Appeal No. UKEAT/0021/13/DM
UKEAT/0022/13/DM

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 & 17 January 2014
Judgment handed down on 7 February 2014

**Before**

## THE HONOURABLE MRS JUSTICE COX DBE

**PROFESSOR K C MOHANTY JP**

**MR J R RIVERS CBE**

UKEAT/0021/13/DM

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| CROWN PROSECUTION SERVICE | APPELLANT |
| MR G R FRASER | RESPONDENT |

UKEAT/0022/13/DM

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| MR G R FRASER | APPELLANT |
| CROWN PROSECUTION SERVICE | RESPONDENT |

Transcript of Proceedings

JUDGMENT

## APPEARANCES

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| For the Crown Prosecution Service | MR STEPHEN HEATH<br>(of Counsel)<br>Instructed by:<br>Messrs Simons Muirhead<br>Burton Solicitors<br>8-9 Frith Street<br>London<br>W1D 3JB |
| For Mr G R Fraser | MR RAD KOHANZAD<br>(of Counsel)<br>Bar Pro Bono Unit |

**SUMMARY**

**DISABILITY DISCRIMINATION**

**PRACTICE AND PROCEDURE – Review**

The CPS appealed against the Employment Tribunal's decision, on review, to revoke their earlier remedy judgment, made in the absence of the Claimant, and to order a new remedy hearing.

In addition to the importance of the finality of litigation, the ET were found to have had proper regard, in the exercise of their discretion, to the relevant factor that the Claimant's mental impairment may have influenced the way in which he had conducted the litigation, which the CPS described as "unreasonable". Reference to the equality duty and the "judicial function" exemption in the **Equality Act 2010**, and the guidance provided in the Judicial College Equal Treatment Bench Book as to the fair treatment of people with mental disabilities.

The appeal was dismissed.

**THE HONOURABLE MRS JUSTICE COX DBE**

## Introduction

1. Litigants with mental disabilities may sometimes pose difficulties for judges and for other parties involved in the litigation. The Equal Treatment Bench Book, published by the Judicial College (revised 2013), provides helpful information for judges about the problems experienced by such litigants, in accessing the courts or tribunals or participating in the proceedings. The authors point out that "…*This may lead to erroneous perceptions, such as that the person is being awkward or untruthful and inconsistent. In fact, the problem may come down to a difficulty in communication or understanding*." (See paragraph 2 of the Introduction to the section on Mental Disabilities.) Difficulties of the kind that can arise are the focus of this appeal.

2. The CPS (the Respondent below) are appealing against the decision of the London Central Employment Tribunal, dated 20 August 2012, to allow the Claimant's application for a review of their judgment on remedy, following a hearing held in his absence on 10 February 2012. The Tribunal revoked that judgment and re-listed the remedy hearing. The Respondent contends that their decision was arrived at in error.

3. We heard argument on 16 January 2014 and gave judgment dismissing the appeal on that day, with our reasons to follow. These are our reasons.

## The facts

4. After a change of career the Claimant successfully completed the Bar Vocational Course and was called to the Bar in October 2005, when he was aged 45. He commenced employment

with the Respondent as a witness care officer on 22 December 2005. In about November 2006 he moved to the role of case progression officer. However, subsequent applications for other posts to enable him to advance his career were all unsuccessful. He became unwell and, after being diagnosed with depression and the effects of stress, he went on sick leave in July 2008. He did not return to work before his employment was finally terminated in February 2013.

5. In the intervening years he was involved in a protracted dispute with the Respondent about his employment prospects and his return to work. In addition to raising a grievance, rejected in 2009 and unsuccessfully appealed, the Claimant applied, unsuccessfully, for ill-health retirement in January 2010.

6. By his Claim Form dated 26 January 2010 the Claimant made a number of claims to the Employment Tribunal. The main complaint was one of disability discrimination, in that the Respondent had failed to make reasonable adjustments in relation to his return to work. All the claims were denied, and the Respondent also denied that the Claimant was disabled within the meaning of the **Disability Discrimination Act 1995**, which was then the applicable legislation. The Claimant lodged further Claim Forms subsequently, but we are concerned in this appeal only with the Claim issued on 26 January.

7. At paragraph 38 of his particulars of claim the Claimant sought "compensation for injury to feelings, aggravated damages and compensation for personal injury under the authority of **Sheriff v Klyne Tugs (Lowestoft) Limited** 1999 should the Claimant's condition have been exacerbated by the discriminations he has suffered at the hands of the Respondent."

8. The liability hearing took place over nine days between January and May 2011. The Claimant was represented by counsel, as was the Respondent. There were a number of specific allegations, but the first and main group of allegations related to an alleged failure to make reasonable adjustments to enable the Claimant to return to work. The second group related to the 'Managing Absence Procedure' adopted in the Claimant's case, and formal warnings he was given for not returning to work.

