Appeal No. UKEAT/0354/13/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
On 8 July 2014
Judgment handed down on 2 September 2014

Before

THE HONOURABLE MR JUSTICE WILKIE

MR D BLEIMAN

MR P GAMMON MBE

U APPELLANT

BUTLER & WILSON LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

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SUMMARY

PRACTICE AND PROCEDURE - Postponement or stay

The Employment Judge failed properly to exercise her case management powers to adjourn an oral application for a review, of a decision made at a hearing, to permit the appellant the opportunity to reflect on what course he wished to pursue. She should also have explained to him that one option available to him was to make a written application for a review rather than proceed immediately with an oral application.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. In this appeal there is an application for a permanent anonymity order preventing the identification of the appellant. Such an order may be made pursuant to Rule 23A of the Employment Appeal Tribunal Rules 1993 as amended. Such an order is currently in place having been imposed by this Tribunal on 31 January 2014 on the occasion of a preliminary hearing. The application is unopposed. We are satisfied that the protection of the appellant's rights under Article 8 of the European Convention of Human Rights requires this protection and we order that the current order shall continue until further order. We will refer throughout this judgment to the appellant as U.

2. This appeal concerns a decision of an Employment Tribunal (ET) at a Pre Hearing Review on 16 February 2012 to strike out U's claims against the respondent by reason of his failure to comply with Case Management Directions made by an Employment Judge (EJ). The decision to strike out the claims was made at a hearing at which the appellant did not attend until after that decision had been made. The appeal concerns the way in which the EJ dealt with the appellant when he attended that hearing and proceeded, then and there, to review that strike out decision and declined to revoke it.

3. The appellant was, at the time, a litigant in person who, it was common ground, suffered a disability in the form of a mental condition. He claimed when he attended the ET to be suffering from a psychotic episode and the EJ observed that he was displaying symptoms consistent with that assertion.

4. We have received extensive written and oral submissions and been referred to a large number of cases. We have been invited to consider giving some general guidance on how EJ's should deal with litigants in person, particularly where they suffer from disability. We decline to do so. Each such case is fact specific and there is ample, fully considered, guidance available in the form of the Equal Treatment Bench Book, to which we will refer. The facts of this case are most unusual and the ambit of the appeal extremely narrow and specific. We emphasise, therefore, that nothing we say is to be taken as amounting to any precedent or guidance to be applied beyond this case.

5. The focus of our consideration is the judgment on a pre-hearing review dated 16th February 2012 at which those claims, not already dismissed by withdrawal, were dismissed pursuant to Rule 13 (1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, for a failure to comply with Tribunal Orders. On the same day, the EJ, in circumstances we will describe, considered whether to review that decision and decided not to revoke it. The reasons for these decisions are dated the 28th February 2012.

The history of the litigation

6. The Appellant was employed by the respondent from 20th March 2006 until a date in April 2011. The precise date of termination of employment is in dispute, as are the circumstances of its termination. The appellant was, for most of his employment, employed as e-commerce manager of the respondent which is a fashion business dealing in jewellery, accessories and apparel and which employs about 30 employees.

7. The appellant issued a Tribunal claim on 26th September 2011. He made claims of unfair dismissal, of discrimination on the grounds of sex, disability, sexual orientation and age.

He made claims for a redundancy payment and for arrears of pay and for other payments. He set out, in 65 numbered paragraphs, a series of complaints from 2006 until April 2010 (paragraph 63). He then made a complaint of having been dismissed on 13th April 2011 (paragraph 64) and of a further incident, post employment, on the 27th June 2011 (paragraph 65).

8. On the 4th November 2011 the respondent responded to the claim. It denied any wrong doing in respect of any of the claims. It pleaded that the appellant had, in December 2010, claimed to have been diagnosed with Post Traumatic Stress Disorder (PTSD) in 2000 and to have been prescribed anti depressant medication. The respondent pleaded that a GP had written to them, in January 2011, saying that the appellant was feeling very stressed at work and that, on 14th March 2011, the appellant had resigned from his employment saying it had been a pleasure to work for the respondent but he felt it best to further his career elsewhere. He had described the respondent's compassion and empathy during his difficult time, which he appreciated. He said his final day would be 22nd April 2011.

9. The respondent then stated that there was an incident on the 13th April 2011, following which, on 18th April 2011 the appellant emailed the respondent apologising for his conduct and stating amongst other things:

> **"Apologies for the scene that I made the other day. It's what's known … as a psychotic break. I have had one before in about 2002 … What happens is you basically get ultra paranoid and start applying meaning to things which is not what is actually going on"**

10. The respondent also contended that the claims had no reasonable prospect of success and were out of time.

11. On 2nd December 2011 there was a case management discussion; the appellant did not attend. His ex-wife represented him and stated that the appellant had had a panic attack. The Tribunal advised the appellant to take legal advice and offered him a video link to allow him to give evidence and/or make representations without undue stress. The case management discussion was adjourned to the 20th December 2011.

12. On 20th December the case was listed for both a Case Management Discussion (CMD) and a Pre Hearing Review (PHR) to consider the respondent's application that the claims be struck out as being made out of time and/or having no real prospect of success. The time estimate for the hearing was 3 hours. The appellant attended in person and gave evidence. The respondent was represented by Mr McGuiness of counsel.

