Appeal No. UKEAT/0230/16/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 May 2017
Judgment handed down on 25 July 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

DR Z SHUI — APPELLANT

UNIVERSITY OF MANCHESTER & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS LAURA PRINCE (of Counsel) Bar Pro Bono Scheme
For the Respondents	MR BRIAN McCLUGGAGE (of Counsel) Instructed by: The University of Manchester Room 2.002 John Owens Building Oxford Road Manchester Lancashire M13 9PL

SUMMARY

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

PRACTICE AND PROCEDURE - Postponement or stay

Fair hearing - postponement/adjournment of proceedings

The Claimant - a litigant in person suffering from mental health issues but not lacking capacity for the purposes of the **Mental Capacity Act 2005** - had received medical advice that he was unfit to participate in the Full Merits Hearing of his ET claim. Although, at an earlier stage, the ET had itself proactively asked for the medical advice in this regard and had advised the Claimant of his right to seek a postponement of the hearing, he had not done so; at one stage expressing his concern that the on-going proceedings made his health worse. There had also been correspondence between the parties shortly before the Full Merits Hearing, in which the Respondents had set out the different options should the Claimant then seek a postponement of the hearing (including the potential applications to strike out and/or seek costs that might be made) and the issue was also canvassed in the Respondents' opening submissions, which the Claimant had the opportunity to read on the first day of the hearing. At the outset of the Full Merits Hearing, the ET clarified with the Claimant that he wished to proceed and discussed with the parties the reasonable adjustments that would need to be put in place. The ET did not expressly remind the Claimant of his right to apply for a postponement or adjournment of the hearing but he was aware that it was open to him to do so and he decided not to make such an application. The hearing proceeded with appropriate adjustments being made to enable the Claimant's participation but he broke down when being cross-examined and the Respondents applied to bring the questioning to an end, notwithstanding that the Claimant had said he was willing to continue. The ET agreed with the Respondents and the parties moved on to closing submissions, with the Claimant having a long weekend to consider the Respondents'

submissions and then to make his own points in reply. Having considered all the evidence and submissions, the ET dismissed the Claimant's claims.

The Claimant appealed on the basis that he had been denied a fair hearing, specifically arising from (i) the ET's failure to proactively adjourn the proceedings at the outset of the hearing, or at least raise the possibility of the Claimant making an application to this effect; and (ii) the decision to bring cross-examination to a halt rather than adjourning the hearing at that stage to permit the Claimant time to recover.

Held: *dismissing the appeal*

Allowing that the appellate Tribunal must itself determine whether a fair procedure was followed at first instance (**R (Osborn) v Parole Board** [2014] AC 1115 SC, **Rackham v NHS Professionals Ltd** UKEAT/0110/15/LA, and **Galo v Bombardier Aerospace UK** [2016] IRLR 703 NICA, applied), in this case the Claimant had not been denied a fair hearing. As he had acknowledged, he was aware of his right to seek a postponement or adjournment at the outset of the hearing but had determined not to do so. The ET had made all appropriate reasonable adjustments thereafter and the Claimant had been able to participate in the hearing and present his case until he broke down in cross-examination. At that stage, the ET adopted an appropriate course in acceding to the Respondents' request to stop the evidence. In truth, it was a matter for the Respondents as to whether they challenged the Claimant's evidence by cross-examination; the decision not to continue to do so gave rise to a risk for the Respondents, it did not deny any right of the Claimant. Moreover, the Claimant was still able to present his case and respond to the case against him: he had already cross-examined the Respondents' witnesses, was able to rely on his own witness statement and had the opportunity to make closing submissions in response to the Respondents' arguments. Viewed overall, the hearing had been fair.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal raises questions as to the way in which Employment Tribunals are to case manage proceedings involving litigants who, whilst having capacity to pursue the litigation, have mental health issues impacting upon their ability to participate.

2. In my Judgment, I refer to the parties as the Claimant and Respondents, as below. This is the Full Hearing of the Claimant's appeal from a Judgment of the Manchester Employment Tribunal (Employment Judge Sherratt, sitting with members Mr Campuzano and Mrs Clover, over seven days in September 2014; "the ET"), sent to the parties on 6 October 2014. The Claimant then appeared in person (albeit accompanied and assisted by his daughter, who I am told is a medical doctor) but has been assisted *pro bono* on his appeal by counsel, and Ms Prince continues to represent him on that basis at this hearing. The Respondents have been represented throughout by Mr McCluggage, counsel.

3. By its Judgment, the ET dismissed the Claimant's claims (which included complaints of disability discrimination, victimisation and unfair dismissal). His appeal was initially considered on the papers by His Honour Judge Shanks to disclose no reasonable basis to proceed. After a hearing (over two separate days) under Rule 3(10) **EAT Rules 1993** before the Honourable Mrs Justice Simler, DBE (President), the Claimant's appeal was permitted to proceed on one ground, as follows:

> **"Whether the ET erred in law in failing to postpone the Full Hearing and/or to inform the Claimant of the possibility of applying for an adjournment either at the beginning of the hearing and/or when it became apparent during the hearing that the Claimant was not in any fit state to continue."**

4. The initial hearing before Simler P was adjourned to enable input to be obtained from the learned Employment Judge relevant to this ground. That was obtained and considered at the resumed Rule 3(10) Hearing, when the appeal was permitted to proceed.

The Relevant Background

5. The Claimant had formerly been employed by the First Respondent as a Research Fellow. It was his case that his employment had started on 1 May 2005 and was open-ended but the First Respondent contended he was in fact employed from 5 July 2010 on a fixed-term contract to 4 July 2013. On 12 March 2013, the First Respondent issued notice that the Claimant's employment would terminate at the expiry of the fixed-term unless a suitable alternative offer of employment was made or some alternative funding identified. Neither happened and the Claimant's employment was duly terminated on 4 July 2013.

6. The ET unanimously concluded that the Claimant's claims were not well founded. It rejected his case that, at any material time, he was a disabled person for the purposes of the **Equality Act 2010** and, further, concluded that he had not performed any protected act; it also found that the reason for the termination of the Claimant's employment had been redundancy and his dismissal had been fair. Those points no longer concern me on this appeal but I do need to consider the ET proceedings themselves in rather more detail so as to set the context for the ground of appeal that is now before me.

7. Concern about the Claimant's ability to participate in the ET proceedings had been raised before the commencement of the Full Merits Hearing. By letter of 27 June 2014, the Regional Employment Judge ("the REJ") wrote to the Claimant (copied to the Respondents) indicating he had allowed an application for a postponement of the Preliminary Hearing

(originally listed for 1 July 2014 but postponed to 9 July 2014) and given directions for further information to be provided concerning the Claimant's medical condition, but expressing concern about the Claimant's ability to participate in the hearing. Specifically, the REJ sought more detailed information regarding the Claimant's health condition and raised - noting that it seemed unlikely that the condition was likely to abate particularly quickly - the possibility of a postponement of the Full Hearing (which was due to commence on 8 September 2014, having been set down for an eight-day listing at an earlier Preliminary Hearing on 12 December 2013).