9. The Tribunal's judgment was sent to the parties on 9 June 2011. They found that the Claimant was disabled, within the meaning of the Act, and their findings in this respect are relevant to the issues in this appeal.

10. The Tribunal relied on a report dated 17 September 2010 from the joint expert Dr Isaac, consultant psychiatrist, who had been asked to address that specific issue, having regard to the legislative criteria. After interviewing the Claimant and considering his medical records, Dr Isaac concluded that the Claimant had a mental impairment. His clinical diagnosis was chronic adjustment disorder with mixed anxiety and depressed mood (309.28 in the DSM-IV-TR classification). The perpetuation and severity of this disorder were said to be predicated on the continuing issues at work.

11. Dr Isaac stated that while this disorder did not have a material affect on the physical domains of everyday function, "…it is more likely than not that his concentration and ability to learn and understand may at times be impaired, especially if his symptoms of anxiety are increased." While the Claimant's condition had been "essentially stable", he was the subject of "ups and downs", as documented in the GP records. His perception of events since July 2008 had resulted in his symptoms becoming more entrenched.

12. Dr Isaac could not say exactly when, after July 2008, the Claimant had become disabled within the meaning of the Act. The Tribunal considered other evidence in this regard, including an occupational health report from Dr Khan in June 2009, who considered that by that time the Claimant's anxiety had been a long term impairment and was likely to meet the disability criteria in the Act. In January 2010 another occupational health assessment referred to the Claimant having an underlying psychological condition, which could exacerbate his symptoms, and concluded that he was not fit for his current role. Although the Respondent disputed that the Claimant was disabled, the Tribunal found on the evidence that their own HR department were regarding him as disabled from some point during 2009 onwards. They also noted that the Respondent's witnesses were on occasion, on their own account, making adjustments to accommodate his illness.

13. The Tribunal also considered the Claimant's own evidence, which they found to be consistent with the medical and other evidence before them. His depression and anxiety were compounded by difficulties in his concentration and memory, so that he was exhausted after only short bursts of mental activity. The Tribunal found that,

> **"…although the Claimant could appear to be functioning well so far as intellect, memory and concentration were concerned, particularly at meetings that he had with the Respondent, and in written communications with them, in fact this took its toll on him. When he made an effort to communicate with the Respondent, it would often be followed by a period of inability to function properly…"**

14. They found on the evidence that the Claimant was disabled, for the purposes of the Act and of the claims before them, from the beginning of March 2009. The Claimant clearly satisfied the definition of long term impairment. As at May 2011, when the hearing concluded, he was still suffering illness and was likely to be disabled; and he had still not returned to work. They recorded in their judgment the fact that the liability hearing had been disrupted by the

Claimant's relapse into illness when, on 3 February 2011, he was unable to attend the hearing and the case was adjourned until 3 May 2011, when he was well enough to return.

15. The Claimant succeeded on only four of the agreed list of allegations. The Tribunal dismissed the main group of allegations, that the Respondent had failed to make adjustments to enable the Claimant to return to work, finding that he would not have returned to work even if the adjustments contended for had been made.

16. The four findings of disability discrimination concerned the way in which the Respondent had carried out the 'Managing Absence Procedure' in 2009. Running this procedure simultaneously with the attempts to get the Claimant to return to work in a B1 case worker role was held to be inappropriate. The Claimant was found to be at a substantial disadvantage by reason of his particular disability, and it was reasonably foreseeable that this would potentially exacerbate his condition. Even though the Claimant would not have returned to work, further stress could have been avoided or lessened and this would have been well understood by the Respondent in November 2009.

**Events leading up to the remedy hearing in February 2012**

17. Between June 2011 and February 2012 the Claimant no longer had legal representation in this claim and was acting in person. During this period one of his other disability discrimination claims against the Respondent was also progressing through the Employment Tribunal case management stages, and preparatory directions to be complied with by the Claimant were being given in that case in addition. We refer to these matters because we consider they had a bearing on what happened. This other claim was heard in April 2012 and we note that the Respondent did not dispute in that case that the Claimant was disabled.

18. The appeal bundle before us contains the correspondence passing between the Claimant, the Respondent and the Tribunal during this period, together with the case management orders being made by the Tribunal to ensure that the remedy hearing would proceed expeditiously. Things did not go well. We summarise the main points.