13. The PHR and CMD on 20 December 2011 concluded. The PHR was adjourned to a later date, the 16 February 2012, with a 3 hour estimate. A number of case management orders were made. It was said that the adjournment of the PHR was due to:

> **"lack of time and insufficient clarity on the issues".**

14. There was, however, clarification in respect of a number of issues. The following issues were identified:

(a) Unfair dismissal – it was accepted that this claim was out of time. The preliminary issues were whether it was reasonably practicable to submit the claim in time, if not, whether time should be extended.

(b) On equal pay – the claim was in time but the preliminary issue was whether it stood any reasonable prospect of success.

(c) Disability – The EJ observed:

"the claimant suffers from Post Traumatic Stress Disorder – he complains about a failure to make reasonable adjustments in the following areas".

(6 numbered areas were identified)

In relation to all these, the preliminary question was whether the claim was in time, if not, whether time should be extended and whether the claim stood any reasonable prospect of success. There was a further claim of direct discrimination in respect of a post termination issue on 27th June 2011. The preliminary question on that claim was whether the Tribunal had jurisdiction to hear the complaint under Section 108 **Equality Act 2010** and whether it stood any reasonable prospect of success.

(d) There were claims in relation to expenses paid by the appellant. The preliminary issue was whether they were in time and, if so, whether they had a reasonable prospect of success.

(e) The appellant withdrew his claims of discrimination on the grounds of sexual orientation and age. He withdrew his claim for a redundancy payment and arrears of pay. Those claims were dismissed on withdrawal.

15. The Tribunal fixed the 16th February 2012 with a 3 hour time estimate at 10:00am for the adjourned PHR. The EJ made certain case management orders set out in an Annexe to the order. They included:

> **"… that the claimant finalise the bundle of documents by adding relevant items to the respondent's bundle by the 10th January 2012; and….. that witness statements be exchanged by 4:00pm on 31st January 2012."**

16. The order concluded:

> **"If any of the orders or directions contained in this Annexe 1 are not complied with, the Tribunal … may ... (b) strike out the whole or part of the claim …"**

17. The appellant did not comply with those case management orders either in respect of the provision of additional documents to be added to the bundle by 10th January 2012 or exchange of witness statements by 31st January 2012.

18. He sought legal advice and, arising out of that, re-issued his original ET1 form on the 9th January 2012 (the appellant having previously attempted to bring his claim via an email dated 12 July 2011 but, he says, the online application system was not working at that time). He made the same claims and particularised them, to a large extent, in a form which was identical with the original claim (though adding a number of incidents during 2010 and early 2011).

19. On 24th and 25th January the appellant sent a number of emails, attached to which were over 500 pages of documents, un-indexed, un-paginated and which the respondents viewed as largely irrelevant.

20. On 31st January 2012, the date for the exchange of witness statements, the appellant sent the respondent an email with a link to a document entitled "[U] witness statement". In that email he said he had attached his unfinished witness statement in an attempt to show that he was trying to comply and asking for a 24 hour extension to finish it. He also said:

> **"The stress from trying to get this in has triggered another psychotic episode"**

21. On 1st February the appellant emailed the respondent explaining that he had attended his GP that morning and been referred to a psychiatrist, Dr Humphries, on the 6th February. Thereafter, there was no communication between appellant and respondent; the appellant having asked the respondent to refrain from any attempt to contact him and until after that appointment.

The hearing of the 16th February

22. The hearing was due to begin at 10:00 am. The appellant was not there. Nor had he contacted the Tribunal to explain that he would be late. The hearing proceeded in his absence starting at 10.20 am. The EJ consolidated both ET claims. Those heads of claim which duplicated the claims in the first ET claim which had already been dismissed upon withdrawal at the 20 December PHR were struck out.

23. The EJ then struck out the remaining claims, the respondent having made, as its primary submission, that the appellant had failed to comply with the case management orders of 20th December 2011 already referred to.

24. As an alternative submission, the respondent had submitted that the other claims would have been struck out in any event because the appellant had failed to present any evidence that they were either brought in time, and /or, had any reasonable prospect of success. The EJ, in her reasons, indicated that such a submission would have succeeded had it been necessary for the Tribunal to consider that issue in the light of the then available material.

25. We have the benefit of the respondent's solicitor's notes of the hearing. The following is culled from those notes and the EJ's decision. The respondent was making a costs application at 11:00 am when the appellant arrived. He said he was having a psychotic episode. He did not have any bundles of documents though he contended that his bundle was next door at the printer. He said that he had a witness statement but he did not provide a copy. It was explained to him that the claims had already been struck out. The EJ invited him to address her whether she should review that decision, as it had been made in his absence, and she agreed to conduct such a review.

26. The appellant had no medical evidence to demonstrate that he was unfit to attend the hearing but the EJ observed:

> **"He was clearly anxious and exhibited considerable signs of disquiet whilst he was in the hearing room".**

He was accompanied by his ex-wife who explained she was there to assist but was unable to give any further help.

