Appeal No. UKEAT/0264/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 June 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR M ISLAM — APPELLANT

HSBC BANK PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LAURA ROBINSON (of Counsel) Bar Pro Bono Scheme
For the Respondent	MS CAROLINE MUSGROVE (of Counsel) Instructed by: Messrs Pinsent Masons LLP 55 Colmore Row Birmingham B3 2AA

SUMMARY

PRACTICE AND PROCEDURE - Review

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

Reconsideration - Fair Hearing

The Claimant's case had been dismissed upon his having applied to withdraw during the course of the Full Merits Hearing. Subsequently, he had applied for a reconsideration of that decision significantly out of time. The ET refused that application. The Claimant appealed.

Held: *dismissing the appeal*

The ET had permissibly exercised its discretion to refuse to extend time for the reconsideration application; in particular, it had been entitled to take the view that the Claimant had failed to provide adequate medical evidence to explain the delay (over six months) before making his application. It had also been entitled to conclude it would not be in the interests of justice to re-open the original decision. On the material before it, the ET had permissibly concluded that the Claimant had not been denied a fair hearing and it was thus not open to him to seek to go behind his earlier withdrawal of his claim. Assessing the question of fair hearing as an appellate Tribunal (applying **R (on the application of Osborn) v Parole Board** [2014] AC 1115 SC; **Galo v Bombardier Aerospace UK** [2016] NICA 25, [2016] IRLR 703), it was apparent that the ET had made appropriate adjustments at the Full Merits Hearing (and before), thus affording the Claimant a fair hearing. There was nothing that should have alerted the ET to consider the withdrawal of his claim was other than for the reasons he had provided at the time.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Judgment of the Birmingham Employment Tribunal (Employment Judge Perry, sitting alone; "the ET"), dated 12 February 2016, by which the ET refused the Claimant's application for a reconsideration of its earlier Judgment when it had dismissed his claims upon withdrawal (that Judgment having been sent out on 18 June 2015).

2. The Claimant represented himself in the ET proceedings, albeit at the Full Merits Hearing he was assisted by his brother. On the appeal, he has had the benefit of representation by Ms Robinson of counsel, acting under ELAAS and, subsequently, the bar pro bono scheme. Before the ET, the Respondent was represented by solicitors and counsel, albeit Ms Musgrove did not then appear.

3. As I have noted, the Claimant's Notice of Appeal relates to the ET's Reconsideration Judgment; it is important to bear in mind there is no appeal against the ET's earlier decision.

4. The Claimant's grounds of appeal were initially considered on the papers, by His Honour Judge Richardson, to disclose no reasonable basis to proceed. After a hearing before me on 31 August 2016 under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, I was persuaded this matter should be permitted to proceed on limited amended grounds. Subsequently, His Honour Judge Shanks gave further directions in respect of evidence for this hearing and I have received, and taken into account, witness statements from both sides, an agreed note of the ET hearing, and comments from the Employment Judge. Although, initially,

A there was some suggestion that oral evidence would be given at this hearing, after further discussion it was agreed this was unnecessary.

B **The ET Proceedings and the Decision Under Appeal**

5. The Claimant is a disabled person who is visually impaired. He is blind in the right eye and only has very limited sight in his left eye and is very light sensitive. He also suffers from a condition known as Stevens-Johnson Syndrome, an auto-immune skin condition which has unknown triggers and which, in the Claimant's case, can be triggered by medicines; indeed, his visual impairments were initially caused by the Claimant suffering from this syndrome. There is also evidence before me that the Claimant has suffered from depression.

D

6. As a result of the Claimant having referred to his disabilities in his ET1, there was what can be fairly characterised as a ground rules hearing before an ET (then Employment Judge Dean sitting alone, on 26 February 2015) at which the Claimant gave fuller information about his conditions and disabilities - specifically as arising from his visual impairment - and he explained the reasonable adjustments that he would need for the fair hearing of his claim. The ET then recorded that position as follows (the Mrs Cook referred to by the ET being the Respondent's solicitor, then appearing as its advocate):

> **"15.1. The claimant requested that any correspondence and documents (including statement, submissions, chronology and any that are generated to be used at the hearing might be printed in a .14 font size to assist his reading.**
>
> **15.2. I confirmed that the tribunal would endeavour to sent [sic] all letters to him printed in .14 font.**
>
> **15.3. I explained to the claimant that if he wished he, like may [sic] others attending the tribunal was able to bring his own laptop to the hearing to be able to use any adaptations he has to read documentation on his screen.**
>
> **15.4. Mrs Cook confirmed that the final bundle of documents would be sent to the claimant as a hard copy and scanned so that he would be able to magnify the text on his laptop.**
>
> **15.5. The claimant who was accompanied to this hearing by his brother to read any documentation to him and the claimant may be assisted by a reader at the hearing.**
>
> **15.6. The claimant and the respondent are asked to identify any additional reasonable adjustments that the tribunal may be asked to make whether before or at the hearing."**

7. I have been given further information about the steps that the Claimant then took in preparation for the Full Merits Hearing, at which he envisaged using his laptop, which had software allowing for enhanced legibility and different colour contrasts that would - once he had loaded all the ET documentation - enable him to read the materials during the hearing and make and read his own notes. In particular, it has been explained to me that many of the documents in the ET hearing bundle were printed in a small font - certainly a size less than point 14 font - such that the Claimant was unable to read them unless they were scanned into his laptop and then magnified (an issue that had been anticipated in the case management directions I have recorded above, see sub-paragraph 15.4).

8. The Full Merits Hearing of the claim was listed before the ET (Employment Judge Perry, sitting with members Ms Littler and Ms Din), from 15 to 17 June 2015.

9. I now have accounts of that hearing from the Claimant (who has provided two witness statements for the purposes of this appeal), from his brother (Mr Saiful Islam, who accompanied him at the hearing), from counsel then appearing for the Respondent (Ms Richmond) and, as I have recorded, pursuant to the EAT's request the Employment Judge has also provided his comments. I have also been assisted by an agreed note of what took place.

10. The Claimant's account is usefully summarised in Ms Robinson's skeleton argument for this hearing, as follows:

> **"17. …**
>
> **a) the reasonable adjustment that all documents to be used at the hearing be in .14 font had not been adhered to.**
>
> **b) it was clear to the EJ from the start of cross examination that the Claimant was not using his computer.**
>
> **c) the Claimant flagged (at least once even on the Respondent's case) that he was unable to use the magnification software or his computer and there was an issue with the screen brightness. It was therefore clear that he was unable to read the documents.**

> **d) the Claimant had not been allowed to use his own colour coded and tabbed hard copy bundle.**
>
> **e) the Claimant's brother was prevented from communicating with him whilst giving evidence and therefore could not assist in finding appropriate pages/paragraphs in rebuttal.**
>
> **f) the Claimant was looking at documents very close up in order to try to read them - a physical demonstration of the difficulties he was clearly encountering.**
>
> **g) the Claimant was told not to use his computer issues as "an excuse"."**

I note, at this stage, that account is not agreed by the Respondent and I am able to observe for myself that it does not entirely accurately record the earlier ground rules agreement (see the point recorded at subparagraph 15.4 that I have already referenced), nor is it fully corroborated by the parties' agreed note. I accept, however, that the Claimant will have recorded what happened from his perspective and how he saw things, or recalled events (allowing for the time-lapse that has taken place in his putting forward this recollection), and I further allow that his perceptions may be very different from how others perceive the situation.