8. By letter of 3 July 2014, the Claimant's GP responded to the ET, clarifying that the Claimant had been diagnosed with psychotic depression and observing as follows:

> **"Mr Shui is currently unfit to attend tribunal. At his last review 26/6/2014 he was found to be drunk, agitated, shouting and shaking his fists. He has stated that he will commit suicide if he looses his case. It is unlikely that his medical condition will improve sufficiently to allow him to be medically fit to attend tribunal in September."**

9. I observe in passing that the Claimant's mental health issues had been apparent for some time by that stage: he had been sectioned in June 2013 and remained under the care of the Community Mental Health Team. That said, it had not been suggested that he lacked capacity within the meaning of the **Mental Capacity Act 2005**; indeed, a later report from an expert psychiatrist in other proceedings in May 2015 expressly addressed this question and confirmed the Claimant was "capable", although would require various adjustments relevant to vulnerable mentally ill individuals (albeit, for completeness, I note that questions as to the Claimant's capacity have been raised more recently by Judges concerned with those other proceedings).

10. Returning to the ET proceedings with which I am concerned, the postponed ET hearing took place before EJ Ross on 9 July 2014; the Claimant appeared in person, the Respondents were represented by their solicitor. It was observed as follows:

> **"2. At the outset of the Hearing the claimant appeared to be very unwell. Employment Judge Ross drew the claimant's attention to the medical evidence of Dr Marcus Julior of 3 July 2014 which stated that Mr Shui was diagnosed with psychotic depression, that he was currently unfit to attend Tribunal and that it was unlikely his medical condition would improve sufficiently to allow him to … attend the Tribunal in September.**
>
> **3. Despite this medical evidence the claimant stated he wished to proceed with the Preliminary Hearing because the stress of the case was making his illness worse."**

11. Having dealt with various other matters, including noting the fact that the Claimant had by then also brought proceedings against the First Respondent in the High Court arising out of similar facts to those relevant to the ET claims, EJ Ross:

> **"11. … indicated to the claimant the stressful nature of representing oneself in the Employment Tribunal. She explained that if an application to postpone or stay the case was likely to be made it was preferable that it should be made sooner rather than later. The representative for the respondent indicated that they were shortly to incur counsel's brief fee and for this reason if the claimant did not or was unlikely to pursue his claim in September 2014 he should make an application to postpone as soon as possible."**

12. On 3 September 2014, the Claimant wrote to the ET asking that "*any possible adjustment*" be made based on the information he then summarised, making reference to an updated medical assessment provided in a letter of 22 August 2014, from the Clinical Lead of the Community Health Team, in which it was stated:

> **"I have been involved with Mr Shui's care … since April 2014, with Mr Shui originally referred to the team in July 2013. I am writing due to the concerns I have regarding Mr Shui's fitness to attend the tribunal in September 2014. I strongly believe that Mr Shui is currently not in a position to attend the tribunal due to his current mental health. In addition I would also like to note the considerable impact the tribunal process is having on his mental health. …"**

13. The Claimant explained that he had forwarded that letter to the Respondents, saying he was seriously thinking of applying for a postponement but they had replied, by letter of 26 August 2014, making clear they would resist any application for a postponement and, if such an application were pursued, would seek to strike out his claims on the basis that a fair trial was not possible and further reserve the right to apply for costs. The Claimant said he had (by letter also dated 26 August 2014, emailed on 27 August) objected that it was inhuman to force someone with a mental disorder to attend a hearing in this way and unfair he should have to do

so and then cross-examine professional witnesses without any legal help. He also expressed his view that the hearing itself would prejudice a fair trial of his claims. He explained he had not applied for a postponement based on his GP's response to the ET (his GP not being a specialist) but felt it reasonable to await the advice of the team primarily responsible for his care. Aware that an application at this stage would cause inconvenience to others, the Claimant concluded by repeating his request that the ET "*considers any adjustment if possible*".

14. By letter of 5 September 2014, EJ Robertson wrote to the Claimant asking what he was asking for. There does not appear to have been any response to that letter.

15. The Respondents' letter of 26 August (which was included as an attachment to the Claimant's letter to the ET) had more generally warned the Claimant as to the lack of merit of his claims and of the Respondents' intention to apply for costs if he did not withdraw the proceedings by 28 August 2014. It was suggested that the Claimant might speak to ACAS to discuss this option. The letter had then gone on to address the question of a late postponement application given the lengthy history of the ET proceedings (specifically referring back to the earlier discussion about the Claimant's health at the Preliminary Hearing on 9 July), concluding with their concern as to the problem that arose and raising the warnings to which the Claimant had alluded in his letter:

> **"15. We are concerned about the chicken and egg nature of this situation. It is clear that litigation is a significant stress for you. It is also apparent from what you said at the preliminary hearing on 9th July 2014 that determination of the litigation will be a step in improving your mental health. However you appear not to be fit to attend the hearing to achieve finality of the litigation and accordingly you will continue to be affected by the stress and worry associated with the litigation. You have not submitted any medical evidence that suggests that you will be fit to attend a tribunal hearing in the near future. For these reasons, if the hearing that is currently listed … is postponed, we do not believe that it will resolve anything. On the contrary, we believe that it will only serve to exacerbate your medical condition.**
>
> **16. We do not believe that there can be a fair trial if the hearing is postponed. Our reasons for this, briefly, are;**
>
> > **16.1. The earliest 8 day slot in the tribunal calendar is likely to be at least six months or more away;**

16.2. There is no definite prognosis of any recovery sufficient for you to take part in proceedings in the foreseeable future. Based on the current position we believe that any postponement will be a pointless exercise

16.3. The mounting costs for the University if the hearing is postponed;

16.4. The dimming of recollections of the witnesses if the hearing is postponed;

16.5. The worry and stresses of the University's witnesses. You are bringing claims against three people in their personal capacity, which as we have previously explained, is a source of great anxiety to them;

16.6. The overriding objective in ordinary civil cases is to deal with cases justly and expeditiously without unreasonable expense.

Accordingly, if you do seek a postponement of the hearing, we will submit an application to strike out your claim on the basis that a fair trial is not possible. We also reserve the right to seek an order for costs against you, which will represent Counsel's brief fee incurred by the University to date."

16. The Respondents' position in respect of any application for an adjournment was further made clear in a written opening submission produced at the outset of the Full Merits Hearing and then read by the ET and the Claimant. Although denying that the Claimant had been disabled at the relevant time, the Respondents accepted that he had been ill over the past year but made clear that any application for an adjournment on the basis of ill health would be "*vigorously contested - any desire for an adjournment could and should have been dealt with months ago*". The opening submission continued:

"20. If for some reason it appears that the hearing will not proceed, R will apply to strike out the case as an abuse of process … because it will not be possible to have a fair trial of the proceedings in the foreseeable future, if ever."