27. The appellant stated he had sought legal advice after the last pre-hearing review. He had been advised to re-submit his claim, which he had done on 9th January. The solicitor had not advised him in relation to compliance with the case management orders. He said that the stress of attempted compliance with the orders had induced a psychotic episode from which he continued to suffer, though he had no medical evidence in support of these assertions.

28. The EJ declined to revoke the judgment. She said it was clear that, until at least the 9th January, the appellant was capable of giving instructions to, and receiving advice from, qualified representatives. Though the quality of that advice may have been highly questionable, that was a matter for him to take up with his advisers.

29. She said that it would be wholly unfair, and not in keeping with the overriding objective, to continue to postpone the matter simply because the appellant had failed to comply with the orders made. She said:

> **"Since the claimant had not produced any medical evidence demonstrating a valid reason for failing to comply, the Employment Judge had to conclude that he had no such valid reason. He had not sought to vary the order and, as of the hearing date, had made not even a token attempt at compliance. Accordingly, the claims remain struck out."**

30. The respondent abandoned its application for costs.

Proceedings in the EAT

31. On 10th April 2012, the appellant appealed against the decisions of the EJ of the 16th February 2012. The grounds appear to have been prepared by the appellant in person. Having set out the background, the grounds of appeal were set out in paragraph 49-54. In particular, at paragraph 52, the appellant asserted that the Tribunal erred in law in refusing to make adjustments, on the 16th February, for the appellant who was in a psychotic state at the time and unable to properly present his case, or explain to the Tribunal he had made every effort to comply with the case management orders but had been unable to do so for reasons relating to his PTSD and psychiatric injury, directly caused by the respondent's actions during and after his employment. At paragraph 46, he asserted that the bundle, which was with the printers next door, included medical reports from Dr Stephen Humphries dated 6th December 2011 and 6th February 2012 explaining his reasons for failing to comply with the Case Management Orders.

32. At paragraph 53, he quoted from paragraph 2.4 of the Tribunal's own decision, and in particular the citation from 2.5 in the following terms:

> **"He asserted that the stress of attempted compliance with them had however induced a psychotic episode from which he continued to suffer"**

33. The grounds of appeal stated that, in support of his application, he attached medical reports from (1) Dr Stephen Humphries dated 6th December 2011 and 6th February 2012, and (2) Dr Rastogi dated 7th April 2012. Dr Humphries is a consultant psychiatrist; Dr Rastogi is a treating psychiatrist.

34. The grounds assert that:

> **"this medical evidence supports the claimant's contention that despite his best efforts he was medically unfit to comply with the ET's orders".**

He requested that the Tribunal consider this medical evidence and grant the order remitting the case to the Tribunal for hearing on its merits.

35. On 29th June 2012, His Honour Judge Serota, considering the appeal on the "sift," ordered a stay on the appeal, to allow the appellant to submit a further, out of time, application for review, on the basis of the 3 medical reports said to support his failure to comply with the management orders on medical grounds.

36. On 30th July 2012 the appellant applied for such a review under Rules 10 and 34 of the Tribunals Rules, on the grounds that:

> **"(1) New evidence has become available since the hearing which was not available, and could not have been foreseen at the time of the hearing and,**
>
> **(2) the interests of justice require a review."**

37. The appellant said that he had prepared a bundle of documents attached to that letter containing copies of, amongst other things, the medical reports already referred to.

38. On 20th August 2012, the secretary of the Employment Tribunal wrote to the appellant setting out the current position of the EJ in respect of his review. The letter stated that EJ could not give the request for a review consideration because the appellant had not attached the medical reports referred to in that application and had not explained why the evidence, particularly the reports of 6th December 2011 and 6th February 2012, could not have been made available or foreseen at the pre-hearing review on 16th February 2012.

39. It was pointed out that the EJ had already conducted a review on 16th February 2012. The letter asked the appellant to supply, within 28 days, the evidence that he would rely on in

support of his application for a further review, including the reports, an explanation of why that evidence was not available or could not have been foreseen at the pre-hearing review, as well as any further information he wished the EJ to consider which was not already given at the pre-hearing review on 16th February.

40. By an administrative error of the Employment Tribunal, that letter was sent to an address in the UK which had been that of the appellant, but which no longer was. The appellant had, on 12th March 2012, emailed the ET notifying them that he had moved back to Australia and had given an address there to which he requested all further correspondence be sent. As a result of the error of the ET, he did not receive the ET's letter of 20th August 2012, and so did not respond to it.

41. On 14th December 2012, the EAT further considering the appeal on the sift, stayed the appeal further to give the EJ the opportunity to adjudicate upon that application for a further review on the basis of the medical reports of Dr Humphreys and Dr Rastogi.