11. Ultimately, Ms Robinson has, in any event, presented the Claimant's case on the basis of that which is agreed between the parties - accepting that there is little material disagreement. She does not suggest that the Claimant's particular perceptions - not agreed by the Respondent and the Employment Judge - would take the Claimant's case any further on this appeal.

12. As I have said, the parties have agreed a note of what took place at the Full Merits Hearing, some parts of which are worth setting out at this stage (the page numbers in that note being to documents within the EAT bundle):

> **"4. The merits hearing began on Monday 15 June 2015 at 10.10am. At the start EJP [Employment Judge Perry] asked about the person sitting next to C [the Claimant] at the 'Claimant' desk and C confirmed that it was his brother, SI. C explained to EJP that SI was there as moral support and EJP did not object.**
>
> **5. SI was present on all three days of the hearing but did not speak to the Tribunal on C's behalf. HC [Helen Cartenian, Employment Litigation Manager at the Respondent] was also present on all three days, taking notes of the hearing.**
>
> **6. Next EJP referred the parties to the list of adjustments discussed by the parties with Employment Judge Dean at the Preliminary Hearing on 26 February 2015 (the "PH"). The**

Tribunal's summary of that PH is at page 109 and the list of adjustments is in paragraph 15 of that summary at page 113.

7. EJP checked that all the documents PM [solicitors for the Respondent] and CR [Ms Richmond] had produced for use at the hearing were in .14 font, and CR confirmed that they were. He also checked that C had the bundle in electronic form as well as in hard copy, and C confirmed that he did. EJP referred to the adjustment in the list that referred to C having a companion to help with reading documents, and noted that C had his brother sitting next to him to read documents to him if C felt this necessary.

8. C had brought his laptop with him and EJP asked C if he had the equipment he needed to be able to read all the documents. C confirmed that he did. C did not mention that the visual enhancement settings were not working or that they had ceased to work the previous week.

9. EJP asked C whether he needed any other adjustments and C said not. EJ Perry suggested that he might like regular breaks and explored that with him. It was agreed that there would be a ten-minute break every hour. C did not identify any other adjustment. EJP told C that C should let him know if there was any problem or he needed assistance in any way.

10. Breaks took place as follows: 11.15-11.50; 12.30-2.40. The hearing ended for the day at around 3.30."

13. After these preliminary matters, the Claimant made a number of applications, including for witness orders, disclosure and for a postponement of the hearing (although it is not suggested that related to any matter relevant to this appeal). Thereafter, at around noon on the first day and after a short break in the proceedings, the Employment Judge again asked the Claimant if he needed anything more in terms of adjustments; he confirmed he did not.

14. On the second day of the hearing, the Claimant was cross-examined from 10.40am to 4.20pm. Again, it is worth setting out the parties' agreed record of what took place:

"21. C was given breaks of 10 minutes or more every hour, with breaks from 11.25-11.35, 12.25-12.35, 1-2 and 3-3.20. The hearing ended at 4.20.

22. C gave evidence sitting at the 'Claimant' desk instead of moving to the witness desk, so that he could have his laptop in front of him and his brother next to him to help him if necessary.

23. CR ensured that whenever she asked C a question that related to a document, she took him to the document, described what it was and read out the relevant passage(s).

24. C's answers to questions were lucid and to the point and he was familiar with all the documents to which CR took him. He sometimes took a while to think over and respond to some questions.

25. C gave evidence that he had a degree in sociology and social policy and was considering doing a masters degree in law. Since leaving HSBC he had applied for jobs as a legal assistant and legal secretary. He has an A level in law. He had previously worked for the Citizens Advice Bureau, providing advice on areas of law such as consumer rights and debt. He had not given advice on employment law but had training on employment issues and has a basic understanding of employment law.

26. At 2.20pm CR cross-examined him on his ability to use paper, as one of his 'failure to make reasonable adjustments' complaints was that he was prevented from taking part in developmental courses because the trainers used paper-based information. She suggested that C sometimes preferred to use paper rather than a laptop, and pointed out that he had been making handwritten notes the previous day rather than using his laptop. C's answer was that he had only been making handwritten notes because he could not get the laptop screen brightness to work and that was affecting his magnifying software.

27. EJP pointed out that he had said to C to tell him if there was any problem, and that C had not done so. C apologised for not alerting about computer issues to EJP. EJP then asked specifically what was wrong with computer? C explained he didn't know exactly, as C is not a technician, he could not do anything about it at that time.

28. [The parties do not agree on certain parts of the record of C's exchange with EJP]

29. EJP instructed Ms Richmond to read out documents, and C said that he had been able to manage the questions OK with CR describing documents and reading out passages. As some documents in the hardcopy bundle were in .14 font, EJP suggested he use that bundle so he could at least read those. This is what he did from that point on, occasionally looking at documents very close up in order to read them himself."

15. As the note records, there is a disagreement between the parties as to what took place at this stage of the ET hearing and I therefore set out the different accounts, starting with that provided by the Claimant, as contained within his original witness statement for this hearing:

"21. C never used the computer during cross-examination.

22. Earlier after lunch, the computer had failed to load magnifier and the screen brightness was really dimmed down presenting difficulties, C could not see the screen clearly. C tried to get it to work by restarting his computer and at this point computer loaded up but presented a black screen. C was visibly frustrated as recalled by his brother SI and thus could not use it instead turning to pen and pad.

23. At this point, EJP asked C, if anything was wrong and C explained bout 'screen brightness' and 'magnifier' not working, SI who observed the events corroborates this in his statement.

24. Thus C gave an explanation about computer issues previous to being cross-examined.

25. During cross-examination, respondent's barrister CR questioned C on computer use claiming he preferred pen and pad. C explained that was not the case and that there was a computer fault.

26. At this point, EJP pointed out that he had told C to tell him if there was any problem, and that C had not done so.

27. This baffled C, at the time, as he had given an explanation earlier about screen brightness and magnifier issues. But rather than getting into an argument, C apologized [sic] regardless.

28. EJP then asked specifically what was wrong with the computer? C explained he didn't know exactly, (as C is not a technician), and he could not do anything about it at that time (as he was under cross examination).