19. The Notice of a CMD to be held by telephone on 22 November was met with a written response from the Claimant indicating that the nature of his illness was such that he could not deal with "*the immediacy of telephone conversations*", and that he would find it "*emotionally disturbing*" to have to deal with this matter via the telephone in his own home. He referred specifically to the possibility of mediation in respect of both claims. (This had in fact been suggested by the Employment Judge who was case managing his other claim, but we are told that it was not regarded with enthusiasm by the Respondent and that it "went nowhere".) Linking both claims together the Claimant also referred to the personal injury aspects of both claims and to the need for an updated medical report, seeking an order for such a report from the joint medical expert, namely Dr Isaac.

20. It seems that the Employment Tribunal did not see this letter before holding the telephone CMD on 22 November, giving standard case management directions in the absence of the Claimant and fixing the remedy hearing for 10 February 2012. The directions included an order for the Claimant to send the Respondent any medical evidence relied on by 18 December.

21. The Claimant, who wrote objecting to what had happened, was invited by the Tribunal to comment on the standard directions made and the Claimant responded on 1 December. His letter, written in somewhat intemperate terms, indicated his lack of understanding as to the remit of the remedy hearing and as to the terms of the updated joint medical report he was

seeking. He stated that Dr Isaac was refusing to accept instructions from him as an unrepresented litigant (we have seen a letter to him from Dr Isaac to that effect), and he also sought to re-argue some of the liability findings.

22. The case was listed for a CMD to be held on 23 December 2011, with a direction that both parties attend in person. The Claimant responded, asking to be spared "*the ordeal of a tribunal appearance*", enclosing a statement of his unfitness for work from his doctor and repeating his request for an updated joint medical report before the matter proceeded further.

23. The situation then escalated. A letter from the Tribunal extending time for compliance with the standard directions was met with a 7 page response from the Claimant, dated 15 December, saying, amongst other things, that he "*…cannot stand a great deal more of the stress and anxiety of this situation…*" setting out a lengthy recital of the correspondence and of his complaints, making allegations of discrimination against the Tribunal and "*imploring the Tribunal to desist*". A request from him, dated 16 December, for the CMD to be adjourned until the medical report had been obtained was refused, the Tribunal emphasising the need to move the claim forward given the hearing date in February.

24. The Claimant did not attend the CMD on 23 December. Having reviewed all the correspondence and previous orders the Employment Judge said this at paragraph 2:

> **"In the light of these documents, the Judge was minded to postpone the remedy hearing…in order to give the Claimant more time to obtain medical evidence in support of any personal injury claim. The Respondent's solicitor then asked for time to take instructions. Having done this, she confirmed that the Respondent would now agree to a joint instruction of Dr Isaac on the issue of whether the discrimination found to have been made out exacerbated the Claimant's mental health problems…She was able to contact Dr Isaac, and he is able to produce a medical report by the end of January 2012. The parties will agree a joint letter of instruction to Dr Isaac."**

25. The hearing remained listed for 10 February and further directions were given for the serving of schedules and witness statements and the preparation of bundles.

26. The Claimant responded on 3 January in what we would describe as emotional and confrontational terms, stating that it was impossible for him to comply with the directions and making a series of unrealistic statements and requests. Mr Heath, appearing for the Respondent before us, described the contents of the Claimant's correspondence at this point as "bizarre". Mr Kohanzad, on behalf of the Claimant, submitted that the Claimant's letters would flag up to any reader that their author might have some mental health difficulties. We accept that submission. We observe that, both in tone and content, his lengthy letters to the Tribunal were becoming increasingly erratic and confused.

27. The Claimant's request for a variation of the directions was refused on 24 January and the parties were urged to endeavour to comply with existing orders. The parties were unable to agree a joint letter of instruction to Dr Isaac. The Claimant continued to write lengthy letters to the Tribunal, complaining of the "*immense pressure*" this was putting him under, and asking for the remedy hearing to be adjourned. The Respondent wrote to the Tribunal on 1 February, complaining about the Claimant's behaviour and suggesting that he was deliberately refusing to comply with the directions.

28. The Claimant's request for an adjournment was refused, the Tribunal notifying the Claimant that the hearing would proceed as listed, and that the Tribunal would do its best on the evidence available unless the Claimant provided medical evidence in support of a postponement.

**The remedy hearing and subsequent events**

29. On 10 February the Claimant did not attend the hearing. Nor did he provide any written submissions on remedy. On hearing from the Respondent's counsel, the Tribunal noted the Claimant's failure to comply with directions and his failure to agree a joint letter of instruction to Dr Isaac unless the expert was asked to deal with matters which were not relevant to the remedy hearing. They noted that no medical evidence in support of a postponement had been provided. Having regard to this background and to the overriding objective they decided to proceed in his absence.

30. They held that, in relation to the disability discrimination found to have occurred, there were two aspects. The fact that the two processes were run together and not separated out over a longer timescale had led to potential stress on the Claimant, and the Claimant had felt exasperated and defeated. The second aspect was the holding of a stage 2 meeting under the absence procedure without first obtaining an up to date occupational health report. The effect of this discrimination was more serious and the Claimant was found to have suffered "**hugely increased stress and anxiety levels**" when the Respondent insisted that the meeting went ahead.