42. On 4th February 2013 the application for review was rejected by the EJ in a letter which set out the reasons in 13 numbered paragraphs. Those set out the procedural history of the matter. In addition to the material already referred to on 16th February, at paragraph 8 the letter reads as follows:

> **"… further, on 31 January, the claimant sent the respondent an email purporting to attach his draft statement but asking for a further 24 hours to complete it. There was no attachment and there was no further attempt by him to comply with the order of exchange of witness statements. …"**

43. At paragraph 10 of that letter the EJ repeated her assessment:

> **"..he asserted that he was undergoing a "psychotic episode" at the time and the employment judge noted that he was exhibiting signs of extreme disquiet".**

44. At paragraph 12 of that letter the EJ, having indicated she had invited the appellant to make such application as he saw fit, and he had asked for a review said this:

> **"…he did not produce any evidence from a medical practitioner to support his assertions in relation to his mental state although, as noted, he was clearly far from well. However, the Employment Judge had considered that the claimant had apparently been able to give instructions to his solicitor between the December hearing and the date for compliance with the orders, but had nonetheless not made even a token effort at compliance at any stage".**

45. This letter, comprising a review based on the further representations made by the Appellant on 30th July 2012, concludes:

> **"The Employment Judge had regard to the overriding objective and the requirement to deal with claims expeditiously and fairly. Given the lack of evidence in support of the Claimant's claims, the fact that they were, on the face of it, out of time in any event, and the failure to comply with the orders without good reason, the Employment Judge reviewed the decision but confirmed that she did not see any reason to vary it. …"**

46. The letter recording the EJ's decision on the further application for a review makes no reference to the content of the application of the 30th July 2012, nor to the correspondence in August already referred to. Save for a bald statement that the application for a review is rejected, it comprises a repeat of, or an elaboration of, the reasons for the decision of the 16th February 2012. The decision letter was sent to the same UK address as the 20th August 2012 letter. Thus the earlier administrative error was compounded.

47. Following upon that decision of the Employment Tribunal, the EAT placed the papers before His Honour Judge McMullen QC, for a decision under Rule 3 (the sift). He concluded that the Notice of Appeal disclosed no point of law with a reasonable prospect of success and, accordingly, made a direction under Rule 3 under which no further steps would be taken to process the appeal.

48. It appears that the merits of the appeal were further considered under the sift mechanism by His Honour Judge Peter Clark on 7th June 2013. He ordered that the appeal be considered at

a preliminary hearing. Fresh grounds settled by counsel were prepared which focused on the absence of any apparent consideration by the EJ, on 16th February 2012, of permitting the appellant a short adjournment to collect the bundle from the printer next door, if that was where it was, or to compose himself so as to enable him to explain why he had been unable, on the grounds of his medical condition, to comply with the case management orders.

49. The grounds of appeal were fourfold. However, following a preliminary hearing before a panel of three Employment Appeal Tribunal members, chaired by the President, Mr Justice Langstaff, on 31st January 2014, grounds 3 and 4 were withdrawn and dismissed which left only grounds 1 and 2 for our consideration.

50. Ground 1 reads:

> "in failing to adjourn the hearing (which would have allowed the review hearing to take place later on that day and/or on a different occasion) the employment judged erred in law in that she:
>
> **"(a) contravened his right to a fair hearing pursuant to Article 6 ECHR …;**
>
> **(b) failed to act in accordance with the overriding objective or natural justice principles …;**
>
> **(c) failed to comply with her duty to make reasonable adjustments in relation to the Claimants disability;**
>
> **(d) failed to comply with her duty not to place unfair pressure on a litigant in person and/or failed to ensure equality of access to the ET processes…**
>
> **(e) breached the EU principle of effectiveness ... [to] secure access to effective judicial process and the availability of effective remedies for breach."**

51. Ground 2 focuses on the holding of the Judge that:

> "since the claimant had not produced any medical evidence demonstrating a valid reason for failing to comply with the case management directions the employment judge had to conclude that he had no such valid reason".

Thereby dismissing his application for a review. The grounds state:

> **"(a) The EJ erred in requiring him to produce medical evidence … [where] she was aware of his medical history ... and it was common ground that ...[he] suffers from a disability and ... was unwell at the hearing.**
>
> **(b) [She] ... erred in finding there was no valid reason …[where] the claimant had informed her that 'the stress of attempted compliance with them … had, however, induced a psychotic episode from which he continued to suffer"**
>
> **(c) [She]… erred in taking in to account the fact that the claimant had seen a solicitor between December 2011 and February 2012. The fact that he had given instructions to a solicitor was not inconsistent with him suffering ill health during this period."**

The medical evidence

52. On 6th December 2011, Dr Stephen Humphries wrote a report for use in relation to an Employment Tribunal. It was based on interviews on 4th July, 18th July and 28th November. Those interviews were not adequate to enable him to construct a full medical legal report. History extracted from U was confusing and fragmented and highly affected by his mental state. His description of a brief reactive psychosis suggested he had an acute paranoid psychotic episode, perhaps stimulated by extreme anxiety. On the second occasion he saw U, he was not coherent and was massively over aroused and Dr Humphries was unable to take a constructive history. On the first occasion he had been able to give a more coherent picture. On 28th November 2011 Dr Humphries could not coherently follow the nature of U's argument.