29. EJP turned to instruct CR to read things out for C's benefit and C agreed to this, as it would be beneficial in order to complete the cross-examination.

30. At this point, C recalls that EJP turned back to him pointing his finger at C and stated "I don't want you using that as an excuse later". This ended any further discussions about the computer.

31. No exploration by panel for alternative computer adjustments or time to seek remedy for equipment was discussed that C can recall."

16. For the Respondent, counsel's statement then provides the following observations:

"4. I wish to add to the account at paragraphs 26 to 28 of the Note, regarding the issue with Mr Islam's laptop during my cross-examination on 16 June. Helen Cartenian's note of this is at page 188. She has recorded very little of the exchange between EJ Perry and Mr Islam about the laptop, and I recorded nothing, and the reason for that is that Mr Islam did not appear at all concerned about the fault with his laptop and did not say that it was affecting his ability to participate in the hearing. I certainly had not realised that there was any problem with Mr Islam's screen, as he had had no difficulty understanding or answering my questions.

5. From the start of my cross-examination, whenever I took Mr Islam to a document I described it to him and read out the relevant passage I wanted to ask him about. When Mr Islam said that he could not get the laptop screen brightness to work, EJ Perry asked him what he wanted to do and he said that he had been able to manage the questions OK with me doing that and was fine to proceed. He did not ask for any time to try and fix the computer or for anything else to be done to help him."

17. The Employment Judge, having referenced his contemporaneous notes of the hearing, has also provided his comments relevant to this point, as follows:

"5.6. Whilst the claimant accepts I asked what was wrong he asserts he was no technical expert [N/27] and did not know what was wrong with the computer. My question was not directed at a technical answer but to the practical effects that had for him. I was seeking to identify the problem to find a solution and make adjustments if possible. The agreed note supports that; it relays that I suggested a way forward and that that was acceptable to the claimant [N/29].

5.7. The claimant asserts [C/30] that at that point I turned back to him and pointed stating "*I don't want you to use that as an excuse later*". My note of the exchange is as I relay at 5.5. I have no recollection of pointing my finger. Nor does the respondent. Nor is that consistent with the lengths I went to during the hearing to ensure a fair hearing. The way the respondent interpreted that exchange [R/6] is also consistent with that. The respondent suggests that I asked the claimant several times if he was able to continue, the claimant stated he was, and it was then I sought to explain the consequences if he did so. The way I recollect the exchange is that I explained to the claimant that if he decided to proceed he would not be able to raise that issue later, so he should stop at that point. Notwithstanding giving him that further opportunity to stop the claimant decided to proceed."

18. Returning to what is agreed, it is common ground between the parties that when stating that he wished to withdraw his claim, the Claimant did not tell the ET that this was due to any computer issues. For the Claimant, it is said that this was because he had previously been told by the Employment Judge not to use computer issues "*as an excuse*". The Respondent does not accept the way the Claimant seeks to characterise that intervention but, in any event, says there

was no reason why the ET should have understood that there was a link between the withdrawal of the claim and any issues regarding the Claimant's computer.

19. More specifically, the Respondent's counsel explains how the Claimant, prior to the resumption of the hearing on day three, raised the issue of withdrawing his case with her, stating that cross-examination had made him realise he had misunderstood things and perhaps had misread documents because some of the text was too small. For the Respondent, that explanation is not wholly accepted. Ms Richmond explains how cross-examination of the Claimant had suggested he had, in fact, been caught out on a lie; she summarises how the Claimant had put his position on the withdrawal of his claim as follows:

> **"16. Mr Islam said that as a matter of good faith and honesty he could no longer blame the Bank and had to withdraw now that he realised he had got things wrong. I said that Mr Islam was clearly a principled person and that I was very impressed that he had the courage to recognise when he was in the wrong and to do something about it."**

20. Plainly, Ms Richmond's statement sets out her perspective of events, but that is not inconsistent with the account recorded in the agreed note, specifically:

> **"33. At the start of the hearing, C that [sic] he wished to make a statement. He said he had decided to withdraw he whole claim. [What C said to the ET in the remainder of that statement is disputed between the parties]**
>
> **34. EJP asked whether C had talked this decision through with anyone, and he replied that yes, he had discussed it with his family members and he had also slept on it.**
>
> **35. EJP explained that if C was to withdraw, he (EJP) needed to ensure that C did so in an informed manner. He said that the consequences would be that if C withdrew, the whole claim would be dismissed and nothing would remain. He would not have the opportunity to bring the claim again in any other forum. EJP also advised him that where a party withdraws, sometimes applications are made by the other party. CR stated that if C withdrew there would be no application by R for its costs.**
>
> **36. EJP then advised Mr Islam that he would give him 10 minutes to go and think about it, as he did not want him to feel under any pressure. The hearing was adjourned.**
>
> **37. After 10 minutes C returned and confirmed that he was sticking to his decision and wished to withdraw. EJP then advised that he would record the decision to withdraw the claim.**
>
> **38. Once the formal proceedings had concluded, both parties prepared to leave the Tribunal room. Ursula Minchin, a witness for R who had been C's senior manager, stopped to wish him well for the future and the two had a short, very cordial conversation at the end of which they hugged. SI also expressed his thanks to her. The Tribunal members were still in the room and EJP commented that he wished more Tribunal hearings could end on such a positive note."**

21. I have also carefully read the Claimant's own statement in this regard and note what he says was in his mind at the time of informing the ET that he wished to withdraw his claim. That said, I also note that he does not suggest that he explicitly communicated these matters to the ET. Reading again from his original witness statement:

> **"52. At the start of the hearing, C said that he wished to make a statement. He said he had decided to withdraw the whole claim; He had reviewed some facts and figures, and said there had been some errors he had made. He stated that in good faith and honesty, he could not continue with his claim against HSBC and decided to withdraw.**
>
> > **a. In stating he had reviewed facts and figures, this is in reference to his writing up questions and references and the errors he made in the previous night.**
> >
> > **b. In good faith and honesty, C wanted to ensure accuracy and an exact account in order to be truthful about his claims. In C's view in order to substantiate his claims he must be accurate of those facts.**
> >
> > **c. "He could not continue his claim against HSBC". Is indicative of C's struggles to present his case and not being able to do so.**
>
> **53. Due to EJP's earlier instruction regarding computer is why C did not mention computer issues as being a reason for his withdrawal.**
>
> **54. C felt he was not in the right state of mind to have any lengthy discussions regarding EJP's instruction and was mentally exhausted at this point. Thus he did not air the issue.**
>
> **55. C was given 10 minutes by EJP to make an informed decision but with no clear access to his references/notes at time and mental stress; C believed there was no alternative but to withdraw."**

22. That understanding is then further reflected in the ET's Judgment, sent out on 18 June 2015, which records what took place, as follows:

> **"Upon the claimant having indicated having reflected on the facts he could not continue his claim against the respondent AND UPON the Tribunal having explained to the claimant that if he withdrew the claim the respondent would seek the claim be dismissed which would prevent the claimant bringing any future claims based on the matters that were the subject of this claim AND UPON the Tribunal having been satisfied the claimant understood the same AND UPON the respondent having confirmed it did not intend to pursue an application for costs**
>
> **It is the judgment of this Tribunal that the entirety of this claim is dismissed on withdrawal."**

23. That record of the Judgment was sent out to the parties, under cover of the ET's standard letter, which refers the parties to the ET booklet, "*The Judgment*", providing a hyper-link to that document, and gives details of how the parties may appeal or apply for a reconsideration of the ET's decision. The letter explains both the rights and the time-limits

relevant to both an appeal and an application for reconsideration; in the latter case, 14 days from the date the ET's Decision was sent out (see Rule 71 of the **Employment Tribunal Rules of Procedure 2013**). The Claimant made no such application within the 14 days required.

24. This, then, brings me to the second issue on which it is necessary for me to descend into the evidence. It is the Claimant's case that at this time he was suffering from depression and was even unable to leave the house for a period. He contends that the ET ought to have been on notice of his depression from his ET1 (which refers to him having been left in a depressed state at the time of his resignation) and other documents in the hearing bundle (which showed he had experienced bouts of depression on an ongoing basis, from at least February 2013 and up to the date of his resignation). In any event, it is a matter of record that, by email timed at 15:59 on 18 January 2016 - so, over six months later - a friend of the Claimant (it is not suggested that the friend had any medical expertise) wrote to the ET on his behalf, seeking a reconsideration of the ET's decision, saying there "*may have been some unfair circumstances and pressures*" that had caused the Claimant to withdraw his case and attaching arguments in support of that application, which referred to some of the documentation in the ET hearing bundle evidencing the Claimant's earlier experience of depression, along with what was said to be a "*document of medical depression*". That document was a letter, dated 20 October 2015, from a Gateway Worker working within the NHS, which recorded what the Claimant had said at a triage assessment that day, as follows:

> **"You identify with symptoms of depression as a result of your recent experience of job losses accumulating in you withdrawing actions at a work tribunal, whereupon you decided you could not continue with the process. You describe a work environment that led you to this situation following a course of 2 yrs, where your job became more challenging as a result of you [sic] employers not helping with aids and adaptations required for your sight problem.**
>
> **Since this event you describe isolating behaviours to the point of not leaving your home for months and withdrawing from life with your family, staying in your room for long periods and not eating well or interacting with others for long periods. You describe sleeping for long periods. You describe feeling life is pointless, however you do not think of ending your life, your nieces being protective factor, you do however struggle to see your future.**
>
> **We discussed services to support work opportunities and I include information in this emailed letter for you to access. We also discussed the merit of anti depressant [sic] medication and its**

value in your recovery, you agreed to discuss this with your GP. I feel the benefits will reduce you [sic] negative thoughts and help you to view your future more positively.

I also believe you should pursue your tribunal regarding your previous employment as this commenced this period of feeling so badly treated."

25. Considering the application for reconsideration, the ET noted that it had been made out of time but reminded itself of its discretion to extend time. It therefore looked for any explanation for the delay in the Claimant's application but found there was no direct explanation. It further noted that it was contended that it would be in the public interest to allow the application, given that the claim concerned the failure to make reasonable adjustments; it also recorded that reference had been made to the Claimant's depression. The ET allowed that there was a public interest in discrimination cases being heard but did not find that was incompatible with there being a time limit for the making of an application for reconsideration; there was also a public interest in claims being determined quickly. As for the Claimant's depression, the ET observed that the only evidence provided was the triage assessment of 20 October 2015 by the Gateway Worker. Symptoms of depression were referenced, but no specific diagnosis given and the relevant dates were unclear. It was also unclear as to whether the Gateway Worker was medically qualified to give an opinion in any event. The ET was not satisfied that the Claimant had shown he was suffering from depression or that he had done so at the time of the earlier hearing or in the period during which he would have needed to apply for a reconsideration. In the circumstances, the ET did not consider there was any basis for exercising its discretion to extend time.

26. If that was wrong, however, the ET went on to consider the merits of the application made, the basis of which is summarised by the ET as follows:

"17.1. the claimant was depressed at the time;

17.2. there were equipment issues that caused him to struggle and

17.3. there were some unfair circumstances and pressures that caused him to withdraw."

Considering each ground in turn, the ET held that the Claimant had not demonstrated any proper basis upon which it should reconsider its earlier decision. It referred back to its earlier conclusions concerning the Claimant's depression (see my previous paragraph) and otherwise explained as follows:

> **"19. As to the equipment issues; these matters were not the reasons the claimant gave at the hearing why he wished to withdraw; having been cross examined he told us the next day he had reflected on the facts and figures and "out of good faith and honesty could not continue his claim against HSBC". He told us he had slept on it, having talked it through with a family member. We asked him to pause and reflect and if he was aware that would be a final determination.**
>
> **20. He confirmed he understand [sic] that was so but wished to "stick to his decision" to withdraw the claim. We were satisfied that was his decision and so the claim was dismissed on withdrawal.**
>
> **21. Whilst the application refers to equipment issues the claimant encountered and we were aware the claimant was experiencing difficulties with his computer, he did not relay them in the detail he does in the application despite the panel seeking to clarify why that was so and what if anything could be done to assist at the time.**
>
> **22. As to the unfair circumstances and pressures these appear to relate to applications the claimant made for disclosure and statements. They were addressed at the time and determinations made. A request for reconsideration is not an opportunity for a party to seek to re-litigate matters omitted in previous argument; it does not entitle a disaffected party to re-open issues which have already been determined.**
>
> **23. As to the questions and comments on the respondent's evidence the application raises; as I state above a request for reconsideration is not an opportunity for a party to seek to re-litigate matters omitted in argument and nor does it entitle a disaffected party to re-open issues which have already been determined. It does permit a party to raise new matters but only where they have subsequently come to light and subject to an explanation having been provided for the same. Further, challenges that the tribunal has been perverse and/or misdirected itself are challenges for which the appropriate avenue is by way of appeal."**

The Appeal and the Parties' Submissions

The Grounds of Appeal

27. The amended grounds of appeal are two-fold. First, whether the ET erred in concluding that the Claimant was not suffering from depression, such that the application for reconsideration should not be considered out of time: the ET's decision to doubt the evidence of the Gateway Worker was perverse and there was a failure to consider all relevant evidence. Second, whether, more generally, the ET erred in concluding it was not in the interests of justice to reconsider the decision; in so doing, the ET misdirected itself in law and/or made a

perverse decision, failing to refer to the guidance in **Rackham v NHS Professionals Ltd** UKEAT/0110/15 and the *Equal Treatment Bench Book.*

