of liability and remedy, where there were still six witnesses due to give evidence after the claimant's case had finished. The informed impartial observer would further understand that a trial judge is entitled to seek to focus cross-examination to that which is relevant and to discourage repetition. When, for example, the respondent's representative had asked some seven times whether or not Mr Sharp had used the words, "*You're sacked*" (or some variation thereof), the EJ was entitled to suggest that he was "*splitting hairs*". With this in mind, I do not find that the informed reasonable observer would have considered that such interventions evidence any real risk of bias.

33. Dealing with the more detailed criticisms of the EJ's interventions during the cross-examination of the claimant:

(1) When reference was made to the email from Mr Barrett of 23 January 2019, and the claimant was asked whether she accepted that this did not suggest her employment may be terminated, I do not consider the informed reasonable observer would conclude that the EJ's interjection to the effect "*It does not say that it would not, either,"* (an entirely natural observation to make in the circumstances), must have demonstrated that he had read these comments from the claimant's disputed notes of the grievance meeting that had not yet been referred to in evidence.

(2) It did not amount to predetermination for the EJ to make an observation, some way into the cross-examination, to the effect that a claimant's credibility might be enhanced by the fact that she had not simply cut and pasted everything from one document to another, and by providing new detail in her oral evidence. Moreover, as the informed reasonable observer would allow, such an assessment of credibility must be for the trial judge who would be

entitled to accept oral evidence under cross-examination as truthful.

(3) No adverse inference can be drawn from the fact that the EJ might have looked at the claimant's pay statements before determining issues of liability. This does not suggest pre-determination; and, as the informed reasonable observer would note (and as the EJ has said in his response), a judge may well seek to be prepared to deal with all stages of the case at the outset. Moreover, this was a case where there was an issue as to whether the claimant had been paid correctly, something that the EJ would be required to determine at the liability stage, and which may have led him to look at the pay statements before the hearing had started.

(4) Further, to the extent that the EJ interjected to refer to the fact that the claimant had sought a contract showing 27.5 hours, as impacting her holiday pay and pension contributions, I do not see why he was not entitled to do so, thereby reminding the respondent's advocate of the claimant's case.

(5) The respondent further complains that the EJ intervened when it had been put to the claimant that: "*The actual and only reason you resigned related to Dean Barrett postponing the meeting on 25 January 2019*." The informed, impartial observer would, however, bear in mind the fact that the claimant was not legally represented, and could not reasonably be expected to understand the legal distinction between a decision to resign in response to an act that itself amounted to a fundamental breach of contract, and a resignation in response to the last act in a course of conduct, which might not, of itself, amount to a fundamental breach. In the circumstances, mindful of the EJ's obligation, pursuant to the overriding objective, to seek to ensure the parties were on an equal footing, there was nothing wrong with the EJ intervening to ensure the claimant was fairly aware of the potential legal relevance of the question.

34. The claimant was, however, also cross-examined about her mitigation of loss. When the respondent's representative asked the claimant to confirm the documents she had provided on this

issue, the EJ interjected:

> "The Claimant has mitigated her loss and you will not convince me that she acted unreasonably. In 25 years I have never had someone argue this and I thought you were an experienced employment lawyer. If the Respondent had pleaded failure to mitigate, I would have issued a deposit order."

35. In his statement in support of the appeal, Mr Tyler, in an account adopted by Mr Jones, expands on this exchange to suggest that the EJ had in fact said:

> "I'm sorry. I was under the impression, wrongly, that you were a legal professional with some experience of employment tribunals. Clearly, I was wrong."

36. That fuller comment is not included within the notes the respondent has adduced for the purpose of this hearing and it is unclear to me what, if anything, the EJ has said in response to that. If such a statement was made, it was sarcastic and judgmental and might have endangered the fairness of the hearing. For the reasons I set out below, however, I have ultimately not considered it necessary to make a finding on this point.

37. Even without the further elucidation provided by Mr Tyler's statement I find that the statement made by the EJ (which he appears to accept, saying that this was: *"A clear indication that I had formed a preliminary view that the respondent's case on an alleged failure to mitigate on the part of the claimant was hopeless,"*) would cause the informed and impartial observer to fear that there was a real risk of bias.