17. The Respondents then related the procedural history and observed as follows:

"22. The position is thus:

a. C has not asked for an adjournment as at the first day of an 8 day hearing.

b. There is no prognosis as to when he might be more healthy.

c. The tribunal process in itself has a "considerable impact" on C's health. It follows that there is little chance of improvement until the tribunal process concludes. This is a 'chicken and egg' situation.

d. The tribunal will be able to modify its procedure to assist with a level playing field eg. breaks, explanations etc. C has plainly received assistance in drafting his statement.

e. The actual legal issues in the case will have limited disputed fact.

23. Should there be the prospect of an adjournment, [R] will further apply to:

i. Strike out on the merits as some of the claims have no reasonable prospect of success; in the alternative,

ii. Seek deposit orders."

18. It is important to be clear that this appeal does not proceed on the basis that those acting for the Respondents behaved inappropriately in maintaining this position either in correspondence or in the opening submission. The Claimant does say, however, that the ET was thus on notice that he (a litigant in person with serious health issues) might reasonably have considered he was being discouraged from making a postponement application; the obligation on the ET (it is said) was therefore all the greater to make sure that the Claimant understood he at least had the option of still doing so.

19. There is no dispute - as has been confirmed by the Employment Judge in response to questions raised by the EAT - that the question of a postponement was not expressly raised by the ET at the Full Merits Hearing, either at the outset of the hearing or subsequently, when it became apparent that the Claimant's health had deteriorated. That said, it does seem that, at an early stage, the Employment Judge checked with the Claimant whether he was well enough to undertake the hearing and what adjustments he required, as the ET records:

"6. There was some question in correspondence as to the claimant's ability to attend the hearing as a result of his current medical condition. The claimant did not make any application to postpone and it was agreed that we should proceed, making adjustments for the claimant as appropriate. This we did by allowing the claimant breaks and allowing him to be assisted by his daughter …"

20. Indeed, it is common ground that - as is recorded in the ET's Judgment and the Employment Judge's response to the EAT - a number of adjustments were discussed with the Claimant in recognition of his health condition, both at the outset and during the course of the hearing. It is apparent that the Claimant had a number of breaks during his cross-examination of the Respondents' witnesses (partly carried out by his daughter, using questions the Claimant

had prepared in advance) and there was some suggestion at the outset that the Respondents would "*curtail the depth of some of their questions*". More generally, in this regard it is helpful to consider the observations the Claimant made about the conduct of the hearing in his written closing submissions at the time, which give a fuller picture of the adjustments made:

> **"*The hearing***
>
> **7. The hearing was clearly extremely difficult to everyone in the Tribunal. C was suffering from psychotic depression and had to represent himself during the hearing. C did not apply for a postponement of the hearing despite medical professionals' strong advice on C's unfitness for the hearing and the Tribunal's suggestion or advice based on the medical evidence in the preliminary hearing. To simplify the case at the moment, C does not mention the reason why C did not apply for a postponement.**
>
> **8. C greatly appreciates that his dignity and human rights were carefully protected during the hearing. The tribunal had efficiently taken a number of meaningful adjustments during the hearing, which included:**
>
> > **[i] R3 gave his evidence at first during cross-examination rather than R4, which was an adjustment based on C's request on an ad hoc basis.**
> >
> > **[ii] The tribunal asked C's daughter to assist C on an ad hoc basis.**
> >
> > **[iii] Many breaks had been taken during cross-examination in order to let C calm down and thus improve his questions and responses.**
> >
> > **[iv] C's questioning was shortened to avoid further harm to his health.**
> >
> > **[v] The tribunal day was shortened.**
> >
> > **[vi] C's place for giving his evidence during cross-examination was relocated to the opposite side where was closer to C's daughter in order to let C feel better.**
> >
> > **[vii] A break between the closing submissions of R1 and C was taken in order to let C have the weekend and an extra day to prepare and write his closing submissions.**
>
> **9. Although R1 thought that the actual facts in the disputes were narrow … C was allowed sufficient time to explain and clarify the chronology of events in details by contemporaneous evidence that included acceptable and unacceptable or untrue documents and/or evidence. The Tribunal was extremely patient to deal with this unpleasant challenge."**

21. In responding to the EAT, the Employment Judge also explained how, once cross-examination of the Claimant was underway, the difficulties became more apparent. Mr McCluggage - in providing his account to assist the EAT - records what took place as follows:

> **"23. I have recorded asking him as my last few questions, whether he accepted that without further funding his employment had to come to an end, to which he answered that he didn't accept there was no choice. Though I did not record it in terms, I distinctly recall that the Claimant was becoming increasingly agitated as my questions developed. This was building up. Any experienced advocate should be able to detect changes in a witness' temperament. I asked a next question, "If no new funding, what did you expect to happen?". I did not record an answer. My recollection is that the Claimant was visibly shaking with his arms raised, was shouting and was angry. I was very concerned about the effect my cross-examination was having on the Claimant's mental health and took the initiative to end it there. Given what I knew of the Claimant's history and previous detention under the Mental Health Act following**

a stressful episode during his employment, I considered at that point it was unethical to continue cross-examination. The submission made was that the hearing could still fairly continue and did not have to damage the Claimant's health through the tribunal making a modification to the process. The Respondent would take the risk of not formally putting all aspects of its case as one might ordinarily expect in a formal court process. I submitted that the documentation in the case told the story for the main extent and that the Claimant could deal with issues in closing submission. My view was that the Tribunal's acceptance of this course constituted a reasonable adjustment for the Claimant. This position was expressly taken to avoid prejudice to the Claimant as it would prevent me from making submissions about the curtailment of cross-examination or the manner in which the Claimant had dealt with questions."

22. The note taken by another member of the Respondents' legal team - Ms Hesp - provides a not dissimilar account:

"21. Following the clarification of issues relating to Dr Shui's statement, cross-examination commenced. I do not have a note of the time, but estimate that this would have been between 10.30 and 11.00am. Counsel began his cross-examination by asking straightforward questions about the termination of Dr Shui's previous fixed term contract in 2010 and the payment of a statutory redundancy payment at that time. Initially Dr Shui was able to give brief and concise answers, but he soon became more difficult to follow. It is my recollection that Dr Shui also became more aggressive and upset.

22. There was a break between 11.25 and 11.35am and I recall discussing with Counsel the fact that cross-examination was proving difficult and that the Claimant was upset and angry.

