Appeal No. UKEAT/0061/17/RN
UKEAT/0062/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 June 2017
Judgment handed down on
31 July 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

MS K JHUTI — APPELLANT

(1) ROYAL MAIL GROUP LTD
(2) THE LAW SOCIETY (INTERVENER)
(3) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY (INTERVENER) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

© Copyright 2017

APPEARANCES

For the Appellant	MR MATTHEW JACKSON (of Counsel) and MR SIMAO PAXI-CATO (of Counsel) Instructed by: Net Solicitors Pett Lodge Ashford Road Charing Ashford Kent TN27 0DX
For the First Respondent	No appearance or representation by or on behalf of the First Respondent
For the Second Respondent	Written Submissions
For the Third Respondent	MR TOM POOLE (of Counsel) Instructed by: Government Legal Department Employment Group Employment Litigation and Advice for Government - Team E5 One Kemble Street London WC2B 4TS

SUMMARY

PRACTICE AND PROCEDURE

1. While there is no express power provided by the ETA 1996 or the 2013 Rules made under it, the appointment of a litigation friend is within the power to make a case management order in the 2013 Rules as a procedural matter in a case where otherwise a litigant who lacks capacity to conduct litigation would have no means of accessing justice or achieving a remedy for a legal wrong.

2. The decision in **Johnson v. Edwardian International Hotels Ltd** [2008] UKEAT/0588/07 was not followed.

3. The appeal was accordingly allowed.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. The issue raised by this appeal is an issue of general public importance that goes wider than the interests of the parties to it. It concerns the extent to which employment tribunals have power in a case involving an individual who is incapacitated as a matter of fact to appoint a litigation friend. Given that this is a matter of public interest and potential concern and in circumstances where the Respondent made clear its neutral stance in relation to this appeal, I permitted participation by two interveners. First, the Secretary of State for Business, Energy and Industrial Strategy, who has responsibility for the rules governing procedure in Employment Tribunals and therefore has a direct interest in the matters raised by this appeal. Secondly, I permitted The Law Society of England and Wales to intervene and make written submissions. The Law Society produced comprehensive written submissions but did not appear. The Secretary of State also produced written submissions, and Mr Tom Poole of counsel appeared on his behalf. For the Appellant I have received, again, comprehensive written argument, and Mr Matthew Jackson and Mr Simao Paxi-Cato, both of counsel, appeared. I am grateful to all parties and counsel for the assistance they have provided.

2. I refer to the parties as they were before the Employment Tribunal.

3. The underlying tribunal claims giving rise to the present appeal relate to claims of automatically unfair dismissal and whistleblowing detriment. The Claimant succeeded in her claims, though there is a pending appeal in relation to some aspects of the substantive decision. At stake for her is an award of damages and the vindication of her rights. If she is unable to

A continue participating in these proceedings, that may have serious financial and other consequences for her.

B 4. Concerns were raised by her solicitor with the Tribunal about the Claimant's capacity to litigate, and on 1 November 2016 an application was made on her behalf to appoint Ms Jane Atkinson as her litigation friend. The application was refused by Employment Judge Baty in a decision contained in a letter dated 11 November 2016. He referred to the correspondence on the issue and then said:

C

> **"Following the EAT case of *Johnson v Edwardian International Hotels Ltd* [2008] UKEAT/ 0588/07, by which this Tribunal is bound, the Tribunal has no power to appoint a litigation friend, and the application made on behalf of the Claimant for such an appointment to be made therefore must be and is refused."**

D 5. An application for reconsideration was made by letter dated 22 November 2016, and at a telephone hearing on 25 November 2016 the Employment Judge reached the same conclusion, as follows:

E

> **"2. The claimant's solicitors are concerned that the claimant does not have mental capacity to instruct them. They applied for an order that a litigation friend be appointed in relation to her. By letter to the parties of 11 November 2016, I turned down this application on the basis that, following *Johnson v Edwardian International Hotels Ltd* [2008] UKEAT/0588/07, the Tribunal has no power to appoint a litigation friend. Prior to this hearing, the claimant's solicitors had indicated that they would like me to revisit that decision in the light of the High Court case of *R(C) v First-Tier Tribunal* [2016] EWHC 707, which I had had before me when I made my original decision. I re-read both authorities in advance of this hearing. I confirmed to the parties that I still considered that *Johnson* was binding on me and that the Tribunal therefore had no power to appoint a litigation friend."**

F

G 6. The evidence as to the Claimant's mental capacity has been updated, and there is now a report of Dr Sandeep Bansal, completed on 24 December 2016. That report concludes that she lacks capacity to conduct these Employment Tribunal proceedings. Dr Bansal notes that she was diagnosed with post-traumatic stress disorder and a moderate depressive disorder triggered by traumatic experiences she had in the course of her employment with the Respondent. The report refers to regular and ongoing treatment for these disorders, including psychiatric and

H

counselling support and the use of medication. It sets out the Claimant's symptoms; her panic attacks linked to anxiety over the outcome of her legal disputes; compulsive behaviour in the management of legal matters, including signing paperwork for another court case without looking at the papers, as a desperate attempt to end the stress linked to her legal disputes. She was distressed throughout the assessment, had difficulty concentrating and felt unsure as to whether she would ever be fit to give evidence in the future. She expressed the view that she could not trust anyone in relation to her legal affairs, other than her friend, Ms Atkinson.

The Decision in Johnson v Edwardian International Hotels Ltd ("Johnson")

7. It is helpful at this stage to say a little more about the case of **Johnson** to which the Employment Tribunal referred. The case concerned a claim for unfair dismissal said to have been procured by the Watch Tower Bible and Tract Society of Britain commonly known as the Jehovah's Witnesses. The appellant made allegations about the involvement of the Jehovah's Witnesses in his dismissal that led the respondent to conclude he was suffering from a mental illness of some kind giving rise to doubt as to his capacity to conduct legal proceedings. The respondent sought an order that the claims should be struck out pursuant to Rule 18(7)(b) of the Employment Tribunals (Constitutions and Rules of Procedure) Regulations 2004 ("the 2004 Rules"). In the alternative, the respondent asked the tribunal to invite the Official Solicitor to conduct a **Harbin v. Masterman** [1895] 1 Ch 351 inquiry into the appellant's capacity to litigate. The tribunal refused to strike out the claim but acceded to that alternative application. That decision was appealed but in the period after the decision was made and before the appeal was heard the Official Solicitor responded to the tribunal's invitation, declining to investigate the appellant's mental capacity on the basis that the functions of the Official Solicitor did not extend to employment tribunals. On appeal, although the respondent accepted the Official Solicitor's refusal to conduct an inquiry, it sought to sustain the order made by the tribunal on a

different basis, contending, in particular, that tribunals must have power to dismiss proceedings maintained by a person who does not have requisite mental capacity or alternatively to stay proceedings while investigations are conducted. At paragraphs 11 and 12 of his judgment, Underhill J (as he then was) held as follows:

> **"11. First, the rules contain no mechanism equivalent to that available in the ordinary courts under CPR 21 for the Tribunal to appoint a litigation friend to conduct the proceedings on behalf of the party in question. Mr Jupp submitted to me that such a power existed under rule 10 of the Employment Tribunals Rules of Procedure (which form Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004), particularly when read in the light of the over-riding objective. Rule 10 is headed "general power to manage proceedings". Rule 10(1) reads as follows:**
>
> > **"Subject to the following rules, the chairman may at any time either on the application of a party or on his own initiative make an order in relation to any matter which appears to him to be appropriate. Such orders may be any of those listed in paragraph (2) or such other orders as he thinks fit."**
>
> **I cannot accept that submission. The appointment of a litigation friend seems to me a very different matter from the kinds of power which would have been envisaged by the Secretary of State in making a rule giving Chairmen (now Employment Judges) a "general power to manage proceedings"; and the same indeed goes for Parliament in creating the rule-making power itself (see sec. 7 of the Employment Tribunals Act 1996. A litigation friend of his or her nature has wide authority to dispose of a party's legal rights, either directly by bringing and/or compromising proceedings, or indirectly by the way in which he or she conducts those proceedings. I do not believe that a power to confer such rights could be created otherwise than expressly, and indeed by primary legislation. (As to this, I accept that - so far as my and Mr Jupp's researches were able to establish - although authority for the provisions of CPR 21 now derives from para. 1 of Sch. 1 to the Civil Procedure Act 1997 there may originally have been no statutory authority for the power to appoint a next friend in the High Court, or the superior Courts from which it was created. However, such authority appears to have been regarded as inherent in the historical jurisdiction of the Court of Chancery. The position of the Employment Tribunals is of course in no way analogous to that.) It follows that a finding of mental incapacity would create a very unsatisfactory situation, in which the Tribunal would be concluding that a claimant could not advance his claim but no means existed for it to be advanced by someone else on his behalf. Sometimes the possibility might exist of obtaining the intervention of the Court of Protection, but there is no mechanism available to assure such intervention. There could thus be a serious injustice. Of course in many cases the circumstances which led the Tribunal to conclude that the claimant had no capacity might also suggest that the claim was misconceived; but that would by no means always be so.**
>
> **12. Secondly, there is in the context of High Court proceedings a presumption that a party has capacity: see *Masterman-Lister v Brutton & Co (nos. 1 and 2)* [2003] 1 WLR 1511. I am sure that a similar presumption should apply in the Employment Tribunal. In circumstances where (a) there is no route *via* the Official Solicitor whereby reliable evidence to rebut the presumption can routinely be obtained (see para. 6 above) and (b) there is no sure mechanism for protecting the party's interests if mental incapacity were, by whatever route, proved (see para. 11), the advantages of seeking to rebut the presumption seem very questionable."**

8. The Employment Appeal Tribunal suggested that tribunals should be wary of embarking down the road of trying to investigate a party's mental capacity, expressing the view that in the great majority of cases the ample powers available to strike out claims on the basis that they are

misconceived, have no reasonable prospect of success or parties have behaved in an unreasonable or vexatious manner mean that an investigation into capacity need never become necessary. Underhill J was not of course dealing with a case in which there was evidence justifying a finding of incapacity, in contrast to the position on this appeal. Here there is unchallenged evidence that the Claimant now lacks capacity to conduct the litigation. At paragraph 14 he expressed the following view:

> **"14. I accept that there may be cases in which one party has (e.g. from medical reports obtained for other purposes) and presents to the Tribunal good evidence justifying a finding of incapacity and applies for the claim to be dismissed on that basis. In such a case it may well be (though, for the reason given, I prefer not to decide) that, in the absence of a procedure for appointing a litigation friend, the claim will indeed have to be dismissed (or, if there is a prospect of the Court of Protection becoming involved, stayed), even in circumstances where there is no other ground for doing so. But such a state of affairs would not be a happy one, not least because the party facing the application would, *ex hypothesi*, not have had the capacity to take decisions in relation to it. I would expect such cases to be exceptional."**

9. In the instant case, the Employment Judge regarded himself as bound by **Johnson** to conclude that there was no power in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules") for an employment tribunal to appoint a litigation friend in a case where a party lacks capacity to conduct litigation. All parties to this appeal (save the Respondent who remains neutral) contend:

(i) that Employment Judge Baty erred in law in regarding **Johnson** as binding authority on the absence of power to appoint a litigation friend or, alternatively, if it is binding, contend that the Appeal Tribunal should now depart from the reasoning in **Johnson** in accordance with the principles set out in **British Gas Trading Ltd v Lock** [2017] ICR 1 on the basis that **Johnson** was wrongly decided or because there are other exceptional reasons that justify departure from the decision in that case.

(ii) The Employment Tribunal does have power to appoint a litigation friend in circumstances where a party is found to lack litigation capacity.