38. In reaching that view, the observer would bear in mind that it was the respondent that had the burden of establishing that the claimant had not taken reasonable steps to mitigate her loss and that the ET had yet to hear the respondent's evidence. Although I can see that the EJ might legitimately have been sceptical as to whether the respondent could discharge this burden, given the limited time the claimant was unemployed (around six weeks), it would still have been potentially open to the respondent to adduce evidence as to other opportunities that were available at the time, or that soon became available, that would have provided the claimant with more hours or a higher hourly rate. The EJ's statement suggested a closed mind on the issue before the respondent had

called its evidence. The informed observer's concern would have been further heightened by the comment about whether the respondent's representative was an experienced employment lawyer. On any view, and even without the further detail provided in Mr Tyler's statement, that was an uncalled for and pejorative remark.

39. Turning then to the respondent's evidence, Mr Tyler was called at the start of day two of the ET hearing, and he began by clarifying a page reference in his witness statement, explaining that when he referred to a document being a true and accurate recollection of events, he had meant to refer to the letter at pages 149 to 151 of the trial bundle, not (as the statement had read) to the preceding pages, 145 to 147. At that stage, the EJ intervened and, according to the respondent's notes, the following exchange took place.

> "EJ: did you not take notes?
> DT: My notes were incorporated in the letter.
> EJ: did you not take a copy of the notes on your PC?
> DT: No
> EJ: I am concerned that this may be a contempt of court as failure to disclose relevant documents?
> EJ: did you take notes on the day?
> DT: I took shorthand notes
> EJ: is it your usual practice to take notes of a meeting?
> DT: Yes, I take my own notes
> EJ: what is the official position of the company regarding notes?
> DT: I take my notes and record the key points in the letter
> EJ: I find your evidence verging on unbelievable.
> EJ: where are the notes?
> DT: the notes are incorporated in the letter provided on pages 149 to 151.
> EJ: Mr Georgiou, you don't need to address Mr Tyler on the notes."

40. For his part, the EJ states that his note records as follows (adjusting that record to make the references to the person asking the question and the person responding consistent with the respondent's notes):

> "EJ: Took notes.
> DT: Yes.
> EJ: On laptop.
> DJ: Yes.
> EJ: Where now?
> DT: Passed to DB [Dean Barrett]
> EJ: Where original?
> DT: Fleshed out and passed to DB.
> EJ: Very concerned - breach of disclosure obligations and potential contempt - will adjourn and permit DT to discuss issue with rep."

41. Although there are some differences between the two records, these are really more as to form than substance. Dean Barrett had signed off the letter to which Mr Tyler was referring and, therefore, the references to Mr Tyler passing the notes to Mr Barrett were consistent with Mr Tyler saying that the notes were incorporated in the letter that was signed off by Mr Barrett.

42. The EJ has not recorded that he said that he found Mr Tyler's evidence verging on unbelievable, but he does accept that he referred to this as a potential contempt. The EJ has explained that he was concerned that Mr Tyler might not have disclosed the original of his notes. That might be so, but the observation to the witness that he might be in contempt of court went beyond legitimate enquiry and would, I accept, cause the informed and impartial observer to consider there was a real risk of bias.

43. It appears that Mr Tyler's inadvertent reference to pages 145 to 147 drew attention to the notes of the grievance meeting that the claimant had adduced, which were not accepted as accurate by the respondent. For the respondent, it is said that it was explained to the EJ that those notes had not been put into evidence (the claimant having not referred to the notes in her own evidence) and it is alleged that the EJ was visibly annoyed about this and immediately stopped Mr Tyler giving evidence, and recalled the claimant.

44. The respondent's note from the hearing does not entirely accord with this, showing the claimant being recalled *after* Mr Tyler had completed his evidence. As for whether the EJ showed visible annoyance, I am not persuaded this goes anywhere, given that he would have been entitled to express some frustration that an apparently relevant document had not been referred to at an earlier stage. In any event, it cannot be objected that the EJ afforded the claimant - a party with no professional representation, who could not reasonably have been expected to understand that the ET would not take into account documents in the bundle unless they had been expressly put into evidence - the opportunity to testify to the notes.

45. As for the respondent's cross-examination of the claimant on this point, it is objected that when it was put that, based on the properties of the document, the notes had been fabricated, the EJ

interjected:

> "this does not show the smoking gun you think it does."