…

25. Cross-examination continued in this vein, probably for about another 5 minutes. Counsel was asking Dr Shui about his understanding that the University would terminate his employment at the end of the fixed term contract if no funding was found or there was no redeployment. At this point Dr Shui became incoherent, upset and began to cry. I have a note of him saying "*too many choices*" and "*not at moment …*" "*I have so many skills, medical Dr and PhD …*" "*Ask him to give me a job going on the street to collect rubbish*". In response Judge Sherratt explained that in the employment tribunal the parties have to follow the procedure which was not easy. He asked if Dr Shui felt able to carry on answering questions.

26. At this point and having taken instructions from me, Counsel for the Respondent raised a concern that proper cross examination was going to cause Dr Shui enormous distress, that his reactions were quite extreme and that there may be an argument that it would cause exacerbation to [Dr] Shui's health problems. Counsel therefore raised the possibility of Dr Shui being excused from cross examination, recognising that that would be an unusual step but that the situation was also far from usual situation [sic]. Counsel noted that this would mean that the tribunal would not have heard all of Dr Shui's evidence challenged, but stated that the case could almost all be discerned from the documents and that this course of action would prevent injustice to either party, recognising that the greater injustice of not being able to cross examine would normally be to the Respondent.

27. Judge Sherratt asked Dr Shui's daughter, who he noted was a (medical) doctor, if she thought Dr Shui was able to carry on. She said that she recognised that it was unfair to the Respondent not to cross examine, but that it had been a long week and did think it may be better to stop.

28. The possibility of a break or a rest was also discussed.

29. Judge Sherratt explained to Dr Shui that the suggestion was that he did not give further evidence, but that the tribunal should consider Dr Shui's comprehensive statement and documents as his evidence. Dr Shui thanked the Judge for his "consideration and kindness", but stated that he did not think it fair to the Respondent if the Respondent did not continue with cross-examination. He stated that he paid his respect to the Judge's role, profession and responsibility and asked him to go ahead. He also suggested that the most important questions could be put to him first, rather than questions being asked sequentially."

23. For his part, the Claimant has also provided his recollections of the ET hearing for the benefit of the EAT. Relevantly he has explained how he was afforded the opportunity to comment on the Respondents' opening submission, having been given time to read and consider it on the first day of the hearing (used as a reading day). He has also included in his evidence the following account of an exchange with the Employment Judge during the cross-examination of the Fourth Respondent:

> **"30. …**
>
> > **[vi] After a while, I said: "My understanding is that the law here is totally different. The Judge applies the British law and does not call his security staff to eject me from this hearing despite the serious medical advices. Therefore, R4 applied a contrary law rather than the British law to eject me from all of the R1's buildings. I think what R4 applied was the Jungle Law." I then questioned R4 which law did he apply. The British law or the Jungle Law? As R4 kept silent, I asked him: "if he thinks that he is the law in the university or the jungle, because he acted as the law there to carry out such unauthorized actions or punishments." R4 did not respond. Under these circumstances, the Judge said that he has power to let his security staff to come to the hearing anytime, and in a threatening way that was slow or almost word by word, the Judge then said to me that: *"You are in my jungle now.""* (Original emphasis)**

Although the Claimant then explains what went through his mind at that stage, his account of what he actually did is somewhat different, as he records:

> **"30. …**
>
> > **[viii] At that moment, I felt a lot of blood rushing into my head that could be used to hit and kill anybody. I attempted to stand up in order to fight back with my dignity as a man being. My daughter immediately seized my arm to hold me down to seat. I turned to look at her. She shook her head and her eyes welled with tears. I had to put my head down and close my eyes to prevent me from carrying out my planned actions. The Judge then announced a break. Although this was different to the R4's actions, I was sure at the time that I would totally lose the case at ET, because the Judge made it clear that it was his jungle, and even his colleague could not put a question to R3. (Paragraph 19)."**

(I note that the last sentence is a reference to the Employment Judge apparently not allowing one of the lay members to ask a question at an earlier stage.)

In any event, as regards his cross-examination, the Claimant relates how being asked questions about the termination of his employment had triggered the "*most painful recollection*" in his life, and continues:

> **"54. At that moment, the Counsel further asked: what did you expect without funding? I almost lost my control and shouted: "I had had too many choices, but none at moment. I got many skills and two doctoral degrees. I am begging you give me a job to collect rubbish on the street. OK then? Are you happy now? Not qualified?" As the Judge asked if I was able to continue rather than if the Counsel should change his question, I said: "I expect that they send me to jail or the police kill me because of the chemical weapon. This is what they want. Help them then.""**

24. This provides the context of what is agreed was the Respondents' application to further modify the normal procedure by not requiring the Claimant to continue being cross-examined. In an interlocutory Judgment given on this application, the ET records the fact that the Claimant suggested that it might be possible for him to continue, effectively resisting the application. Taking these representations into account but also having regard to the fact that there was comprehensive documentation in the lever arch files available in the ET bundles, the ET concluded it was in the interests of justice and in the interests of not causing (further) harm to the Claimant's health that the cross-examination should conclude and submissions should take place instead. At paragraph 5 of the interlocutory Judgment, the ET records it had taken account of the fact that the Respondents would potentially be disadvantaged by that approach; there is no record, however, that it expressly considered any potential disadvantage to the Claimant thereby. The ET further considered it would be "*fair, sensible and reasonable*" if it then took the Respondents' submissions, giving the Claimant until the following Tuesday (this was on the Friday and the ET was not going to be sitting on the Monday for reasons personal to the Respondents' counsel) to prepare his response, which could be provided in writing. Again, the ET did not raise the possibility of otherwise adjourning the hearing.

25. Returning finally to the question of a postponement or adjournment of the hearing, Mr McCluggage (in responding to the EAT) recalled some surprise on the Respondents' part that the Claimant had not pursued an application for postponement at the outset of the hearing.

More specifically, Ms Hesp recalls (cross-referring to her notes from the hearing) at least a reference to the question of a postponement by the Claimant during the course of the hearing:

> **"8. During Dr Shui's cross-examination of Greg Pass, Dr Shui indirectly raised a point relating to postponement. Dr Shui suggested that the fact that Judge Sherratt had decided to proceed with the hearing because Dr Shui had not applied to postpone it showed that Mr Pass's treatment of Dr Shui (excluding him from University premises because he was not fit) had been unreasonable. Dr Shui said this followed because Judge Sherratt had stronger medical evidence at that point than Greg Pass had had at the time of exclusion. Dr Shui argued that Judge Sherratt had not ordered him to stay at home or threatened to use security. Dr Shui's daughter then clarified that what Dr Shui meant was that Dr Shui's current situation (as at the time of the tribunal hearing) was worse than it had been when Mr Pass was involved because his medical situation was worse, but that Judge Sherratt had chosen not to use heavy handed action. At that point Judge Sherratt stated that the parties were in the Employment Tribunal under the Employment Tribunal procedures to ensure that Dr Shui's case could be listened to in a safe and fair way. He went on to state that either party could apply to postpone the hearing, but that no-one had.**
>
> **9. I can confirm that neither Dr Shui nor his daughter took up the obvious opportunity to ask for an adjournment."**

The Relevant Legal Principles

26. As I observed at the outset of this Judgment, this appeal raises questions as to the way in which ETs are to case manage proceedings involving litigants who, whilst having capacity to pursue the litigation, have mental health issues impacting upon their ability to participate. I start by considering the guidance that has been provided in respect of any obligation owed to those who appear before the ET in person, a question which concerned the EAT (Underhill P, as he then was, presiding) in **Mehta v Child Support Agency** [2011] IRLR 305. Accepting that an ET has a responsibility to see that litigants in person are in a position to make a free and informed choice, after all proper allowances have been made for their position, the EAT concluded that, ultimately such litigants still "*have to be treated as responsible for what they say and do in the course of proceedings*" (see paragraphs 12 to 14).