31. The Tribunal concluded,

> **"…the incidents of discrimination we have found made out caused transient (albeit serious for a short period) exacerbation of stress and anxiety."**

32. Having regard to the relevant authorities addressing awards for injury to feelings they found the appropriate figure for compensation to be £2,530 inclusive of interest. The Tribunal said,

**"We make no award for personal injury because we have seen no medical evidence on which to base any award for injury to health."**

33. The Tribunal's written reasons for this judgment were sent to the parties on 1 March. The Claimant wrote a lengthy letter on 9 March requesting a review. The basis of his application was (1) that the judgment had been made in his absence; (2) that new evidence was now available from his new GP, explaining why the mental health expert already instructed was the more appropriate person to comment on the impact of the tribunal on his mental health; and (3) that it was in the interests of justice for there to be a review in all the circumstances. The Claimant summarised his previous correspondence and emphasised the need for medical evidence from Dr Isaac relating to his personal injury claim. He denied that the failure to agree a joint letter of instruction was due to any fault on his part.

34. The Claimant's application for a review was listed for hearing on 20 August 2012.

**The review decision**

35. The Claimant appeared in person at the hearing and the Respondent, who opposed the application, was represented by Mr Heath, who also provided detailed written submissions to the Tribunal.

36. In their reasoned judgment, sent to the parties on 2 October 2012, the Tribunal set out the history and found that the delays and difficulties had centred on the issue of medical evidence and, in particular, a further report from Dr Isaac. They found that the reason for the Claimant's non-attendance on 10 February was not his illness, but his inability to produce medical evidence from Dr Isaac, because the parties had failed to agree the letter of instruction in time for the hearing. The Claimant referred, amongst other things, to his lack of any legal

representation in this claim after the liability hearing; to the stress the litigation was causing him; to the fact that he had previously suffered an acute stress reaction to the liability hearing, even when he was represented, causing the hearing to be adjourned; and to his vulnerability as a disabled litigant.

37. The Claimant relied primarily on the interests of justice in support of his application for a review. He wished to maintain a personal injury claim on the basis of exacerbation of his mental health condition by the proved acts of discrimination. The Claimant referred in particular to the CMD on 23 December, when the Employment Judge had been minded to give him the opportunity to submit updated medical evidence in support of his personal injury claim and had directed that there be an agreed letter of instruction to Dr Isaac.

38. The Tribunal summarised the Respondent's submissions and referred to the authorities drawn to their attention, dealing with the importance of the finality of litigation. They accepted that a successful party should in general be entitled to regard the Tribunal's decision on a substantive issue as final.

39. They noted that the Respondent made a number of allegations of unreasonable behaviour by the Claimant, in submitting that it would be unjust to allow him now to re-open his remedy claim. The Respondent relied on the Claimant's failure to comply with orders; and on what they said was the unreasonable stance he had adopted in relation to the medical report, in wanting to see that report before writing his witness statement and finalising his schedule of loss. The Respondent also submitted that the prospects of the Claimant successfully persuading the Tribunal that he had suffered an exacerbation of his mental ill-health as a result of the limited number of allegations proved were very small.

40. Granting the Claimant's application and revoking their earlier judgment on remedy, the Tribunal said this at paragraph 6 of their reasons:

> **"We largely agree with the Respondent about the unreasonable conduct of the Claimant in these proceedings: at least, it is certainly unreasonable objectively speaking. However, we have to take into account the fact that the Claimant suffers from mental impairment, as described by Dr Isaac, and this may have influenced his ability to conduct these proceedings in a rational manner. We believe, in accordance with the overriding objective and our duty as a public body to adjust these proceedings to make reasonable adjustments of these proceedings where claimants are disabled, that we have to take account of this and weigh it in the balance when considering whether to allow this application for review. Further, we conclude that it may not be possible to do justice to the remedy award with no medical evidence on whether or not the Claimant has suffered personal injury or exacerbation of existing mental impairment by reference to the discrimination we have found. Of course he may not be able to do this. However, we believe that he should be given one final chance to see if medical evidence in support of that claim can be obtained. We note that the Respondent has now made an application for costs against the Claimant and, subject to the Claimant's ability to pay such, this may be an appropriate way of balancing the interests of justice, so that the Respondent is not substantially prejudiced. We stress that we have made no determination of any costs application yet, as we have not had a costs hearing. Of course, it is always important to bear in mind that justice demands finality in litigation. However, we conclude that the balance in the interests of justice argument in this case slightly favours the Claimant on this occasion, and we allow the application for review."**

## The Respondent's appeal

41. Mr Heath acknowledges that the Tribunal's power to grant an application for review of an earlier judgment is a wide one. By rule 34, schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** parties may apply to have certain decisions reviewed, including, by virtue of rule 34 (1)(b), "a judgment (other than a default judgment but including an order for costs, expenses, preparation time or wasted costs)."