The Claimant's Case

28. Ms Robinson submits that the ways in which the Claimant had put his application for reconsideration should have alerted the ET to the fact that this gave rise to points that went to the wider public interest and the interests of justice. On the ET's approach on the issue of depression, the application had referred to pages within the original hearing bundle, including the ET1, which had referenced the Claimant's depression and included medical evidence, including that from the Respondent's own Occupational Health reports. In addition, the Claimant had attached a document from a Gateway Worker; it was simply perverse for the ET to conclude that the Gateway Worker was unqualified to diagnose depression and that there was insufficient evidence of depression in these circumstances. Although the Claimant had not relied on depression as a disability, for the purposes of the ET proceedings he had not needed to, given it was accepted he met the definition of a disabled person for **Equality Act 2010** purposes in any event. He had referred to suffering depression, at times severe depression, in his ET1 and other documentation; that was relevant evidence to which the ET apparently failed to have regard. Further, the ET had unjustifiably doubted the evidence from the Gateway Worker: as the Claimant suffers from Stevens-Johnson Syndrome, which put him at risk from some medication, the Gateway Worker's referral of him to his GP for the purposes of any prescription was explicable for reasons other than, as the ET assumed, the Gateway Worker's own qualifications to prescribe, let alone diagnose, depression.

29. More generally, the ET failed to have regard to the *Equal Treatment Bench Book* or the guidance given in **Rackham** and failed to consider whether, given the Claimant's assertion that

A the reason he had withdrawn his claim was because he had been unable to properly participate, he had been denied a fair hearing; although there had been a ground rules hearing and reasonable adjustments ascertained, not all the adjustments had been adhered to - the ET had erred in failing to consider whether or not there was a fair hearing as a matter of substance.

B

30. In any event, the obligation on the EAT was to itself determine whether a fair procedure was adopted below; see **R (on the application of Osborn) v Parole Board** [2014] AC 1115 SC, as approved in **Galo v Bombardier Aerospace UK** [2016] NICA 25, [2016] IRLR 703. This was a case where the unfairness was obvious; see **Rackham** at paragraph 43; the Claimant was unable to see less than a size point 14 font and, thus, when faced with substantial parts of the hard copy bundle in a far smaller font size, he was effectively unable to participate in the hearing. It was common ground that, on the second day, prior to cross-examination, the Claimant had referred to having had problems with his computer, and his magnifying software, the night before. During cross-examination, he had then explained he was not using his computer to read documents because of computer problems that he was unable to explain or rectify. Cross-examination had been proceeding with the Respondent's counsel reading out passages from the documentation, and it was agreed this was a course that would continue to be followed; that, however, placed the Claimant at such an obvious disadvantage that it was plain he was not receiving a fair hearing and the obligation was on the ET to raise the question whether he wished to apply for an adjournment but it failed to do so.

C

D

E

F

G

31. Not only was the Claimant thus disadvantaged in his own cross-examination, when he went home that evening he was unable to access his magnification software so as to see the copious notes he had made for cross-examination of the Respondent's witnesses (albeit the Claimant accepts that he never drew the ET's attention to this particular problem before he

H

applied to withdraw his case; he says he did not feel able to do this as this would be using his computer problems as "*an excuse*"). Once it had become apparent that the ground rules laid down for the hearing were not being met, the obligation on the ET was to make it clear - consistent with the ongoing duty laid down in **Galo** - what the options were: to proactively suggest the possibility of an adjournment, or to ask what other adjustments he was seeking, rather than effectively directing what adjustment would be made (the reading out of documentation) and then securing agreement to it; this was not requiring the ET to step into the arena; it was simply requiring it to make sure the arena was not unfairly closed to the Claimant.

The Respondent's Case

32. By way of preliminary observation, the Respondent makes clear it does not accept that there was a failure to make the reasonable adjustments identified at the preliminary ground rules hearing. The Claimant was an educated man, with a degree in Sociology and Social Policy, who had an A-Level in Law and was considering doing a Masters Degree in Law; he had been looking for work as a legal assistant and legal secretary and had experience working for the CAB. Moreover, he had been able to access and effectively participate in the ET proceedings throughout and, at the outset of the Full Merits Hearing, had confirmed that the reasonable adjustments required had been made.

33. Turning to the first point of challenge, although a disability had been conceded, that had not been on the basis of the Claimant having suffered from depression; that was not something he had relied on as a disability. Moreover, as he confirmed when applying for reconsideration, the Claimant had never said that symptoms of depression had impacted upon his ability to fully participate in the ET proceedings. More specifically, the extent of the Claimant's depression and its impact on his ability to make the application for reconsideration was a matter for the ET

to evaluate on the available evidence. Although there were some references to his having suffered depression in the hearing bundle, that all related to periods pre-dating the litigation; the Claimant had been able to prepare for and participate in the ET proceedings and there was nothing to indicate he was suffering from depression at the time. As the party seeking to rely upon depression as the explanation for the delay, the Claimant bore the burden of proof. The ET had been entitled find this burden was not discharged by the evidence from the Gateway Worker, who did not state their own qualifications, had not offered a diagnosis, did not append any medical notes, and had referred the Claimant back to his GP for medication. In any event, the letter from the Gateway Worker was dated 20 October 2015: even if accepted at face value, did nothing to explain the further three-month delay to 18 January 2016.

34. As for the more general criticism that the ET ought to have reconsidered the issues of fair hearing arising from the Full Merits Hearing, whilst accepting the guidance laid down by the Northern Ireland Court of Appeal in **Galo**, and that it was a matter for the EAT to determine for itself whether a fair procedure was followed (see **Osborn**), in the present case there had been a ground rules hearing and reasonable adjustments put in place, permitting a flexible response to the Claimant's needs during the hearing. The ET had navigated the appropriate course between its duty to ensure a fair hearing and its obligation to ensure respect for the Claimant's dignity and ability to make his own decisions. It was, further, right to have regard to the interests of the Respondent, in particular, its interests in seeing a finality to this litigation.

35. Ultimately, the Claimant had made an informed decision to withdraw his claim, after, and expressly because, he had made a number of concessions in cross-examination. He had first checked that the Respondent would not pursue him for costs and had been given the

A opportunity to reflect on his decision. The interests of justice plainly dictated that the reconsideration application be refused.

B **The Relevant Legal Principles**

36. The ET's power to reconsider an earlier Judgment and the process whereby it might do so is found at Rules 70 to 73, Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, which allow for reconsideration, either on the ET's own initiative or on the application of a party, where it would be in the interests of justice.