53. Dr Humphries concluded in that report, as follows:

> **"from a psychiatric point of view clearly U has quite significant psychiatric problems. I think that he suffers from a generalised anxiety disorder, but I am unable to identify symptoms of PTSD, and certainly I have seen him on two occasions when his level of anxiety was such that, at least on the first occasion on 18 July 2011, I felt he was bordering on a brief reactive psychosis and, on the most recent occasion, on 28 November 2011, although not psychotic, his anxiety levels were at such a pitch that it was very difficult to follow his train of thought."**

54. Dr Humphries' letter of 6th February 2012 was brief and referred to a visit that day. Dr Humphries says:

> **"He has had great difficulty in preparing his legal case due to his anxiety symptoms which intensify under stress, with the result that he has missed deadlines for the submission of**

material. On this occasion when I saw him he asked to be restarted on Paroxetine 20mg daily and Mirtazapine 15mg per night which has helped his symptoms in the past."

55. Dr Rastogi, in his report of 7th April 2012, reported that he had seen U on two occasions, 22nd March and 4th April 2012. He had been diagnosed with PTSD in 2000. He had been suffering from a brief psychotic disorder with manic and psychotic symptoms in April 2011 triggered by external stresses. Dr Rastogi says:

> **"that it is clear that, during this ten years, he has experienced relapses with significant functional decline precipitated by stress, mainly related to work. Recently the triggers have been related to deadlines of tribunals which U has found extremely hard to cope with. The inability to cope with deadlines and provide documentation is itself causing significant stress and perpetuating his condition further. U is currently mentally unstable due to exacerbation of his anxiety and early onset psychosis, which sets in, due to stress, placing him at a risk for future relapses and delayed recovery. It is evident that there is a direct relationship between relapses of psychosis with stress exposure and emotionally charged situations. His prognosis is dependant on the level of stress and currently he is incapable of doing any stressful events such as preparing for tribunals. Hence it was recommended that U be given time to recover and avoid any stressful situation in near future. The increased number of relapses impairs recovery and functioning and has a poor prognosis."**

<u>The relevant law</u>

56. At the time the EJ was operating under the Employment Tribunal Constitution and Rules of Procedure Regulations 2004, Regulation 3 of which states that the overriding objective of the Regulations and Rules is to enable the Tribunals and EJs to deal with cases justly, which includes, so far as practicable:

> **3. (a) ensuring that the parties are on an equal footing;**
>
> **(b) dealing with the case in ways which are proportionate to the complexity or importance of the issues;**
>
> **(c) ensuring that it is dealt with expeditiously and fairly; and**
>
> **(d) saving expense.**

57. Regulation 3 obliges the EJ to seek to give effect to the overriding objective when exercising any power given to her under the Rules in the Schedule.

58. Paragraph 10, of Schedule 1, contains the general power to manage proceedings, to be exercised by the EJ. The powers may be exercised either on the application of a party or on the Judge's own initiative. Examples of orders which may be made under Rule 10 (1) are contained in Rule 10 (2) and include:

> **"(m) postponing or adjourning any hearing"**

59. Rule 13 concerns compliance with orders and practice directions. Sub Rule (1) provides:

> **"If a party does not comply with an order made under these rules … an Employment Judge …**
>
> **(b) may ... at a pre hearing review ... make an order to strike out the whole or part of the claim …"**

60. Rule 34 provides for review of judgments and decisions. It is common ground that decisions to strike out claims for want of compliance with orders of the Tribunals falls within the remit of Rule 34. Sub Rule (3) provides as follows:

> **"… decisions may be reviewed on the following grounds only: –**
>
> **(a) the decision was wrongly made as a result of an administrative error**
>
> **…**
>
> **(c) the decision was made in the absence of a party**
>
> **(d) new evidence has become available since the conclusion of the hearing to which the decision relates provided that its existence could not have been reasonably known of or foreseen at that time, or,**
>
> **(e) the interests of justice require such a review"**

61. Rule 35 provides:

> **"(1) An application under Rule 34 to have a decision reviewed must be made to the Employment Tribunal office within 14 days of the date on which the decision was sent to the parties. The 14 day time limit may be extended by an Employment Judge if he considers that it is just and equitable to so.**
>
> **(2) The application must be in writing and must identify the grounds of the application in accordance with Rule 34 (3) but if the decision to be reviewed was made at a hearing an application may be made orally at that hearing.**
>
> **(3) The application to have a decision reviewed shall be considered (without the need to hold a hearing) by the Employment Judge of the Tribunal which made the decision … and that person shall refuse the application if he considers that there are no grounds for the decision to**

be reviewed under Rule 34 (3) or there is no reasonable prospect of the decision being varied or revoked.

(4) If an application for a review is refused after such preliminary consideration, the Secretary shall inform the party making the application in writing of the Employment Judge's decision and his reasons for it. If the application for review is not refused the decision shall be reviewed under Rule 36.

62. Rule 36 provides as follows, in so far as is relevant:

(1) Where a party has applied for a review and the application has not been refused after the preliminary consideration above the decision shall be reviewed by the Employment Judge or Tribunal who made the original decision. If that is not practicable a different Employment Judge or Tribunal, as the case may be, shall be appointed by the Regional Employment Judge, the Vice President or the President

…

(3) A Tribunal or Employment Judge who reviews a decision … may confirm, vary or revoke the decision. … Where an order is made that the original decision be taken again, if the original decision was taken by an Employment Judge without a hearing the new decision may be taken without hearing the parties and if the original decision was taken at a hearing a new hearing must be held."