42. By rule 34 (3) decisions may be reviewed on the following grounds:

> **"(a) the decision was wrongly made as a result of administrative error;**
>
> **(b) a party did not receive notice of the proceedings leading to this decision;**
>
> **(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."**

43. Nevertheless, relying on **Flint v Easter Electricity Board** [1975] ICR 395 and **Council of the City of Newcastle upon Tyne v Marsden** [2010] ICR 743, Mr Heath submits that the interests both of the parties and of the public require finality in litigation; and that it is only in unusual cases that a losing party should be permitted a second bite at the cherry. In general, a successful party should be entitled to regard a Tribunal's decision on a substantive issue as final, subject to any legitimate appeal.

44. In this case, Mr Heath submits, the Tribunal identified at paragraph 6 of their Reasons two unusual features which they considered tipped the balance in the Claimant's favour: first, the Claimant's mental impairment, and secondly the fact that it may not be possible to do justice to his personal injury claim without medical evidence.

45. Dealing with the first feature, Mr Heath's essential complaint, reformulating his grounds of appeal, is that the Tribunal were erroneously purporting to make reasonable adjustments for the Claimant's mental impairment at the precise point of their decision-making function, believing themselves to be under a duty to do so, pursuant to the prohibition on discrimination in the exercise of public functions in s.29 of the **Equality Act 2010**, and believing themselves to be under a duty to make reasonable adjustments pursuant to s.29(7) of that Act. In fact, no duty to make such adjustments arose, by virtue of the "judicial function" exemption from that equality duty contained in Schedule 3 Part 1, paragraph 3 of the Act.

46. Mr Heath acknowledges that courts and tribunals can, and regularly do have regard to general, non-binding guidance and practical advice of the kind given in the Equal Treatment Bench Book, in considering how best to accommodate disabled litigants in the court or tribunal process. However, the language of obligation used in paragraph 6 indicates, says Mr Heath,

that the Tribunal did not just have regard to the Claimant's mental health, along with other relevant factors, but that they considered that they were under an obligation to make reasonable adjustments in that respect **" as a public body"**. That phrase can refer only to s.29(7) of the 2010 Act and the duty to make reasonable adjustments. This was wrong in law and the appeal should succeed on that ground alone.

47. Alternatively, he submits that wrongly assuming that they had a statutory duty to make reasonable adjustments was a factor erroneously taken into account by the Tribunal at the point of exercising their discretion on the application for a review. It was also a misapplication of the principles in **Flint** and **Marsden** because they erroneously regarded their non-existent statutory duty to make adjustments as outweighing the interests of the successful party in the finality of litigation. The appeal should therefore be allowed on that basis in the alternative.

48. Further, in relation to the second feature taken into account by the Tribunal, namely the absence of medical evidence, Mr Heath submits that, had the Claimant not behaved unreasonably, he would have complied with the Tribunal's directions and served medical evidence in support; and the personal injury element of his claim would have been dealt with at the remedy hearing in February 2012. The Claimant had one cause of action and he was under a duty to bring all aspects of his claim for compensation before the Tribunal at the same time.

49. However, the Claimant did not act reasonably and, in the circumstances, the Tribunal were entitled to approach compensation in the round and make the award they did on the basis of the material before them. In particular they were entitled to make no award for personal injury in the absence of any medical evidence addressing resulting injury or exacerbation of the Claimant's ill-health. Further, the Tribunal were bound by their findings in the liability

judgment and the Claimant's claim for damages for personal injury was hopeless, given the limited grounds on which his claim succeeded. There was no contemporaneous evidence that the discrimination found to have occurred had played any part in worsening the Claimant's condition. Any report from Dr Isaac, obtained more than two years after the relevant incidents and based, inevitably, only on what the Claimant himself told him, would have been of no evidential value. The Tribunal therefore erred in taking the absence of such evidence into account as a relevant factor and finding that it outweighed the interests of the Respondent and of the public in the finality of litigation.

50. Resisting the appeal on behalf of the Claimant, Mr Kohanzad submits, essentially, that the Tribunal did not misdirect themselves, as the Respondent suggests, and regard themselves as under a statutory duty to make reasonable adjustments when deciding whether to grant the application for a review. Their reasoning at paragraph 6 reflects no more than the Tribunal's weighing up of all the relevant factors, in deciding where the balance lay when considering the interests of justice in this case. This was a perfectly proper exercise of their discretion on the evidence and their decision cannot be impugned.