C

37. A party wishing to apply for reconsideration must do so within 14 days of the date the written record of Judgment was sent to the parties. In the present case, it is common ground that any such application was thus to be lodged by 2 July 2015. That said, it is accepted that the ET had a discretion to extend time for the late submission of the application for reconsideration. As an exercise of judicial discretion, the normal principles would apply to any challenge by way of appeal on this question: it would only be open to the EAT to interfere if it were established that the ET had erred in law, reached a perverse conclusion and/or failed to take into account a relevant factor, or had regard to an irrelevant factor.

D

E

F

38. As for issues of fair hearing and the obligation upon an ET when dealing with a case involving a disabled litigant in person, in **Rackham v NHS Professionals Ltd** UKEAT/0110/15 the EAT (The Honourable Mr Justice Langstaff (President) presiding) expressly referred to the guidance provided in the *Equal Treatment Bench Book*, earlier commended to judicial office holders by the EAT (The Honourable Mrs Justice Cox presiding) in **CPS v Fraser** UKEAT/0021/13 and UKEAT/0022/13. Langstaff P also referred to the other potential bases upon which it might be argued that a positive obligation was imposed upon ETs; it

G

H

considered that the particular source of the duty was less important than what was then required of the ET. In **Rackham** (where the Claimant suffered the effects of Asperger's), the EAT held:

> **"50. It seems to us we have to ask here whether there was any substantial unfairness to the Claimant in the event. We have to consider the whole picture, and we have to consider fairness not in isolation, viewing his case alone, but as one in which there were two parties. The point made by Mummery LJ in *O'Cathail* [*v Transport for London* [2013] ICR 614] deserves repetition. Here, when we examine the history, we would emphasise the importance for those who have disabilities that they be given proper respect for their autonomy as human beings. In many cases, if not most, a person suffering from a disability will be the person best able to describe to a court or to others the effects of that disability on them and what might be done in a particular situation to alleviate it. This may not apply, of course, to those who are challenged in such a way that they may lack capacity or perhaps be very close to lacking it. However, there is no reason to think that the Claimant here was in that category at all. Though suffering from the effects of Asperger's and though his IQ was 67, he had, as the Judge observed, been able to fulfil a useful role in employment and had been able to conduct a case in the first-tier Tribunal. We would comment that his autonomy and integrity as a human being would require his views to be properly respected. If therefore, as happened here, the Claimant were to agree, as he did, to adjustments proposed by the Respondent, when the Claimant had earlier made a request for very similar adjustments, we consider the Judge was entitled to regard his agreement as evidence that those adjustments were appropriate. The Tribunal was also entitled to take into account that the Claimant's GP endorsed these adjustments as those that would be necessary. …"**

39. With some caution, the EAT subsequently went on to provide the following more general guidance:

> **"57. We have been asked whether we should give guidance for the benefit of other Tribunals. Early in the proceedings we expressed the view that disabilities are so different one from another, and even in respect of disabilities within the same class may be of such different severity and associated with other symptoms that themselves may differ that we would be very cautious about doing so. Our caution is amplified by the fact that the Equal Treatment Bench Book has had the advantage of expert input and consideration by authors who have examined the area and have set out in some detail guidance for Tribunals.**
>
> **58. We would make only three points that may be of use to future cases. First, we would emphasise that each case is the case of an individual. Each individual will necessarily be in a position that is to some, and it may be some great, extent different from that of another. A decision as to what it is reasonable to have to do which is then made by a Tribunal must be tailored not to some general idea of what a person with that disability, or it may be disabilities generally, needs but what the individual before the Tribunal requires.**
>
> **59. Second, we think that a considerable value should be placed upon the integrity and autonomy of the individual. It is precisely that which the extracts from Article 13 and Article 1 of the Convention emphasise. If a person entitled to make a decision affecting the conduct of their case makes that decision, it is not in general for any court to second-guess their decision and to make it in a manner which patronises that person. As we have said earlier in this Judgment, there may be exceptions to that, though they may be rare. Generally, we would wish to emphasise the very considerable importance of recognising that those who have disabilities are fully entitled to have their voice listened to, whatever it is they may be saying.**
>
> **60. Third, we think that emphasis might wish to be given in the Tribunal sphere to that which is covered in the Equal Treatment Bench Book in criminal cases, in particular where it describes ground rules hearings. The suggestion in the Tribunal context is that there might in an appropriate case be a preliminary consideration of the procedure that the Tribunal should adopt in order best to establish the rights of the parties before it. It may for instance consider the ground rules that it is appropriate to lay down for the hearing and the adjustments that it might be necessary to make. This may not be possible if the question of disability is seriously in dispute between the parties, but where it is not it is very often likely to be of advantage. It should not, however, be seen as a step that once taken is set in stone, since in the way of the**

world the condition or position of the parties may change, but, as Mr Harminder Singh would wish to emphasise, it provides something of a baseline from which other applications and decisions may be considered. We should add that although the Tribunal in this case did not call what it did a preliminary ground rules hearing, it effectively held one.

61. Finally, we think that there is a considerable value in taking these steps quickly. In almost any case speed is important, but it particularly may be so in the case of those who suffer from disabilities and in whose best interests as well as the interests of other parties it is sensible to resolve disputes as early as possible."

40. In the present case, the Claimant relies on the following provisions from within the *Equal Treatment Bench Book*:

"8. A start is for the judge or tribunal panel to look around the court or tribunal room and consider whether everyone present can participate as required. If there is doubt, such as where a party or witness is elderly or otherwise disabled, a simple enquiry can be made directly or through an usher: 'Are you comfortable sitting there?' 'Can you see/hear?' 'Are you warm enough?' It should be made clear that it is acceptable for anyone present to say if a problem develops during the hearing.

…

31. The overall aim must be to ensure that no disability amounts to a handicap to the attainment of justice. The person who has difficulty in coping with the facilities and procedures of the courts is as entitled to justice as those who know how to use the legal system to their advantage. There are many potential sources of discrimination and not being heard or being misunderstood by the judge is as discriminatory as an inability to access a court or tribunal building.

…

Measures that can be taken at the hearing

48. Position a carer near to the disabled person

49. Have frequent breaks. Concentration may be impaired or there may be a need to eat or drink more frequently perhaps to restore blood sugar levels or take medication and then allow time for this to work. Ask if a person with physical disability needs a period of movement to relieve discomfort.

50. Ensure that those with mental health problems or learning disabilities have things explained to them slowly or more than once. They may be particularly nervous and under stress.

51. Consider the order in which evidence is heard so that they are not kept waiting longer than necessary.

52. If applicable, it may be helpful if wigs and gowns are removed.

53. Consider the layout of the room and whether this is likely to cause discomfort.

54. Permit a person with visual impairment to be accompanied by a guide dog. Remember that the dog will need a 'comfort break', water and perhaps a walk.