The appellant's disability

63. The appellant contends that the failure to adjourn the hearing was a failure to make a reasonable adjustment or reasonable accommodation on account of his disability. It is accepted that Section 29 of the **Equality Act 2010**, which imposes such obligations in respect of services and public functions, does not apply to judicial functions (Schedule 3 Part 1 paragraph 3 to the Act). However, it is contended by the appellant that there is a duty to make reasonable adjustments indirectly by means of the incorporation into UK law of the United Nations Convention on the Rights of People with Disabilities 2006 UNCRPD ratified by the UK on the 7th August 2009 and by the European Union on the 23rd December 2010.

64. Alternatively, the appellant contends that the overriding objective is a source of a duty to make reasonable adjustments and it is emphasised that this is reflected in advice contained in the Equal Treatment Bench Book which must be taken into account by every Judge hearing a case involving a disabled person. Yet further, it is said it is an incident of the obligation to

ensure a fair trial pursuant to Article 6 of the European Convention on Human Rights as mediated, in the case of a person of disability, by Article 14.

65. We do not, in this judgment, need to adjudicate upon the extent to which the specific statutory exemptions in the **Equality Act 2010** are affected by what is said to be the incorporation of the UNCRPD into domestic UK law. It is sufficient that we agree and accept that the fact of the appellant's disability, as known to the EJ, was an important factor to which she had to have regard when making case management decisions in accordance with the overriding objective and reflecting good practice as advised by the Equal Treatment Bench Book.

The question of adjournments

66. It is contended by the appellant that the right to a fair hearing may require a Judge to adjourn a hearing and that it is a fundamental aspect of the obligation to hear both sides and to give both parties an opportunity to put its case. The appellant points to a passage in a decision of this Tribunal in **Iqbal v Metropolitan Police Service** UKEAT/0186/12/ZT, in which His Honour Judge Richardson says:

> **"As Teinaz [Teinaz v London Borough of Wandsworth [2002] ICR 1471 at paragraph 21-22]shows, if there is medical evidence that the party is not fit to participate in the hearing, an adjournment will generally have to be granted whatever the inconvenience to other parties …"**

And at paragraph 19-20 in that judgment:

> **"It will often be appropriate to apply the guidance in Teinaz by adjourning the case to enable the claimant to make an urgent appointment to see the practice that is treating him. The Tribunal is entitled to ask the litigant to take with him a short letter drafted by the Tribunal explaining the assistance that the Tribunal can give to Litigants in Person and explaining what assistance and opinion it is that is required from the medical practitioner. Of course, time is limited, and the medical practitioner's opinion will inevitably be a short one, but in a case such as this it may be of critical importance to the fairness of the decisions that the Tribunal make."**

67. Furthermore, the appellant points to authorities in Tribunals and on appeals from Tribunals to the effect that the right to a fair hearing may require a Judge to adjourn a hearing even though the party has not applied for an adjournment (see **J & C Cosgrove t/a Fisher Tours** [2010] UKUT 147, and SCLR 546 [Court of Session] and **CP v M Technology School** [2010] UKUT 314 (AAC) [2010] ELR 757.

68. The respondent points out that it is trite law that the Tribunal has a broad discretion whether or not to grant an adjournment. In particular we are reminded of the principle established as long ago as 1992, in **Ashmore v Corporation of Lloyds** [1992] 2 AER 486, that:

> **"Litigants are not entitled to the uncontrolled use of a trial Judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial Judge's time as is necessary for the proper determination of the relevant issues."**

69. Similarly, in the context of the Employment Tribunals, we are reminded of the **Chief Constable Lincolnshire v Caston** [2010] IRLR 327 CA, in which Lord Justice Longmore remarked:

> **" … I … would ... reiterate the importance that should be attached to the EJ's discretion. Appeals to the EAT should be rare, appeals to this Court from a refusal to set aside the decision of the EJ should be rarer. Allowing such appeals should be rarer still."**

The standard of review the EAT must apply in such cases

70. There has been a debate before us on whether, in reviewing the EJ's conduct of the hearing after the appellant arrived, we are engaged in an exercise akin to judicial review, where the Wednesbury principles apply, so as to limit the scope of the review of the EJ's exercise of discretion, or whether it is incumbent on this Tribunal to make up its mind whether, or not, the appellant had a fair hearing, in which case the question would be a fresh decision for this Tribunal to take.

71. We have been reminded that there is a recent Court of Appeal authority concerning the question of adjournment that the appropriate standard of review is that of judicial review (Wednesbury), see **O'Cathail v Transport for London** [2013] ICR 614, at paragraph 44-46 and **Riley v Crown Prosecution Service** [2013] IRLR 966.