27. More detailed guidance as to the obligation owed towards litigants in person has since also been provided by the Court of Appeal in **Drysdale v Department of Transport** [2014] IRLR 892, as follows:

> **"49. *Discussion***
>
> **From the authorities … I derive the following general principles:**
>
> **(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.**
>
> **(2) What level of assistance or intervention is 'appropriate' depends upon the circumstances of each particular case.**
>
> **(3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.**
>
> **(4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.**
>
> **(5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and 'feel' for what is fair in all the circumstances of the specific case.**
>
> **(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/ omitted to do, and which amounts to unfair treatment of a litigant."**

In **Drysdale**, a particular question arose as to whether the ET should proactively have adjourned the proceedings to permit Mr Drysdale (who was being represented by his (not legally qualified) wife and who was applying to withdraw his claim) to consult with his wife about the decision to withdraw and to further reflect on his position. The Court of Appeal considered this issue as follows:

> **"63. That leaves the question whether notwithstanding Mrs Drysdale's confirmation that she wished to withdraw the claim and the appellant's apparent assent to that decision, it was incumbent upon the ET to adjourn the proceedings on that afternoon, either for a few minutes or for a longer period, to enable the appellant and Mrs Drysdale to reflect further on the decision to withdraw.**
>
> **64. In my view, notwithstanding the absence of a legal representation, neither the overriding objective nor any other principle of law required the ET to take such a step. Whether to do so or not was a question of judgment falling squarely within the margin of discretion of the ET. The ET had no reason to suspect that the decision to withdraw the claim was ill-considered or irrational. Further, even if the ET had identified a risk that the decision was impulsive, that risk would have been removed by the conduct of the parties in the immediate aftermath of Mrs Drysdale's announcement. Also, the fact that Mrs Drysdale was not legally qualified would have been lower down the scale of significance in this case than in many others where there is no professional representation, given Mrs Drysdale's evident intelligence, clarity of thought and speech, and strength of purpose - qualities we have been able to observe ourselves in the course of this appeal.**
>
> **65. I consider that the ET cannot justly be criticised for the approach they took. There is no reason for holding that they acted other than with scrupulous fairness and propriety."**

28. Turning to consider the guidance available for those cases in which the litigant in person is also disabled, in **Rackham v NHS Professionals Ltd** UKEAT/0110/15/LA, the EAT (Langstaff P presiding) specifically considered the obligation upon an ET when dealing with those circumstances (in that case the Claimant suffered from Asperger's syndrome). Referring to the guidance provided in the *Equal Treatment Bench Book* (commended to judicial office holders by the EAT (Cox J presiding) in **CPS v Fraser** UKEAT/0021/13 and UKEAT/0022/13) and other potential bases upon which it might be argued that a positive obligation was imposed upon ETs, the EAT considered the particular source of the duty was less important than what such a duty might entail. In answering that question, 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. … 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. …"**

29. With some caution, the EAT in **Rackham** went on to provide the following more general guidance:

> **"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… 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."**

30. A review of the appropriate steps that should be considered in cases involving litigants with disabilities was also conducted in **Galo v Bombardier Aerospace UK** [2016] IRLR 703 NICA, where - having reviewed the relevant authorities - detailed guidance was provided (see paragraph 53). The NICA also there considered the role of the appellate Tribunal in this context, referring to the earlier pronouncement of the Supreme Court in **R (Osborn) v Parole Board** [2014] AC 1115, at paragraph 65, where Lord Reed JSC made clear that the appellate Tribunal:

> **"… must determine for itself whether a fair procedure was followed … Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required."**

31. As for the specific questions that might arise when considering the question of an adjournment, the Court of Appeal (Peter Gibson LJ giving the judgment of the Court) provided the following guidance in **Teinaz v LB Wandsworth** [2002] IRLR 721:

"21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.

22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."

32. More generally, in **Transport for London v O'Cathail** [2013] EWCA Civ 21, [2013] IRLR 310 Mummery LJ considered the ET's obligations in respect of adjournments, observing:

"43. … the [ET Rules provide] … that 'the overriding objective of these Regulations and the rules …is to enable tribunals and employment judges to deal with cases justly.' … 'Justly' means that overall fairness is paramount in the exercise of the discretion. The claimant did not have a monopoly of the fairness factors in this case. It would not be fair for TfL to be repeatedly denied a hearing on the ground of the claimant's recurrent health problems.

44. … decisions of the ET can only be appealed on questions of law … In relation to case management the ET has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The ET's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the EAT should continue to adopt …

45. Overall fairness to *both* parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment.

46. … The ET did not err in law by reaching a decision that the EAT would not have made, had it been considering the application to adjourn. What is fair in the interests of the parties is, in the first instance, a matter for assessment by the ET. The EAT ought only to intervene if the ET has erred in principle or produced a perverse outcome in the sense that no reasonable tribunal could have concluded that it was fair in all the circumstances to refuse the adjournment.

47. Finally, Article 6 of the Convention does not compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds, if it would mean that the hearing would take place in the party's absence. There are two sides to a trial, which should be as fair as possible to both sides. The ET has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within reasonable time and the public interest in prompt and efficient adjudication of cases in the ET."