(iii) The power derives from the 2013 Rules read with the common law duty of fairness and/or the Human Rights Act 1998 ("HRA").

10. It seems to me that, before determining whether **Johnson** should be followed or not, it is necessary to consider both the primary legislation and the 2013 Rules made under that legislation in order to determine as a matter of statutory construction the extent of the Employment Tribunal's powers in this regard. I shall therefore first consider the statutory framework before returning to the decision in **Johnson** and considering whether that alters the provisional conclusion I reach.

The Statutory Framework and the Rules

11. Unlike in Part 21 of the Civil Procedure Rules 1998 ("the CPR**")** there is no provision in the 2013 Rules dealing with protected parties, nor is there any express provision for addressing issues of capacity or making provision for the appointment of a litigation friend. The first question that arises on this appeal is whether, notwithstanding the absence of any express power, the power to appoint a litigation friend is implicitly provided for in the 2013 Rules.

12. The 2013 Rules are made under the authority of s.7 of the Employment Tribunals Act 1996 ("ETA 1996"**)** and came into force on 29 July 2013, applying to all (or the majority of) cases, irrespective of when they were commenced. The ETA 1996 confers power on the Secretary of State to make regulations for the establishment of employment tribunals and provides that employment tribunals shall exercise the jurisdiction conferred on them by or by virtue of the ETA 1996 or any other Act.

13. Section 7(1) is the enabling provision for the Rules. It empowers the Secretary of State by regulations to make:

> **"… such provision as appears to him to be necessary or expedient with respect to proceedings before employment tribunals."**

That is a broad general power. The more specific power in s.7(3) which provides that procedure regulations may make provision for a range of matters including prescribing the procedure to be followed in employment tribunal proceedings, does not limit the broad general power in s.7(1) ETA 1996.

14. Although a litigation friend has wide authority to deal with a party's legal rights in the way litigation and proceedings are conducted, the appointment of a litigation friend is a procedural matter and not a matter of substance. It falls within the practice and procedure of a court or tribunal to be regulated by rules of procedure. There is no express power in s.7 ETA 1996 to provide for rules for the appointment of litigation friends by employment tribunals. However, the absence of an express power in primary enabling legislation for civil procedure rules relating to the appointment of litigation friends has not prevented broad, general powers in the Supreme Court of Judicature (Consolidation) Act 1925 (s.99) [1] or the Civil Procedure Act 1997 (schedule 1, paragraph 1) and the equivalent provisions in the County Courts Acts 1959 and 1984 from being construed so as to authorise the appointment of litigation friends.

15. I recognise that employment tribunals, as creatures of statute, are not in the same position as the Senior Courts, in that they (like the County Courts) have no inherent jurisdiction. They derive their powers from the statute that created them. However, the power

[1] The Supreme Court of Judicature Act 1873 (s.69) contained a reference to next friends in Rule 9 of the Schedule to the 1873 Act, but it is in limited terms and simply provided that no person should be added as a next friend of a plaintiff under a disability without his consent thereto.

in s.7(1) ETA 1996 is broadly analogous with the rule-making powers in the Acts and in particular, the County Courts Acts, to which I have just referred. These, while expressed in broad terms, were regarded as capable of authorising rules regarding the appointment of a next or litigation friend in appropriate cases. Section 7(1) is drafted widely and includes the regulation of any aspect of proceedings in the employment tribunal as appear necessary or expedient. It seems to me that s.7 ETA 1996 properly construed necessarily includes making regulations that are necessary or expedient for enabling a party as a matter of procedure to participate in proceedings where otherwise he or she would be prevented from doing so by reason of incapacity. In other words, in my judgment, s.7 (1) ETA does provide the vires for rules affording power to appoint litigation friends for people who lack capacity to conduct litigation.