72. On the other hand we are referred to the decision of the Supreme Court in **R(Osborn) v Parole Board** [2013] 3WLR 1020 UKSC 61. In that case, in the leading speech of Lord Reed, at paragraph 65 he stated:

> **"The first matter concerns the role of the Court when considering whether a fair procedure was followed by a decision making body such as the Board ... dicta[in the certain of the decisions appealed] might be read as suggesting that the question whether procedural fairness requires an oral hearing is a matter of judgment for the board reviewable by the court only on Wednesbury grounds … that is not correct. The Court must determine for itself whether a fair procedure was followed … its function is not merely to review that reasonableness of the decision maker judgment of what fairness requires."**

73. In the light of our conclusion on the substance of this case, it is unnecessary for us to decide whether we are bound to follow the Court of Appeal's decisions in respect of adjournments, or whether the decision of the Supreme Court in **Osborn,** concerning what comprises a fair procedure, applies to a decision (or a failure to make a decision) on adjournment so as to oblige us to make the decision afresh as to whether or not the appellant had the benefit of a fair procedure. In this case the outcome is the same.

The parties' submissions

The appellant's submissions

74. The appeal is based on a narrow ground.

75. The appellant accepts that there are limits to the extent to which an EJ is under a duty to assist a litigant in person, even one who has a disability. The EJ is there to hear the case on the

basis of the materials placed before her by the parties. It is not for the EJ to descend into the arena to advise a litigant in person on how they might better present their case. However, Rule 10 empowers the EJ to act on her own initiative without any prior application of either party. In this case it is common ground there was no application by the appellant for an adjournment.

76. Nor does the appellant criticise the EJ for having proceeded to decide the respondent's application that the claim is struck out for non compliance with case management orders, in the absence of the appellant when he had not attended at 10:00 and, at 10:20, she began to entertain the respondent's application. Nor does the appellant criticise the substance of the decision on the material then placed before her.

77. Nor does the appellant criticise the EJ for raising with the appellant, at the hearing, the question whether he wished to apply for a review of the decision, she had just taken in his absence, to strike out his claims for non compliance with case management orders.

78. The appellant does complain that, having done so, and the appellant having indicated that he would wish to make such an application, the EJ then failed to consider whether to adjourn for a short time in order to enable the appellant to recover his lucidity and/or to enable him to obtain, from the printer's next door, the bundle which, he said, he had brought and upon which, implicitly, he would wish to rely.

79. It is said that, in the circumstances known to the EJ, a failure, even to consider, a short adjournment for those purposes was so obviously wrong that, even applying the high standard of review required by a Wednesbury approach, her decision, or her failure, was plainly an error of law.

80. Those circumstances were said to be as follows:

(1) It was common ground that the appellant was suffering from Post-Traumatic Stress Disorder;

(2) The EJ knew, from the material referred to in determining the strike out application that the appellant was saying that the strain of complying with the case management orders had resulted in a psychotic episode. He had endeavoured to demonstrate that he was seeking to comply by emailing an unfinished witness statement, on the deadline date, to the respondent and, on the following day, had been to see his GP, who had referred him to his psychiatrist for an appointment some 5 days later on 6th February;

(3) She knew that he was claiming to have been having a psychotic episode when he arrived at the tribunal and that he was exhibiting symptoms consistent with that condition and was obviously unwell;

(4) He was also saying that he had a bundle which he had brought to use, but that it was next door at a printers; and

(5) He wished her to consider his application for a review of her decision to strike out his claim.

81. It is said that the EJ, in those circumstances, was so obviously wrong in failing to consider, or grant, a short adjournment to enable him to recover, if he could, his lucidity and to enable him to go next door to obtain his bundle for use in his application, that this Tribunal should conclude that her failure to consider exercising the powers that she had under the Rules, constituted an error of law.

The respondent's submissions

82. The respondent contends that, in the absence of a medical report, there was no case for the EJ to take the initiative and consider whether to adjourn the hearing. There was no medical evidence to suggest that an adjournment of any length, whether brief or otherwise, would assist the appellant in preparing his case.

83. The appellant did not ask for an adjournment. He had his ex wife there who had, on a previous occasion, the 2nd December, attended in his place and had asked for an adjournment on that occasion, but on the present occasion she was unable to give any assistance.

84. The respondent contends that the history of the litigation was such that the EJ was entitled, in the interests of fairness to both parties, to entertain the application for a review straight away, and, in so doing, gave good reasons for refusing it, commenting, in particular, on the absence on any medical evidence to support the claim that there was good reason for non compliance with the case management orders and pointing out that, in the meantime, the appellant had had the benefit of legal advice which had resulted in a second ET1 being submitted on the day before the deadline for the submission, by him, of further documentation.

Our conclusions

85. It is, in our judgment, important to note the limited nature of the criticisms now made of the EJ's conduct. The criticism is essentially that: confronted with a man with mental disabilities; who was claiming to be having a psychotic episode; who was demonstrating symptoms consistent with that condition; who was plainly unwell; who wished to proceed to apply for a review; but who stated that the bundle of documents that he had brought for the hearing was next door; no EJ, acting reasonably in exercising her case management powers,

could have failed to consider and grant a short adjournment to enable the appellant to recover his lucidity, if he could, and to obtain the documentation which he was saying he had for the hearing, and upon which he would obviously need to rely.