55. Consider the stress placed on persons with a hearing impairment of concentrating and communicating in a different environment through an interpreter, and the length of time that it is reasonable to expect a signing interpreter to work without a break, generally considered to be about 20 minutes owing to the physical nature of this form of interpretation.

56. Consider how to cope with the various types of equipment that a person may need to use in order to communicate. This may be slower and more tiring than other forms of communication.

57. Be aware of the powers to prevent inappropriate questioning, and use them where appropriate.

58. Ensure that fresh drinking water is available and the room is not too crowded or stuffy.

Adjournments

59. If a hearing before a court or tribunal needs to go part heard or be adjourned as a result of the need to make reasonable adjustments for a person with a disability, it is good practice to record that this is the reason for the extended hearing or adjournment and ensure their availability prior to the recommencement of the case."

41. And, specifically addressing the issues that might arise with those who have visual impairments and appear before the courts:

"13. Produce all documents in large print or Braille. A direction may be given at an early stage in the proceedings that any documents or communications be sent to the disabled party in a large font produced on a word-processor or after enlargement on a photocopier."

42. A review of the appropriate steps that should be considered in cases involving litigants with disabilities was also conducted by the Court of Appeal of Northern Ireland in the case of **Galo v Bombardier Aerospace UK** [2016] IRLR 703, where, having reviewed the relevant authorities, the following guidance was provided:

"53. …

(1) It is a fundamental right of a person with a disability to enjoy a fair hearing and to have been able to participate effectively in the hearing.

(2) Courts needs to focus on the impact of a mental health disability in the conduct of litigation. Courts must recognise the fact that this may have influenced the claimant's ability to conduct proceedings in a rational manner.

(3) 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 published by the Judicial College (Revised 2013) (hereinafter called 'the ETBB') in considering how best to accommodate disabled litigants in the court or tribunal process. It is clear therefore that courts and tribunals should pay particular attention to the ETBB when the question of disability, including mental disability, arises.

(4) The ETBB provides helpful information for judges about the problems experienced by such litigants in accessing the courts or tribunals or participating in 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.' The ETBB has regularly been revised and updated. It has a section dealing with mental disabilities describing the different ways in which mental disability may arise and manifest itself. It points out that adjustments to court or trial 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 to particular situations when they arise. Decisions concerning case and hearing management '… should address the particular needs of the individual concerned insofar 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 that if a litigant has a condition that is worsened by stress, the difficulties will almost certainly become greater if he/she is acting in person (paragraph [25]).

(5) The presence of a McKenzie friend in civil or family proceedings or an independent mental health advocate in a tribunal should be encouraged in order to help locate information, prompt as necessary during the questioning of witnesses and provide the opportunity for brief discussion of issues as they arise. A more tolerant approach to the use of a lay representative may assist.

(6) A modified approach may be necessary when seeking to obtain reliable evidence from a person with mental health problems especially those who are mentally frail. It is necessary to ascertain whether any communication difficulties are the result of mental impairment. Section 7 of the ETBB stresses the need for particular assistance to be given in relation to those of mental disabilities, specific learning difficulties and mental capacity.

(7) An early 'ground rules hearing' is indicated in the ETBB at Chapter 5. Such a hearing would involve a preliminary consideration of the procedure that the tribunal or court will adopt, tailored to the particular circumstances of the litigant. Thus, for example, the tribunal may consider:

- The approach to questioning of the claimant and to the method of cross-examination by him/her. Adaptions to questioning may be necessary to facilitate the evidence of a vulnerable person.

- How questioning is to be controlled by the tribunal.

- The manner, tenor, tone, language and duration of questioning appropriate to the witness's problems.

- Whether it is necessary for the tribunal to obtain an expert report to identify what steps are required in order to ensure a fair procedure tailored to the needs of the particular applicant.

- The applicant under a disability, if a personal litigant, must have the procedures of the court fully explained to him and be advised as to the availability of pro bono assistance/McKenzie friends/voluntary sector help available.

- Recognition must be given to the possibility that those with learning disabilities need extra time even if represented to ensure that matters are carefully understood by them.

- Great care should be taken with the language and vocabulary that is utilised to ensure that the directions given at the ground rules hearing are being fully understood.

- As happened in the *Rackham* case, consideration should be given to the need for respondent's counsel to offer cross-examination and questions in writing to assist the claimant with the claimant being allowed some time to consult, if represented, with his counsel. These were deemed 'reasonable adjustments'.

- The tribunal must keep these adjustments needed under review."

43. The NICA also considered the role of the appellate Court or Tribunal in this context, referring to the earlier pronouncement of the Supreme Court, in **Osborn v Parole Board** at paragraph 65 where Lord Reed made clear that the appellate Court "*must determine for itself whether a fair procedure was followed*" and its function "*is not merely to review the reasonableness of the decision-maker's judgment of what fairness required*".

Discussion and Conclusions

44. Although I have spent some time setting out the background to this matter - and, in so doing, have sought to make clear the Claimant's position in respect of the Full Merits Hearing below - I bear in mind that this appeal relates to the ET's Reconsideration Judgment; there is no appeal before me against the ET's earlier decision dismissing the Claimant's claims upon withdrawal. So, turning to the decision that is before me, I am therefore concerned with an exercise of the ET's discretion (1) to refuse to extend time and, in any event, (2) to decline the Claimant's application for reconsideration in the interests of justice.

45. As far as the first question is concerned, I remind myself that it is not for the EAT to interfere in an ET's exercise of judicial discretion, unless plainly wrong, perverse or made on the basis of irrelevant facts, or ignoring relevant facts. I also bear in mind that the original ET will be best placed to form a view of evidence relied on in support of an application for an extension of time, where that requires it to take into account the context of the material that was before it at the original hearing. As for the second question raised on this appeal, I am, however, also mindful of the guidance that has been given at the highest appellate level, to the effect that determination of fairness, in terms of underlying proceedings, must be a matter for the appellate Court itself. That seems to me similar to the role that the appellate Court has to fulfil, for example, on bias appeals, when it must stand in the shoes of the objective, informed observer and determine whether it can properly be said that there was a possibility of bias; similarly, when determining questions of fairness, the appellate body must objectively view that which took place below and decide for itself whether or not a fair process was followed.

46. I turn, then, to the first basis of challenge on this appeal and the ET's approach to the evidence of the Claimant's depression. The Claimant relies on the reconsideration application

itself and the various references to documents within the ET hearing bundle, which evidenced his depression. In regard to that earlier material in the original trial bundle, it is fair to say that in its Reconsideration Judgment the ET did not refer to it. Did it, thereby, err in failing to have regard to a potentially relevant matter, in its exercise of discretion?