16. Schedule 1, which is applied to all employment tribunal proceedings, by Regulation 13 of the 2013 Rules, contains the rules of procedure governing all employment tribunal proceedings. So far as relevant, the 2013 Rules make the following provision. Rule 1 is an interpretation provision. Rule 1(3) provides a definition for a "case management order"

> **"… being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment; …"**

17. Rule 2 deals with the overriding objective, enabling tribunals to deal with cases fairly and justly, and makes clear that dealing with a case fairly and justly includes, so far as practicable, "ensuring that the parties are on an equal footing".

18. Rule 29 deals with case management powers. It provides:

> **"29. *Case management orders***
>
> **The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not**

restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."

19. Rule 35 provides:

"35. *Other persons*

The Tribunal may permit any person to participate in proceedings, on such terms as may be specified, in respect of any matter in which that person has a legitimate interest."

20. Rule 41 provides:

"41. *General*

The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."

21. Rule 29 of the 2013 Rules empowers employment tribunals to make case management orders at any stage of the proceedings whether on their own initiative or on application by the parties. Case management orders are widely defined as including any order or decision of any kind in relation to the conduct of proceedings. Unlike Rule 10 of the 2004 Rules, Rule 29 expressly provides that "The particular powers identified" in the rules that follow Rule 29 "do not restrict the general power" to make case management orders. Thus, while as a matter of general statutory interpretation provision for the specific excludes the general, that is not the approach to be adopted in interpreting Rule 29 of the 2013 Rules. That is consistent with the approach adopted by employment tribunals to granting stays. In the 2013 Rules there is no express power to stay a case unless it relates to a stay for lead cases dealt with under Rule 36. Nevertheless, there has never been any suggestion that employment tribunals do not have power to stay cases for reasons other than that there are to be cases treated as lead cases.

22. Furthermore, Rule 29 is to be interpreted in accordance with the overriding objective, as the 2013 Rules make clear. That includes dealing with a case fairly and justly and so far as practicable ensuring that the parties are on an equal footing. To continue with a hearing with an unrepresented litigant who lacks mental capacity to conduct litigation is tantamount to continuing with the hearing in that party's absence and flies in the face of a Rule designed to ensure so far as practicable that parties are on an equal footing. Rules 35 and 41 do not detract from the breadth of Rule 29, but support it.

23. Significantly, as both the Appellant and the Interveners argue, it would be incompatible with the common law duty of fairness (which includes the right to an effective remedy for a legal wrong) to read either s.7 (1) of the ETA 1996 or the power to make a case management order in the 2013 Rules as not empowering employment tribunals to appoint a litigation friend in a case where a litigant lacks litigation capacity. There is no doubt that if a litigation friend is not appointed to act for a claimant in employment tribunal proceedings that claimant, if under a disability that leads to a lack of mental capacity to conduct proceedings, will not be able to put forward evidence or make representations and will be unable to test the evidence for the respondent. Such a claimant, as a person without capacity, will be unable to instruct a solicitor to act on his or her behalf in proceedings or for the purposes of any appeal. That is because a solicitor cannot act for a client without litigation capacity since any retainer between a client and a solicitor terminates in the event of the client losing capacity (see **Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust** [2015] EWCA Civ 18).

24. In this regard, I have been provided with The Law Society's Mental Health and Disability Committee Practice Note on meeting the needs of vulnerable clients. This draws

A together obligations from statute, observations from practice and ethical requirements that may arise for solicitors acting for vulnerable clients. At paragraph 4.6, guidance is given about assessing capacity when deciding whether to accept a client's instructions, including information as to the Mental Capacity Act 2005 and the guiding principle in that Act that there is a presumption of capacity. At paragraph 4.7, guidance is given as to what happens when a client lacks capacity to give the solicitor instructions. The guidance demonstrates that there is a particular difficulty for solicitors acting for a vulnerable client who has or might have lost capacity in the course of proceedings. The guidance provides:

> **"4.7. What happens when a client lacks capacity to give you instructions?**
>
> **If you consider that a potential client lacks capacity to give you instructions, you may be entitled to decline to act on their behalf. If you do wish to act on their behalf, you must first make sure that you are able to identify a person who has the requisite authority to give you instructions (see 4.7.1. below).**
>
> **If you consider that an existing client has lost the capacity to continue to give instructions, then the following considerations apply:**
>
> > **generally a retainer terminates by operation of law where a client loses the capacity to give or confirm instructions**
> >
> > **however, there may be exceptions to this rule (in particular where the retainer has provided for the potential loss of such capacity).**
>
> **Where an existing client loses capacity to instruct you, you should as far as practicable take action to protect your client's interests. As set out below, if you are to continue to act, you need to make sure that you have identified a person who is able to give you instructions.**
>
> **If you remain doubtful as to the correct course of action you should contact the SRA [Solicitors Regulation Authority] Ethics Helpline.**
>
> **4.7.1. Taking instructions on behalf of a client who lacks capacity**
>
> **Depending on the circumstances of the case, you may be able to act, or continue to act on behalf of a client lacking capacity to instruct you by obtaining your instructions from a litigation friend, attorney or court appointed deputy. …"**

25. Further, the right of a citizen to access a court or tribunal and thereby to access justice is a right of the highest constitutional importance and legislation removing that right is *prima facie* contrary to the rule of law, as recognised in decisions such as **Anisminic Ltd v. Foreign Compensation Commission** [1969] 2 AC 147. Clear and explicit words are required to justify a restriction to the constitutional right of unimpeded access to courts and tribunals.

26. An aspect of common law fairness is the right to an effective remedy for a legal wrong. In **Jones v Kaney** [2011] UKSC 13 Lord Dyson held as follows:

> **"13. The general rule that where there is a wrong there should be a remedy is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional. As has been frequently stated, any justification must be necessary and requires strict and cogent justification …"**

Further, as the Supreme Court explained in **Unison, R (on the application of) v. Lord Chancellor** [2017] UKSC 51:

> **"72. When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect. It does not envisage that every case of a breach of those rights will result in a claim before an ET. But the possibility of claims being brought by employees whose rights are infringed must exist, if employment relationships are to be based on respect for those rights. Equally, although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail. It is thus the claims which are brought before an ET which enable legislation to have the deterrent and other effects which Parliament intended, provide authoritative guidance as to its meaning and application, and underpin alternative methods of dispute resolution".**

27. The appointment of a litigation friend for a person lacking capacity raises an issue not just of representation but of participation. If a person who lacks litigation capacity cannot have a litigation friend to assist her, then she cannot participate in proceedings in any real sense. Without a litigation friend the individual cannot access a court or tribunal to establish a wrong and cannot obtain any remedy for an established wrong. It seems to me in those circumstances that it would be incompatible with the common law duty of fairness to read s.7 ETA 1996 or the power to make a case management order in Rule 29, as not empowering employment tribunals to appoint a litigation friend in a case where a litigant lacks litigation capacity.

28. I can see no necessary justification for construing the 2013 Rules in a way that amounts to an impediment or obstacle to the right to access justice to achieve a remedy for a legal wrong

for those who lack litigation capacity but wish to vindicate their legal rights. Consistently with the principle established in **R (Pierson) v Secretary of State for the Home Department** [1998] AC 539 that a statutory power, although expressed in general terms, should not be construed to authorise acts that infringe fundamental principles of common law, Parliament is presumed not to have intended to curtail such rights unless that intention is clearly indicated either expressly or by necessary implication, and is reasonably necessary to achieve a legitimate aim.

29. I reach the same conclusion by reference to the strong interpretive obligation under s.3 HRA. On this issue the Secretary of State adopts a neutral stance, but it seems to me, in agreement with the Appellant and The Law Society, that to interpret Rule 29 as permitting the appointment of a litigation friend in an appropriate case, accords with s.3 HRA and goes with the grain of the legislation and not against it.