33. As for the question of an adjournment when faced with a health issue arising during the course of a hearing, in **U v Butler & Wilson Ltd** UKEAT/0354/13/DM (Wilkie J presiding) it was observed that:

> **"86. … Anyone conducting a judicial or quasi judicial hearing confronted with a person who is plainly unwell would necessarily and obviously adjourn the hearing for a brief time in order to enable them to recover sufficiently to present their case, or their evidence, if possible. … In our judgment, to fail to consider an adjournment, in those circumstances, but to require the applicant to press on with their application, notwithstanding their evident ill health and lack of the relevant documents, is so obviously wrong that, applying the *Wednesbury* standard of review, this appeal must succeed."**

34. The arguments raised by the current appeal also raise some question as to the importance of cross-examination. In **Duffy v George** [2013] EWCA Civ 908, at paragraph 24, Mummery LJ considered the difficulties arising where cross-examination is constrained in ET proceedings but also warned as to the respective roles of the ET and EAT:

> **"24. Proper steps must be taken to deliver procedural justice in all cases, especially those where (a) the case turns on the credibility of the evidence given by the parties; (b) the only direct evidence is the word of one party against the word of the other; (c) the party making the allegations decides not to attend the hearing; and (d) the party against whom the allegations are made is denied the opportunity to challenge them by cross examining the accuser. As for the last point, lack of the opportunity to cross examine a witness in the ET has been recognised as a ground for remission of a case for re-hearing: different facts may come out of a cross examination, which might have been accepted by the tribunal and have led it to reach a different conclusion: *McBride v British Railways Board* [1972] 7 ITR 84. The case for remission is even stronger where there are no other witnesses and no other evidence and the opportunity to cross examine on the allegations has been denied.**
>
> **25. Appeal tribunals and appeal courts must recognise that, in the first instance, procedural matters are for the ET to decide. Provided that an ET exercises it discretion judicially by considering whether and how to exercise it and by taking all relevant circumstances into account, there will be no error of law. Neither the EAT nor this court would be entitled to interfere with the decision of the ET in the absence of an error of legal principle or unless the exercise of discretion was plainly wrong."**

And Pitchford LJ concurred, observing:

> **"51. It is a cornerstone of the common law concept of natural justice that the accused must be given the opportunity to face his accuser. In the overwhelming majority of cases the complainant will give oral evidence and be cross-examined by or on behalf of the opposite party. There are two essential purposes of cross-examination, the first being to test the evidence of the witness, and the second being to provide the witness with an opportunity to respond to the case put to the witness on behalf of the opposite party. By this means the tribunal of fact is the better able to reach a judgement as to the reliability and effect of the complainant's evidence. The criminal trial is equipped to deal with the receipt of oral evidence from anxious, frightened and intimidated witnesses. However, there are exceptional circumstances in which the judge in a criminal trial will contemplate the admission of evidence, even from the complainant, other than by way of oral testimony. The following describes some of the provisions which apply to a criminal trial and may be relevant to the exercise of case management powers by an employment tribunal in parallel circumstances."**

Submissions

The Claimant's Case

35. On behalf of the Claimant it is submitted that the ET had a duty to assist the Claimant as a litigant in person (**Mehta**) and, more specifically, an obligation to make reasonable adjustments for the purpose of ensuring the Claimant's access to, and participation in, (as someone suffering with psychotic depression and thereby disabled for the purposes of the **Equality Act**) the ET proceedings (**Rackham**; **Galo**). Specifically, the ET should have drawn to the Claimant's attention the possibility of his applying for a postponement of the hearing, either at the outset of the Full Merits Hearing or at the point during the Claimant's cross-examination when his condition obviously deteriorated; alternatively, at the latter stage, there was a duty on the ET to actually proactively adjourn the hearing, even if just for a short while.

36. As for the role of the EAT, the appeal was not to be determined simply as a review of a case management decision by the ET (see the Supreme Court in **Osborn**, followed by the NICA in **Galo** and note further the approach adopted by the EAT in **Rackham**): whether the obligation upon the ET arose due to a duty to make reasonable adjustments or more generally as a requirement to afford the Claimant a fair hearing, the EAT had itself to be satisfied as to whether there was any substantive unfairness to the Claimant.

37. It was to be noted that prior to the Full Merits Hearing two medical opinions had been provided to the ET which both stated that the Claimant was unfit to participate in the proceedings. This was against a background of ill health, including an earlier detention under the **Mental Health Act** and in circumstances in which the Claimant was representing himself, notwithstanding the medical advice that his mental illness would be made worse in stressful situations. It was, further, apparent to all at the outset of the Full Merits Hearing that the

Claimant was ill. In those circumstances, it was incumbent upon the ET to be particularly careful to ensure the Claimant understood the implications of proceeding with his case and that he had the option of applying for an adjournment of the hearing if he required one (although allowing that if the ET did that then - in order to make sure the Claimant then made an informed decision (**Mehta**) - it would also have to refer to the applications that the Respondents had given notice that they would make). What the ET could not do was to simply assume that the Claimant understood that he could make an application for a postponement either at the outset or during the course of the hearing. And that was so even if the ET asked the Claimant if he was able to proceed at the outset: that was not the same as drawing his attention to his continued right to apply for a postponement.

38. Had such an application been made, it is highly likely that the hearing would indeed have been postponed until the Claimant was fit to deal with the hearing or at least until there was medical evidence that addressed the question when the Claimant might be able to participate in the hearing and/or as to any further reasonable adjustments that might be required (see **Teinaz**) or until it was no longer possible to have a fair trial of the issues in the case. Although regard had to be had to fairness to all parties, as was made clear in both **Teinaz** and **Rackham**, convenience has to take second place to fairness.

39. As for the adjustment made to curtail the cross-examination of the Claimant, that meant he was denied the opportunity to respond to the case against him. There was a distinction to be drawn between evidence and submissions and it should be a last resort to stop cross-examination taking place (not least as there were many different ways in which cross-examination could be continued subject to adjustments); certainly there was evidence (from the notes of the hearing) that the Claimant did not feel he had got all his points across during cross-

examination and the Respondents had made the point in their closing submissions that his case remained unclear. There was further an issue as to respect for the Claimant's autonomy in bringing cross-examination to an end when he had made clear his willingness to continue. Whilst it was correct that the ET had briefly adjourned the hearing, that was only to consider the Respondents' application to bring cross-examination to an end. At previous stages, when the Claimant had shown obvious signs of distress and difficulties, the ET had briefly adjourned and that had enabled the Claimant to then proceed in asking questions of the Respondents (and breaks as a potential reasonable adjustment had been identified in the psychiatric report in the other legal proceedings, albeit that obviously was not before ET here).

The Respondents' Case

40. The Respondents accepted that (as Langstaff P had suggested at paragraph 6 in **Rackham**) if it was found that the hearing had been unfair then, regardless of the merits of Claimant's underlying case, the EAT would be bound to set aside ET's decision and remit for fresh consideration. The Respondents further accepted that if the appeal properly raised issues that could not simply be considered as questions of case management, the role of the EAT was not simply one of review (**Osborn**); although if the issue raised purely related to a decision whether or not to grant a postponement - other reasonable adjustments having been made in any event - then the EAT's role would be so limited. Rather than engaging in technical distinctions, the EAT in **Rackham** had asked itself whether there was any substantive unfairness to the Claimant. In the present case, whether viewed as a legitimate exercise of case management discretion or as a fair hearing issue, there was no unfairness to the Claimant overall. In any event, whatever formulation of applicable principles was used, there had to be a healthy respect for the ET's view. The overriding objective (Rule 2 **ET Rules 2013**) expressly required the ET, as part of its duty to deal with the case before it fairly and justly to (a) ensure the parties are on

an equal footing and (b) avoid unnecessary formality and seek flexibility in the proceedings. Guidance as to the obligation upon an ET in respect of litigants in person (albeit not litigants in person with particular disabilities as here) was provided in **Drysdale** and **TfL v O'Cathail**, both cases that allowed that ETs were to be afforded a wide margin of appreciation, particularly given the fact and context sensitive nature of the issue.