86. In our judgment that criticism is obviously right. Anyone conducting a judicial or quasi judicial hearing confronted with a person who is plainly unwell would necessarily and obviously adjourn the hearing for a brief time in order to enable them to recover sufficiently to present their case, or their evidence, if possible. Furthermore, anyone exercising such a function who has invited a party to consider making an application and whose invitation has been taken up, would, save in the most extraordinary circumstances, adjourn, to enable them to gather together the material, which was immediately adjacent according to the applicant, in order that such application may be made in the most effective way practicable. In our judgment, to fail to consider an adjournment, in those circumstances, but to require the applicant to press on with their application, notwithstanding their evident ill health and lack of the relevant documents, is so obviously wrong that, applying the Wednesbury standard of review, this appeal must succeed.

87. The EAT, for this case, has had the benefit of including two members appointed for their relevant experience. The lay members have, between them, participated in a wide variety of Tribunal and other decision-making hearings in which participants have presented in a state of anxiety or distress, whether or not as a result of disability and with or without medical certification. This wide experience of how those conducting such hearings can and do reasonably respond to such difficult circumstances, has assisted us in considering this case and, in particular, in having the confidence to be sure that the EJ's actions (in the narrow ambit of this appeal) were obviously wrong. It is not a conclusion which we have reached lightly.

88. In our judgment, where the question of an adjournment inevitably arose by reason of what was presented at the Tribunal hearing, and where the adjournment required would be short, initially contained within the time allotted for the hearing, the availability, or otherwise, of a medical report supporting the adjournment, is of no relevance to the limited issue of whether to grant a brief adjournment. The question of a medical report would of course be relevant were an attempt being made to adjourn the case to a completely different day.

89. We make it clear that our decision is limited to the failure of the EJ to consider, or grant a brief adjournment for the purposes to which we have referred. We make no judgment on the other issues which may go to the substantive review of the decision to strike out the claims for non compliance with case management orders. In particular, nothing which we say prevents either side relying on the presence, or absence, of medical reports, or their sufficiency, or the question of reliance by the appellant on legal advice, or its sufficiency. Those are all matters which the parties will be free to deploy, if they wish, when an EJ, which we will order, considers an application for a review, if one is now made.

90. We therefore uphold this appeal. We will address the order we make below.

A further issue.

91. Although not relied on by the appellant, and not a reason for allowing this appeal, we should make clear our concerns about a particular aspect of the EJ's conduct on this occasion.

92. It is, of course, correct, as the appellant concedes, that it is no part of an EJ's duty to descend into the arena so as to assist, or advise, a litigant in person on how they might better argue, or present, their case. In particular, there was no duty upon the EJ to advise the

appellant, when he attended after the strike out decision had been taken, that he was entitled, in certain circumstances, to ask for a review of that decision. However, the EJ, bearing in mind no doubt the overriding objective, did take the initiative to alert the appellant to his entitlement to apply for a review and that such an application might be made orally then and there. We have no doubt that that was a sensible course for the EJ to take, having regard to the overriding objective.

93. Having decided to do so, however, in our judgment it was incumbent on the EJ not to mislead the appellant in respect of his entitlements to make an application for review. In particular, it was incumbent on her, if she was going to alert him to his right to do so, to make it clear to him that such application need not be made immediately and orally, but might be made, in the fullness of time, in a written form, at some point prior to the expiration of 14 days from the date on which her reasons for her strike out decision would be sent to the parties.

94. By failing to do so, she laid a trap for the unwary, which was exacerbated by her failure to consider adjourning the hearing, for a short time, for the purposes we have already identified, so as to enable the oral application, if that is what the appellant decided to make, to be made as effectively as was practicable. The result was that the appellant made his application immediately, whilst displaying the symptoms already referred to, and without the benefit of the documents to which he wished to refer. In the event, the application failed. The EJ's failure properly to advise him on the different ways in which he could make an application for a review meant that he was denied the opportunity of considering whether to take his time, not make the application at the hearing, but make one in writing, supported with whatever documentation he might wish to submit.

95. We repeat, this is not the ground on which the appellant relied or on which the appeal is allowed but, if it had been advanced as a ground, and it had been necessary for us to consider it, we would have allowed it on this ground as well.

Summary and disposal

96. In summary, the appeal against the EJ's dismissal of the oral application to review succeeds. The consequence of that is that there is currently no application for review and the decision of the EJ to strike out the claims remains extant.

97. It is apparent, however, that the appellant would wish to make an application for a review. We give directions that, if he does so, he must make such application, in writing, supported with written argument and documentation to the Employment Tribunal within 21 days of the date of this judgment.

98. We also direct that the respondent, if so advised, may make written submissions, supported with such other documentation as they see fit, in opposition to the review, no later than 21 days thereafter.

99. We remit, to a different EJ, the task of deciding upon any such application for a review as the appellant may make. This is because we accept the submissions of the appellant, with which the respondent does not take issue that it has now become impracticable for this EJ to revisit the issue for a third time. We make it clear that this means that an EJ shall consider it pursuant to Rule 35 (3) and, thereafter, if the application for a review is not refused pursuant to Rule 35 (3), then to proceed to review the decision pursuant to Rule 36.