47. Although I am prepared to accept that the documentation in question referred to the Claimant having suffered bouts of depression in the past (including up to and around the time of his resignation), it was not something he had relied on before the ET as a continuing disability, let alone as something giving rise to any requirement of reasonable adjustments on the part of the ET itself. More specifically, the ET was entitled to look to the Claimant for an explanation for the delay in making his application for reconsideration - over six months - and to find that references in the hearing bundle to periods of ill-health pre-dating the litigation did not assist in establishing that explanation. The Claimant, after all, had shown himself able to lodge an ET claim, participate in the earlier preparatory stages, including preparing his own witness statement; he had given an account of how he had been looking for work in a paralegal capacity and had not displayed any obvious symptoms of depression at the Full Merits Hearing. An ET is not obliged to fill in the gaps itself in terms of medical evidence; it is entitled to look to the party seeking an extension of time to adduce proper evidence to explain the delay.

48. To the extent that the Claimant's application did refer to medical evidence within the relevant period, the only material was that provided by the letter from the Gateway Worker, to which the ET did have regard. It was, however, not prepared to accept that as determinative; not least as the Gateway Worker did not clarify their own qualifications and failed to state a positive diagnosis, such that the ET remained unsatisfied that the Claimant had shown that he was suffering from depression at the relevant time. Again, I do not consider that the ET's

A conclusion in this regard was other than permissible. But, even if I took the view that the ET had been wrong to dismiss this letter, it really took matters little further: at most, it might have provided an explanation for the Claimant's delay up to October 2015, it did not do so for the following three months and, again, I do not accept that an ET - obliged, as it is, to balance the interests of justice as between both parties and to have regard to broader public policy principles, including the need to avoid delay and of finality in litigation - is required to infer that which was not clear from the evidence, i.e. as to the Claimant's continuing state of health impacting upon his ability to lodge a reconsideration application at some earlier time.

49. Turning, then, to the other point of challenge, I ask whether the ET ought to have allowed the application for reconsideration on the basis that real questions had been raised as to the fairness of the earlier Full Merits Hearing. Although I have accepted (per **Galo** and **Osborn**) that it is for an appellate Tribunal to form its own view as to the fairness of the process at first instance; I also note that, in the present case, I am undertaking a somewhat different exercise in that I am considering an appeal against the refusal of a reconsideration application and, thus, not so much adjudicating directly on the fairness of the original hearing as determining whether it was wrong for the ET not to allow that this raised a question such as it was in the interests of justice to allow a reconsideration to take place.

50. Having now been able to review all the evidence as to what had taken place at the Full Merits Hearing, I am unable to see that the ET did other than also reach a permissible conclusion in this regard. Having heard the Claimant's evidence, the ET was entitled to be sceptical that the account the Claimant was seeking to provide in support of the reconsideration application was fairly reflective of his position at the original hearing. The material now available to me makes clear that the ET was entitled to understand the reason for the Claimant's

application to withdraw was other than because he was experiencing difficulties with his computer and was thus being denied a fair hearing.

51. Even if I allow, however, that I can step beyond the normal confines of an appeal against the exercise of judicial discretion, and thus go on to form my own view as to what took place at the Full Merits Hearing, the following points seem to me to be significant. First - consistent with the guidance provided in the *Equal Treatment Bench Book* - there had been a ground rules hearing and adjustments put in place (going beyond the specific examples given in the *Bench Book*); it was - again consistent with the guidance in the *Bench Book* and with that provided in **Rackham** - acknowledged that the adjustments might need to be revisited and further or different adjustments made and it was apparent (see paragraph 15.6 of the Preliminary Hearing directions) that there was a continuing expectation that the Claimant would identify any additional adjustments that the ET might be asked to make. Moreover, at the outset of the Full Merits Hearing, the ET checked that the ground rules had been complied with and the Claimant confirmed that they had. Further, the ET had specifically checked that the Claimant's companion (his brother) was able to assist him reading documents and that the Claimant had his laptop with him and all the equipment he needed; again, the Claimant confirmed that he had. The ET also asked whether the Claimant needed any other adjustments; the Claimant confirmed he did not. Thereafter, to the extent that problems arose during the hearing, I am satisfied that the ET (again consistent with the guidance provided in **Rackham** and the *Bench Book*) continued to adopt a flexible approach and sought to ensure any issues were flagged up by the Claimant (and I do not consider that the exchanges referenced by the Claimant do other than evidence an ET that was seeking to be receptive of the issues he raised; at all times respecting his right to pursue his case as best he saw fit).

52. Having regard to the particular facts of this case - and that must include the fact that the Claimant is a highly educated, able individual, with some understanding of legal processes, who had shown himself able to participate in the ET proceedings in a proactive way and who had evidenced no inability to raise procedural points at the Full Merits Hearing - I am unable to form the view that this was other than a fair hearing. Even allowing that the Claimant might have suffered disadvantages when being cross-examined, because he was unable to himself read the hard copies of the material, he had not objected to the course adopted whereby passages were read to him; he did not take the opportunity to seek an adjournment or even to explain what other steps might reasonably be taken so as to avoid such disadvantage as he felt he was still suffering. Respecting his ability to litigate his own claim, the ET was entitled to expect the Claimant to explain any continuing disadvantages it needed to address, consistent with the earlier direction that he should do so. Given the adjustments that continued to be made - which included having the Claimant's brother sitting alongside him at the advocate's table while he gave evidence, having a number of breaks during that evidence and having the documents read aloud to him - I do not accept this was a case (per **Rackham**) where the denial of a fair hearing was obvious; it was not. Indeed, it was a case where the Claimant needed to let the ET know of any difficulties he was continuing to suffer; he did not.

53. Of course, what is being appealed against is not the refusal of a reconsideration application relating to the dismissal of a claim by an ET after a Full Hearing or after a strike-out application, but the dismissal of a claim after the Claimant's own voluntary withdrawal of it. The decision to withdraw was not taken in the heat of the moment - for example, during his cross-examination - but was taken overnight, after the Claimant had the opportunity to reflect on this course with his family. The next morning, the Claimant very clearly articulated why he was withdrawing his case to the Respondent's counsel, without there being any suggestion of

absence of fairness in the hearing. When explaining his position to the ET, the Claimant did not suggest his decision was informed by any difficulty (perceived or otherwise) impacting upon the fairness of the hearing and he was given a further opportunity - in the form of a short adjournment - to again reflect on his position. Had fair hearing issues impacted upon that decision, the Claimant then had the further opportunity to reference this fact when the hearing again resumed. Balancing what the Claimant had said at the time, against what he was saying in support of his reconsideration application, and given the broader picture, as I have set out above, as I have already indicated, I am unable to say that the ET did other than permissibly determine what was most likely. More than that, however, I would, myself, share the same view. I therefore dismiss this appeal, expressly finding that the underlying hearing was, indeed, fair, and therefore upholding the ET's decision on the reconsideration application.