41. Turning to the facts, at the outset of the hearing the Claimant was asked whether he was well enough to proceed. The issue of a postponement had been raised at earlier stages in the proceedings and the Claimant had previously made clear he wished to proceed because the stress of the case was making his illness worse (see the record of the PH before EJ Ross on 9 July 2014) - a view supported by the medical evidence; there was a strong interest for all concerned in the case being concluded sooner rather than later. Furthermore, in their opening submission for the Full Merits Hearing, the Respondents had again addressed the question of adjournment/postponement. The Claimant (who was accompanied by his daughter, who was a medical doctor) had time to digest the content of that document and to comment on it but did not seek to raise the issue of postponement, although - as paragraph 7 of his closing submissions before the ET made clear - he was aware of his right to do so.

42. Moreover, the Claimant did not have the monopoly on justice in this case; the ET was obliged to act fairly towards all parties. It did so, making adjustments for the Claimant during the course of the hearing (as the Claimant acknowledged in his closing submissions). As for the curtailment of cross-examination, that did not prevent the Claimant relying on his 51-page witness statement and his 12-page written closing submissions. The Respondents had highlighted possible modification of cross-examination at the outset, recognising it might need to be curtailed. There had been a break in the hearing not long after cross-examination of the

Claimant had started and shortly before the time when the Respondents' counsel suggested it should be brought to an end. In any event, there was no obligation to cross-examine a witness: there might be a disadvantage to the party who does not challenge by way of cross-examination (**Duffy**) but they were entitled to adopt that course (with the attendant risk). In this case, there were no examples of findings by the ET absent evidential basis or perverse on the basis that the Respondents had failed to challenge a point in cross-examination. At most it was observed that the Respondents had said they did not understand the Claimant's case in certain respects but they had not been obliged to cross-examine the Claimant to assist in clarifying his case.

43. Moreover, returning to the ET's obligations towards the Claimant, there was no unfairness in omitting to "remind" him of the right to apply for a postponement when it was apparent that he knew he had that right before, at the outset and during the hearing. There was, further, no error in the ET not itself adjourning when it had asked the Claimant whether he was able to proceed and in the context of reasonable adjustments being made. Yet further, there was no error in the ET not adjourning at the point when difficulties arose in cross-examination: the Claimant was able to participate in the hearing albeit he was not able to respond to cross-examination. And, whilst it might have been preferable to address the question of reasonable adjustments at an earlier, case management stage, there was no prejudice to the Claimant here because adjustments were made during the course of the hearing, on a dynamic basis.

Discussion and Conclusions

44. The right to a fair hearing is fundamental - if not respected then there has been no proper determination of the claim; as Langstaff P observed at paragraph 6 of the EAT's judgment in **Rackham v NHS Professionals Ltd** UKEAT/0110/15/LA:

> **"6. … the merits, however compelling in favour of the decision the Judge reached, form no part of our consideration. That is because a party is entitled to a fair hearing before an impartial Tribunal. That the impartiality of the Tribunal is an essential characteristic of a**

hearing was recognised by Mummery LJ in *AWG Group Ltd v Morrison* [2006] EWCA Civ 6. He recognised that convenience has to give second place to impartiality. The same, we think, is to be said of fairness as of impartiality, because it is what any litigant is entitled to expect from a court hearing, and an unfair hearing is no proper hearing at all."

45. Moreover, when faced with an appeal raising fair hearing issues arising from the underlying proceedings, I bear in mind (*per* the Supreme Court in **Osborn**, followed by the NICA in **Galo**) that determination of questions of fairness will be for the appellate Tribunal. I see that as fulfilling a similar role to that undertaken by appellate Tribunals in (for example) bias appeals, when they 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 fair hearing, the appellate body must objectively view that which took place below and decide for itself whether or not a fair process was followed.

46. Here the criticism of the ET is focussed on the question whether there should have been a postponement or adjournment of the Full Merits Hearing, at the outset or during his cross-examination, when it became apparent that the Claimant's condition had deteriorated. Although the appeal has thus focussed on two particular moments within the hearing, it is right that I see these points in context: was the hearing fair for the Claimant when viewed overall? It is this question that elevates the issue raised on this appeal from a simple matter of case management to the more fundamental question, whether the Claimant was denied a fair hearing.

47. Considering first the position at the outset of the hearing, it is apparent that a question arose as to how the trial could proceed in a way that was fair to both parties. There had been earlier attempts to explore the difficulties arising as to the Claimant's health and his ability to participate and represent himself; the ET had proactively sought information in this regard and had expressly raised with the Claimant the possibility of seeking a postponement of the hearing.

For his part, the Claimant had appreciated the ET's concerns and was aware that the medical advice was that he was not well enough to participate in the hearing. Equally, however, he had voiced his own concern that the litigation was making his health worse and there was thus an advantage to proceeding, with reasonable adjustments being made. For all concerned, the circumstances that presented at the outset of the Full Merits Hearing were thus challenging. Ideally, the Claimant would not have been representing himself at the hearing at a time when his medical advisers had said he was unfit to do so, but - as the Respondents had observed - there was no indication as to when he might be medically fit enough and whether this might be within a time frame that would enable a fair trial to take place, not least given the concern that the continuation of the proceedings would mean that his medical condition was exacerbated. And in this context, it is relevant to note that it is not suggested that the ET should proactively have postponed the hearing at an earlier stage: it is accepted that it was entitled to raise the issue with the Claimant but then respect his decision as to whether or not to pursue an application for a postponement. Did the position then change at the outset of the hearing?

48. In addition to the information that was already available, it is apparent that at the outset of the Full Merits Hearing the Claimant presented as someone who was unwell. He was, however, aware that it was open to him to apply for a postponement - not just because the ET had previously advised him that he could but also because the Respondents had addressed the issue in its recent correspondence with him and in its opening submissions (which the Claimant had the opportunity to read over the course of the first day). It is true that the Respondents had pointed out the potential negative consequences if the Claimant pursued an application for a postponement of the hearing but, as Ms Prince has acknowledged, that was no more than making clear how those acting for the Respondents saw the options (duly protecting the position of their clients), something that was appropriate if the Claimant was to be able to make

an informed decision. It is equally true that the ET did not itself then raise the issue again with the Claimant but the evidence before me makes it clear that he was aware of his right to make an application in this respect but chose not to do so (see paragraph 7 of the Claimant's closing submissions before the ET, cited above).