46. As the respondent's note makes apparent, however, the EJ had understood the claimant to have said that the original note taker had made handwritten notes. In the circumstances, it is understandable that the EJ might then observe that the document properties on the typed version did not amount to a smoking gun: at some later stage, the notes would have been typed up and/or saved onto the relevant computer, and the properties would, therefore, not necessarily demonstrate that the original notes had not been made at the meeting itself. Neither would the informed observer consider there was a risk of bias arising from the EJ's restriction of the cross-examination of the claimant purely to the notes that she had been recalled to address. That was the limited nature of the recall.

47. The next objection in time is taken to the EJ's intervention during the claimant's cross-examination of Mr Barrett, where he interjected to put: "*everyone had consumed a fair amount of alcohol*". Mr Barrett had the opportunity to respond to that intervention (which supports the EJ's characterisation of this as a question) and I would accept that the EJ was entitled to seek to make sure that the claimant's case was put in cross-examination, again, not least because she was not professionally represented. That said, given the earlier interventions that I have highlighted - which I have found did cross the line - the informed objective observer might reasonably consider this suggested that the EJ had already determined this issue and was stepping into the arena in putting this to a witness. That was unfortunate because it would have suggested the manifestation of a closed mind before the completion of all the relevant evidence.

48. For completeness, though unnecessary for a party to demonstrate actual impact on their case of comments or behaviour evincing apparent bias, the respondent's note from the hearing records that the respondent's representative did not attempt to pursue any re-examination of Mr Bartlett due to the EJ's hostility.

49. The respondent also complains that, during its closing submissions, the point was made on a

number of occasions that the claimant had not challenged the evidence of the respondent's witnesses. As the EJ observed at the time, however, the claimant was not professionally represented and he legitimately took the view that her husband's failure to put every point in her case to the respondent's witnesses could carry little, if any, weight. That observation was made in circumstances in which the claimant's case had been set out in various documents including her witness statement and the EJ was entitled to take the view that the key points were known to the respondent and its witnesses could address the matters relevant to the issues to be determined in their evidence.

50. Having thus made my findings as to what took place at the hearing before the ET, I have sought to stand back and ask myself whether the impartial and objective observer would consider that there was a real risk of bias. Even allowing for robust case management, and for the need for the EJ to seek to ensure the unrepresented claimant was not put to a disadvantage, there were times when I have had to conclude that the informed, reasonable observer would indeed consider there was a real risk of bias. This was not limited to a particular part of the case (for example, to the question of mitigation of loss), but also manifested itself in the EJ's interventions when the respondent's witnesses were giving evidence. The respondent may be wrong to see each of the judge's interventions as evidencing apparent bias, but that, of course, is a problem that can arise when there are other examples of behaviour that do cross the line and indicate a closed mind: every intervention is then viewed with suspicion, even if only in hindsight.

51. Adopting the neutral position of the informed impartial observer I have rejected most of the objections made, but have nevertheless accepted that there were at least three occasions during this relatively short hearing when the EJ gave the appearance of having taken a side.

52. Having reached that conclusion, I am bound to allow the respondent's appeal. That is because the appearance of bias vitiates a fair hearing; both parties were entitled to a fair hearing in this case but my finding is that this was denied. That being so, the ET's decision must inevitably be set aside, and the matter remitted for a fresh hearing which, in the circumstances, must take place

before a completely new ET. That is unfortunate, of course, for both parties in this matter given the length of time it has taken for this matter to be resolved, but the importance of ensuring a fair hearing can never be underestimated and I am therefore bound to make that determination.

The Remaining Grounds

53. For completeness, I should make clear that I would not have allowed the appeal on ground 2. That related to matters relied on by the respondent which, it is said, ought to have gone to the claimant's credibility. Those were, however, matters for the EJ, who (had the hearing been fairly conducted in all other respects) would have been entitled to reach the view that he did as to the relative credibility of the witnesses.

54. As for ground 3, the respondent was correct in its objection to the EJ's apparent regard to the impact of the coronavirus pandemic on the claimant's job search, which he wrongly suggested may have arisen in the early part of 2019. As a matter of record, that plainly could not be the case and therefore, the appeal would have had to be allowed on that basis. Otherwise, however, had it been necessary for me to consider the other objections raised by ground 3, I would have taken the view that it was an attempt to re-argue the case below and I would not (save on the one point I have identified) have allowed the appeal on that basis.

Disposal

55. Having found that the apparent bias ground has been made out, the only result that can arise at that stage is for me to allow the appeal, set aside the ET's judgment, and direct that this matter be remitted for re-hearing afresh, before a differently constituted ET.