51. In the alternative, if the Tribunal did proceed on the basis that they had a statutory duty to make reasonable adjustments when considering whether to grant the application for a review, it was not an error of law for them to do so. The 'judicial function' exemption in paragraph 3 of Schedule 3, Part 1 of the Equality Act simply means that a Tribunal is not obliged to make reasonable adjustments in the exercise of its judicial function. However, that does not mean that it is an error of law for the Tribunal to do so.

52. In relation to the medical evidence factor, he submits that the Claimant's personal injury claim cannot be said to be untenable, given the findings in the liability judgment. The Claimant is entitled to damages for psychiatric injury caused by an act of discrimination. While the Tribunal's findings of fact as to the Claimant not returning to work may be held to preclude an award for loss of earnings, those findings have no bearing on the question whether the discrimination found to have occurred caused personal injury or exacerbated an existing condition. The Tribunal were entitled to have regard to this factor and to conclude that it might not be possible to do justice to the remedy award without medical evidence. In any event, the personal injury claim would appear to be extant. The claim was not dismissed on 10 February 2012. Save for the reference to making no award for personal injury in the absence of medical evidence (see paragraph 9 of the remedy judgment referred to above), the claim was not dismissed and no substantive decision on this claim has yet been given.

**Discussion and conclusions**

53. Clearly, in deciding to grant the Claimant's application for a review, the Tribunal were performing their judicial function. However, reading their reasoned judgment as a whole, and in particular their reasoning at paragraph 6, we reject the submission that they believed themselves to be under a statutory duty to make reasonable adjustments in the exercise of that function, pursuant to s.29(7) of the Equality Act. In our judgment the Tribunal were doing no more than weighing all the relevant factors in the balance, in time-honoured fashion, in deciding where the interests of justice lay in this case, and how their discretion should be exercised. In considering the Claimant's conduct they recognised that they had a duty to factor in his mental impairment and its potential impact on the way he had conducted the proceedings.

54. In support of his submission to the contrary, Mr Heath relied in particular on the following passage in paragraph 6:

> **"We believe, in accordance with the overriding objective and our duty as a public body to adjust these proceedings to make reasonable adjustments of these proceedings where claimants are disabled, that we have to take account of this and weigh it in the balance when considering whether to allow this application for review."**

55. The paragraph must, however, be read as a whole. Immediately preceding this passage the Tribunal have referred to the necessity,

> **"…to take into account the fact that the Claimant suffers from mental impairment, as described by Dr Isaac, and this may have influenced his ability to conduct these proceedings in a rational manner."**

In oral argument Mr Heath submitted, in response to a question from the Appeal Tribunal, that the words **"…we have to take account of <u>this</u> and weigh <u>it</u> in the balance"**, in the following sentence, referred not to their statutory obligation to make reasonable adjustments, but to the Claimant's mental impairment and its possible effects.

56. We accept that submission and there is nothing else, either in that paragraph or elsewhere in the judgment, to suggest that they were taking into account, when exercising their discretion, the fact that they had a statutory duty under s.29(7) to make reasonable adjustments. The existence and nature of the s.29 equality duty and the scope of the 'judicial function' exemption in Schedule 3 had not been referred to by Mr Heath in his detailed submissions. Nor had the Claimant referred to it. The judgment contains none of the matters that would have to be addressed, in accordance with the statutory criteria, if the Tribunal considered they themselves were under a duty to make reasonable adjustments under s.29(7). No PCP is identified. Nor is there any finding as to the Claimant's substantial disadvantage or the reasonable adjustment being made to prevent it. We are not persuaded that this experienced Tribunal were engaged in

this exercise or assumed, erroneously, that they had a duty under the Equality Act to make reasonable adjustments when considering the review application.

57. In our view, the reasoning in paragraph 6 discloses no legal error in relation to this first matter. The Claimant's mental impairment and its potential relevance to his conduct of the proceedings were self-evidently relevant factors that the Tribunal were obliged to take into account in exercising their discretion in this case. There is therefore nothing wrong with their reference to them being expressed in the language of duty or obligation.

58. In **R v Isleworth Crown Court ex parte King** [2001] EWCA Admin 22, to which Mr Heath referred us, the Divisional Court (Brooke LJ and Morison J), drew attention to the importance of the guidance given to all judges in the 2000 edition of the Equal Treatment Bench Book (ETBB), published by the Judicial Studies Board (now the Judicial College). It is unnecessary to deal with the particular facts and decision in that case, but the reference to the significance of the ETBB is worth repeating in this appeal in view of Mr Heath's submissions upon it.