30. The primary and delegated legislation with which I am concerned regulates employment tribunal procedure in accordance with the overriding objective. That objective, which includes the requirement to deal with cases fairly and justly and to ensure that parties are on an equal footing, cannot be achieved in the case of a party who does not have capacity to conduct litigation without some means of enabling such a party to access justice to vindicate their rights. Other examples of rules performing a similar function are found in the 2013 Rules and regulate matters of practice and procedure (see for example Rules 35 and 41). Here, the Appellant has a legitimate interest in the proceedings in the Employment Tribunal, which began at a stage when she had capacity. She has a cause of action she wishes and is entitled to vindicate. She has common law rights to a fair trial together with rights under Article 6 of the European Convention on Human Rights and Fundamental Freedoms. If there is no means by which a

litigation friend can be appointed in the Employment Tribunal, she will be put in a materially different position to other litigants acting without a disability and who have capacity. I can see no legitimate aim to be achieved, nor do I consider that the absence of an avenue for appointing a litigation friend in these circumstances can be regarded as a proportionate means of achieving a legitimate aim.

31. I have not found it necessary to consider the submissions made by reference to the United Nations Convention on the Rights of Persons with Disabilities, to which the UK is a signatory. This is an unincorporated treaty that has not been enacted into UK law and has no direct effect. It does not confer enforceable rights. I consider, in agreement with Morris J, in **R (Davey) v Oxfordshire County Council** [2017] All ER (D) 113 at paragraph 27, that great care must be taken in deploying these provisions as determinative tools for the interpretation of domestic legislation. It seems to me that in this case it is unnecessary to resort to these provisions in any event given the conclusions I have already expressed.

32. Accordingly, while there is no express power provided by the ETA 1996 or the 2013 Rules made under it, the appointment of a litigation friend is within the power to make a case management order in the 2013 Rules as a procedural matter in a case where otherwise a litigant who lacks capacity to conduct litigation would have no means of accessing justice or achieving a remedy for a legal wrong.

33. I return to the decision in **Johnson** to consider whether it requires me to take a different approach. I note that **Johnson** was decided in the context of the 2004 Rules. These are different to the 2013 Rules. Unlike Rule 10(2) of the 2004 Rules, which listed 20 examples of case management orders that could be made, Rule 29 of the 2013 Rules contains no list.

A Moreover, as I have noted, it expressly states that the particular powers identified in the Rules that follow Rule 29 do not restrict the generally expressed power in that Rule. The 2013 Rules are significantly less prescriptive than the 2004 Rules.

B

34. Furthermore, the observations in **Johnson** were obiter (see paragraph 14). Underhill J was reluctant, as he said in terms, to lay down specific rules having not had the benefit of full argument on the matter (see paragraph 10). He expressly declined to reach a definite decision C as to whether tribunals have the power to dismiss proceedings commenced by a person who does not have litigation capacity (see paragraphs 9 and 14), and he did not provide definitive guidance as to the steps open to tribunals that have grounds to believe that a litigant before D them does not have capacity to conduct the case. It is unsurprising that this was his approach. There was no adversarial argument in that case; and the case was very different on its facts, there being real uncertainty as to whether or not the individual lacked capacity. Moreover, the issue on the appeal in **Johnson** was whether the Tribunal erred in law in granting a stay of E proceedings to enable a request to be made to the Official Solicitor to report on the Claimant's mental capacity rather than whether given a finding of incapacity a litigation friend should be appointed.

F

35. It is also right to note that a number of matters were not cited to Underhill J and it is not apparent from his judgment that arguments based on the overriding objective and the need to G deal with parties on an equal footing were considered. There is no reference to arguments based on the common law duty of fairness or to the strong interpretive obligation in s.3 HRA, and nor were these accordingly addressed. It seems to me in these circumstances, whilst of course considerable deference is due to the views of Underhill J in **Johnson** the matters that I H

have just identified amount to exceptional circumstances that justify me in departing from his decision.