49. For its part, the ET appropriately explored with the Claimant the question whether he wished to proceed and, if so, as to what adjustments would need to be made. Given that the Claimant did not lack capacity, I do not consider that it would have been open to the ET to have ignored his wishes at the outset of the hearing and itself adjourned the matter until satisfied that the medical advice had changed; that would have been failing to afford respect to the Claimant's choice and would potentially have made his position worse. As for expressly reminding the Claimant of his right to apply for a postponement, had the ET done so it would also have needed to explain the potential consequences should such an application be successful; as Ms Prince accepted, given the matters raised by the Respondents, it would be unfair to put such an option to a litigant in person without ensuring they were in a position to make an informed decision. And, in substance, that is what happened in this case: the issue of a possible postponement was fully canvassed in the Respondent's opening submissions and the Claimant had time to consider the point and to decide what he wished to do.

50. Moreover, standing back to see what then happened - prior to the particular issue arising during his cross-examination - no matters have been identified as suggesting that the Claimant did not experience a fair hearing. With the various adjustments in place (and there is no suggestion that the ET acted other than in accordance with guidance provided in the *Equal Treatment Bench Book*, and in cases such as **Galo**, and made all appropriate reasonable adjustments), the Claimant was able to participate in the proceedings and to present his case,

notwithstanding his health difficulties. In making this observation, I do not seek to down-play the challenges the Claimant will have experienced in representing himself (albeit assisted by his daughter) at this hearing. That said, knowing of the medical advice and aware of his right to apply for a postponement, he opted to proceed with the hearing and has acknowledged that the ET thereafter undertook "*meaningful adjustments*" to protect "*his dignity and human rights*".

51. I turn then to the question whether the position changed when the Claimant broke down in cross-examination. In this instance, the ET did not adopt the course the Claimant sought (for cross-examination to continue) but acceded to the application made by the Respondents, stopping the cross-examination at that stage and proceeding to closing submissions.

52. The short answer to this point is that no issue really arose: it was a matter for the Respondents as to whether they sought to challenge the Claimant's evidence in cross-examination; if they did not do so, they bore the risk that the ET would simply accept his thus unchallenged evidence. Indeed, it is questionable whether the Respondents needed to make any application in this regard (rather than simply state their position); neither the Claimant nor the ET could force the Respondents to challenge the Claimant's case in cross-examination - that was solely their choice.

53. In any event, the Respondents *did* seek a modification in what was otherwise understood would be the procedure, so as to prematurely halt their cross-examination of the Claimant. Ms Prince says this denied the Claimant a fair hearing of his case, arguing that cross-examination not only allows the other party to test the evidence of the person being questioned, it also provides that person with the opportunity to respond to the case being put (see **Duffy**). That is so, but here the Claimant still had the opportunity to respond to the Respondents' case, by

relying on his own witness statement, which stood as his evidence in chief, and making closing submissions (after having had time to reflect on the closing arguments of the Respondents). Even if I allow that being seen to give evidence under cross-examination permits the person concerned to further bolster the credibility of their case, I do not accept that is the only way of ensuring a fair hearing and I would not wish to constrain the case management discretion of ETs by suggesting it would be unfair to make adjustments to, for example, consider a party's case on the papers, or to proceed by allowing them to counter the case against them in written submissions rather than oral testimony (which is what, in effect, the ET did here).

54. Given, however, that the Claimant was not asking for such alternative steps to be taken, was it right for the ET to adopt this course in this instance? Ms Prince contends this undermined the fairness of the hearing for the Claimant; even allowing that the ET was obviously concerned by his visible signs of distress under cross-examination, she argues that it should have addressed that difficulty by proactively adjourning the hearing at that stage to allow the Claimant to recover before continuing with his cross-examination.

55. I bear in mind, however, that the particular point at which the Claimant broke down occurred shortly after an earlier break. The ET was entitled to be concerned that the adjustments that it had put in place were proving insufficient to address the difficulties the Claimant was suffering when dealing with cross-examination. It was also entitled to have regard to the fact that the Respondents were prepared to forgo their right to challenge the Claimant's oral testimony. In the circumstances, I cannot see that the ET was wrong to adopt the course that it did in agreeing that the cross-examination would stop at that stage. It may have been that a more lengthy adjournment of the proceedings would have enabled the Claimant to better recover but there was no medical evidence to suggest that this would be so

and the ET was entitled to seek to avoid adopting a course that might have seen the proceedings adjourned on an open-ended basis, potentially jeopardising the fairness of the hearing for all concerned. In any event, viewed not simply as a matter of case management discretion but as a question of fair hearing, I do not see that the Claimant was thereby denied his right to a fair trial of his case: there was a short adjournment of the case over a long weekend, after the Respondents' closing submissions; the Claimant was thus afforded the opportunity to reflect on those submissions and prepare his own closing arguments and, in so doing, to respond to the case made against him in his own closing submissions.

56. Having considered the specific points identified in this appeal, I stand back and look at the picture overall: did the Claimant receive a fair hearing or was that fatally undermined by the ET's case management decisions at the outset of the hearing (the decision it implicitly took to proceed after the Claimant had said he wished to do so) and/or at the point when the Claimant broke down in cross-examination (the decision to agree that questioning would stop and the parties move on to closing submissions)? In determining this question, I am bound to have regard to the particular facts of this case, not to a hypothetical construct. The evidence is that the Claimant was aware of his right to seek a postponement of the hearing but chose not to do so. That was an informed choice: informed by the medical advice but also by what the Claimant himself knew of the stress of the on-going proceedings; informed further by the earlier guidance from the ET and from the correspondence with the Respondent. That is not to say that the choice was an easy one - the circumstances were challenging for all concerned - but the decision to proceed could be seen to have been proved correct given the way in which the hearing progressed, at least up to the Claimant's cross-examination. As for the decision to halt cross-examination, I do not accept that the ET's failure to accede to the Claimant's stated wish to continue then rendered the hearing unfair. The course adopted merely acknowledged the

Respondents' right to choose not to challenge parts of the Claimant's oral testimony by way of cross-examination. The ET itself observed that there was a risk to the Respondents in adopting this course but that was a risk they were entitled to take; no right was thereby denied to the Claimant. In any event, the Claimant's substantive right to challenge the Respondents' case was respected: he had already been able to cross-examine (with reasonable adjustments being made) the Respondents and their witnesses and had given his evidence by means of his witness statement. He then had the opportunity - after a break over a long weekend - to make his response to the Respondents' case by way of closing submissions.

57. Standing in the shoes of the objective observer, I do not consider that the Claimant's argument is made out. I accept that the ET hearing was very challenging for the Claimant but that does not mean it was unfair. The ET was mindful of its obligations to the Claimant and I am satisfied that his right to a fair hearing was not undermined. I therefore dismiss the appeal.