59. Recognising the importance of the need for courts to treat people with disabilities fairly and sensitively, and the increased emphasis on fairness since the coming into force of the **Human Rights Act 1998**, Brooke LJ referred expressly to the advice given in the ETBB in relation to disability and trial management. In particular, judges needed to be aware of the vulnerability of some of those affected by disability, to communication problems that may arise, and to the fact that the stress of litigation may exacerbate their symptoms. At paragraph 41 of his judgment, Brooke LJ said this in relation to that advice :

> **"I wish to stress in this judgment that this advice is important advice which every judge and every justice of the peace is under a duty to take into account when hearing a case involving people with one disability or another."**

We would endorse those observations. Mr Heath accepted that they were of general application and applied to all courts and tribunals.

60. Over the twelve years that have passed since that judgment, the ETBB has regularly been revised and updated, and the helpful information and advice it provides is now well established. The section dealing with mental disabilities describes the different ways in which mental disability may arise and manifest itself, and points out that adjustments to court or tribunal procedures may be required to accommodate the needs of persons with such disabilities. Memory, communication skills and the individual's response to perceived aggression may all be affected. Practical advice is given as to particular situations that may arise. Decisions concerning case and hearing management *"…should address the particular needs of the individual concerned in so far as these are reasonable. The individual should be given an opportunity to express their needs. Expert evidence may be required"* (paragraph 20). It is recognised (paragraph 25) that if a litigant has a condition that is worsened by stress, the difficulties will almost certainly become worse if he/she is acting in person.

61. The authors of the ETBB refer to the need for a high degree of awareness, and for judges to avoid erroneous perceptions, as the passage quoted in the opening paragraph of this judgment indicates. Judges should be able *"to recognise the existence of a mental disability if not informed of it, identify its implications in the court or tribunal setting and understand what should be done to compensate for areas of disadvantage without prejudicing other parties"*, an approach which we recognise is not always easy to apply in practice.

62. In our judgment the Tribunal in this case were right to recognise that they had an obligation to take into account this Claimant's mental impairment and the effect it may have had on his ability to conduct the proceedings rationally. It was one of the factors to which they should have regard in considering where the interests of justice lay. In addition to the need for medical evidence, which we shall deal with shortly, they also took into account, as another relevant factor, the importance of the finality of litigation and the right of the Respondent as the successful party to regard the earlier decision on remedy as final. All these factors were relevant to the broad discretion to be exercised by the Tribunal when considering what the interests of justice required in this case.

63. Mr Heath advanced a further contention in argument, on the basis that his primary submission failed and we found that the Tribunal did not err in law in the way he suggested in taking these matters into account. He submitted that their finding as to the Claimant's impairment and its effects had to be evidence- based, and that there was no evidence before the Tribunal which would permit them to come to the conclusion that his unreasonable behaviour arose from his impairment, rather than from his deliberate adoption of delaying and obstructive tactics. Their finding was therefore perverse. He draws attention to their agreement with the Respondent, at the beginning of paragraph 6, that the Claimant's conduct in these proceedings was unreasonable.

64. We cannot accept that submission and it is based, as it seems to us, on an inaccurate description of what the Tribunal actually found. In addition to Dr Isaac's report, detailing the nature and scope of the Claimant's mental impairment, and the occupational health assessments and other findings in their liability judgment, the Tribunal also had well in mind the nature and tone of the extensive correspondence from the Claimant over the course of several months, as

well as the Claimant's own submissions at the review hearing. In our view there was ample evidence from which they could conclude, as they did, that his impairment "**may have influenced his ability to conduct these proceedings in a rational manner**". In doing so they properly took into account the fact that his condition may have rendered him unaware that he was behaving unreasonably. In paragraph 6 the Tribunal were recognising that the unreasonableness of the Claimant's conduct, viewed objectively, had to be considered subjectively, in the light of his mental impairment and its likely effects.

65. For these reasons we consider that the Tribunal did not err in taking the Claimant's mental impairment and its effects into account in this case. Nor did they proceed on the erroneous assumption that they were under a statutory duty to make reasonable adjustments. It is therefore unnecessary for us to consider Mr Kohanzad's alternative submission that, even if they had proceeded on that basis, they were not in error.

66. We heard interesting arguments from both counsel as to the scope of the "judicial function" exemption from the prohibition on discrimination in the exercise of public functions contained in the Equality Act; and as to whether an erroneous assumption that there was such a duty upon the Tribunal in this case would require the EAT to intervene. However, it is unnecessary to set out the relevant statutory provisions and address those arguments in this judgment, given that we reject the basis of Mr Heath's primary challenge. We should say that we consider the exemption to be limited to judges' core adjudicative and listing functions, as the guidance in the ETBB suggests, but we say no more about that, given our finding that these issues simply do not arise for consideration in this case.