36. I am fortified in reaching that conclusion by the judgment of Picken J in the case of C, R (on the application of v. FTT Procedure Committee, the Lord Chancellor [2016] EWHC 707 (Admin). In that case he considered whether the First-Tier Tribunal Rules ("FTT Rules") include a power to appoint a litigation friend. At the permission stage the Lord Chancellor, who had been joined in the proceedings, supported the argument that the FTT's decision that the Rules did not permit such an appointment was unlawful and that the FTT did in fact have power to appoint a litigation friend. For the reasons set out at paragraphs 9 to 19 of that judgment, Picken J agreed with the claimant and the Lord Chancellor that there was power to appoint a litigation friend in the FTT Rules. Were that not the case, the claimant would have been unable to litigate and such a situation would amount to a breach of the common law duty of fairness. In reaching that conclusion, he distinguished (and doubted) the decision of Underhill J to the contrary in **Johnson**.

Guidance

37. Having circulated my judgment in draft, I have been provided with the judgment in **AM (Afghanistan) v. SSHD** [2017] EWCA Civ 1123 where the Senior President comments on further guidance available on these issues and indicates that the Tribunals Procedure Committee is to consider rules defining and regulating the way in which issues of capacity are dealt with, and the appointment and conduct of litigation friends. This must be addressed as a matter of urgency.

38. Furthermore and notwithstanding my conclusions in this judgment, I fully endorse the observations of Underhill J in **Johnson** that employment tribunals should tread carefully if invited to embark down the road of investigating a party's mental capacity and should only accede to such an approach where there is clear evidence to support it. This is emphatically not an avenue that should be permitted to be used by respondents who, for whatever reason, conclude that a claimant is suffering from a mental illness by reason of the allegations or claims he or she brings. There is ample power in the 2013 Rules to strike out a claim or allegation on the basis of it being misconceived or in circumstances where a party behaves unreasonably or is vexatious without resorting to an investigation into capacity.

39. Subject to that important caveat, and in the interim before express rules are developed the following broad guidance may be helpful. The CPR do not apply in the Employment Tribunal or Employment Appeal Tribunal. Nevertheless the special provisions contained in CPR 21 provide guidance that is relevant by analogy to the approach to be adopted by employment tribunals where the question of appointment of a litigation friend arises. There are a number of important principles identified by and referred to in CPR 21 that are relevant and seem to me to be capable of being applied by analogy:

(a) First and foremost, a person is assumed to have capacity unless it is established that they lack capacity. The assumption of capacity can only be overridden if the person concerned is assessed as lacking the mental capacity to make a particular decision for themselves at the relevant time: see the Mental Capacity Act 2005, s.3, which provides a formula to be used in making that assessment. The burden of proof is on the person who asserts that capacity is lacking and if there is any doubt as to whether a person lacks capacity, that is to be decided on the balance of probabilities: see s.2(4) Mental Capacity Act 2005.

(b) Secondly, a person should not be permitted to act as a litigation friend unless he or she can fairly and competently conduct proceedings on behalf of the protected party and has no personal interest in the litigation or an interest adverse to that protected party.

(c) Thirdly, an application for an order appointing a litigation friend must be supported by evidence demonstrating that the person to be appointed is suitable and consents to act. Evidence must also be provided establishing the basis of the litigation friend's belief that the party lacks capacity to conduct the proceedings.

Conclusion

40. For all these reasons, I have concluded that the 2013 Rules are wide enough, read and interpreted in accordance with the common law duty of fairness and/or the strong interpretive obligation in s.3 HRA, to permit the appointment of litigation friends in a case where a party lacks capacity to conduct litigation and that s.7 ETA provides the necessary vires. In those circumstances, the appeal is allowed.

41. I understand that the individual identified in this case to be the Claimant's litigation friend may no longer be available or willing to act in that capacity, and in those circumstances it is not open to me to substitute a decision appointing or permitting the appointment of a litigation friend in this case. The matter will accordingly have to return to the Employment Tribunal for it to deal with that question. Although I can see no reason why Employment Judge Baty should not deal with that application, there is no reason to reserve it to Employment Judge Baty.

A

42. Finally, I express my thanks to all parties and counsel for the assistance they have given me in dealing with this appeal.

B

C

D

E

F

G

H