67. In relation to the finding that it might not be possible to do justice to the remedy award without medical evidence relating to personal injury, we reject Mr Heath's submission that the Tribunal erred in taking this factor into account in addition.

68. The procedural history to which we have referred, and in particular the CMD held on 23 December 2011, indicates that the Employment Judge recognised the necessity to have a medical report addressing the Claimant's personal injury claim; and that he had gone to some lengths to secure one. He was right to do so. A claim for damages for personal injury was clearly set out in the particulars of claim. The advisability of obtaining a medical report addressing causation of injury was emphasised by the Court of Appeal in **Sheriff v Klyne Tugs (Lowestoft) Ltd** [1999] IRLR 481, Stuart-Smith LJ stating that **"…there is a well-recognised difference between injury to health and personal injury, and injury to feelings"** and, later on in the judgment, **"The question, which may be a difficult one, is one of causation. It follows that care needs to be taken in any complaint to an employment tribunal under this head where the claim includes, or might include, injury to health as well as injury to feelings."**

69. In his report of 17 September 2010 Dr Isaac had dealt only with the question whether the Claimant was disabled, having regard to the statutory criteria. For quantum purposes it was necessary for him to address whether the acts of discrimination found to be proved had caused or materially contributed to an injury or to an exacerbation of the Claimant's existing condition; and to describe, as best he could, the effects of such an injury or exacerbation and how long they would have lasted.

70. We do not accept Mr Heath's submission that the Claimant's personal injury claim was hopeless. While the discrimination claim succeeded only in part, it is the effect of that discrimination on the Claimant, rather than the number of allegations found to be proved, that is relevant at the remedy stage. While a claim for loss of earnings, we accept, may have little mileage given the findings in the liability judgment, there was plainly scope, subject to medical evidence, for an award by way of general damages, or for the award made to include an element of such damages. We refer to the Tribunal's findings at paragraphs 6 and 7 of the remedy judgment, to which we referred earlier on in this judgment (see paragraphs 16 and 30-31), namely the serious, albeit transient effects upon the Claimant of the way in which the 'Managing Absence Procedure' was carried out.

71. While it may be correct that a report from Dr Isaac could rely only on what the Claimant now told him, there apparently being no contemporaneous medical evidence of injury or exacerbation of injury, that is the case for many claims involving psychological injury before both courts and tribunals. Employment tribunals are well used to making assessments on that basis in such cases, and these issues can be explored in cross-examination, where appropriate. We bear in mind that, at the liability hearing, the Tribunal found the Claimant's own evidence as to his condition to be supported materially by the medical and other evidence in the case.

72. The Tribunal were therefore entitled to have regard to this factor in exercising their discretion in this case. In a case where the remedy hearing had proceeded in the Claimant's absence, where medical evidence was recognised as being necessary to deal with the personal injury element of his claim, where the Claimant's mental impairment may have influenced his conduct of the proceedings when he was acting in person, and where the Tribunal said only that they were making no award under that head in the absence of any medical evidence, we

consider they were entitled to factor into their decision-making the need for medical evidence to do justice to the remedy award in this case.

73. For all these reasons, we find no error in the Tribunal's reasoning or in their decision, in the exercise of their discretion, to grant the application for a review and to revoke their earlier remedy judgment. The Respondent's appeal must therefore be dismissed, and the Tribunal's order for the remedy hearing to be re-listed is upheld.

74. Given our findings on the appeal, the Claimant's short cross-appeal does not arise for determination and can be dismissed. That arose in this way, as we understand it. If the Respondent's appeal had been upheld and the EAT had decided that, in paragraph 6 of the Reasons, there was a finding of unreasonable conduct by the Claimant which would bind the Tribunal in any further proceedings, in particular proceedings relating to costs, the Claimant sought to challenge the finding that his conduct was unreasonable.

75. In their reasoned judgment the Tribunal were deciding only whether the interests of justice required a review of their earlier, remedy judgment made in the Claimant's absence. For this purpose, the Tribunal were recognising at paragraph 6, as a relevant factor to be taken into account, that the unreasonableness of the Claimant's conduct, viewed objectively, had to be considered subjectively, in the light of his mental impairment and its likely effects. They made no other finding as to the unreasonableness or otherwise of the Claimant's conduct which would bind them in subsequent proceedings. In particular, the Tribunal emphasised that they were not making any finding in relation to any costs application. The particular concern raised in the Claimant's cross-appeal does not arise and it will therefore be dismissed.

76. Both the Respondent's appeal and the Claimant's cross-appeal are therefore dismissed. In those circumstances it is unnecessary for us to determine the Claimant's own appeal against the remedy judgment, which was ordered to be heard immediately after the Respondent's appeal, if that appeal was upheld. That appeal will now be dismissed upon withdrawal, and we will make an order to that effect.