Appeal No. UKEAT/0050/16/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 January 2017
Judgment handed down on 27 February 2018

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MS N LEEKS — APPELLANT

NORFOLK & NORWICH UNIVERSITY HOSPITAL
NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DECLAN O'DEMPSEY (of Counsel) Direct Public Access
For the Respondent	MS CLARE HARRINGTON (of Counsel) Instructed by: Messrs Birketts LLP Kingfisher House Gliders Way Off Barrack Street Norwich NR3 1UB

SUMMARY

PRACTICE AND PROCEDURE - Case management

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The argument that in cases involving a disabled person where an ET had failed to make a reasonable adjustment by extending the time for complying with a procedural (case management) Order or postponing or adjourning a hearing fell to be considered by the EAT making its own decision as to what was proportionate, fair and just and not by a conventional appellate scrutiny as to whether there was an error of law was rejected. This was not the inevitable consequence of the judgment of the Supreme Court in **R (Osborn) v Parole Board** [2013] UKSC 61, [2014] 1 AC 1115 as argued in an article by Ms Claire Darwin of counsel starting at page 423 of the *Industrial Law Journal 2016* and accepted (*obiter dictum*) by the EAT in **Rackham v NHS Professionals Ltd** UKEAT/0110/15/LA and by the Court of Appeal in Northern Ireland in the case of **Galo v Bombardier Aerospace UK** [2016] NICA 25.

In the civil jurisdiction the need to take account of fundamental rights has been recognised as part of the exercise of a judicial discretion as to whether or not a case should be adjourned or a judgment set aside (see **Bank of Scotland plc v Pereira** [2011] 1 WLR 2391, **Levy v Ellis-Carr** [2012] EWHC 63 Ch, **Decker v Hopcraft** [2015] EWHC 1170 QB, **Governor and Company of the Bank of Ireland v Jaffery** [2012] EWHC 734, **Forrester Ketley v Brent** [2012] EWCA Civ 324, **TBO Investments Ltd v Mohun-Smith and Another** [2016] EWCA Civ 403, [2016] 1 WLR 2919 and **Emojevbe v Secretary of State for Transport** [2017] EWCA Civ 934); likewise in the jurisdiction of the ET (see **Teinaz v London Borough of Wandsworth** [2002] EWCA Civ 1040, [2002] ICR 1471).

But this need to take account of proportionality in respect of the impact of decisions on those suffering a disability did not lead to a different approach to appellate scrutiny and whilst expressing the current approach as "***Wednesbury*** *unreasonableness*" might not always be understood as requiring a thorough scrutiny as to whether there had been an error of law, the alternative proposed of this Tribunal making its own decision as to what was fair and just was not acceptable not least because of the statutory jurisdiction of this Tribunal. Consequently, **O'Cathail v Transport for London** [2013] EWCA Civ 21, [2013] ICR 614 and **Riley v Crown Prosecution Service** [2013] EWCA Civ 951, [2013] IRLR 966 have not been overruled and remain binding on this Tribunal.

The judgment of a division of the Tribunal in **Pye v Queen Mary University of London** UKEAT/0151/15/MC would be followed in preference to the *obiter dictum* in **Rackham** and the decision in the NICA in **Galo** whilst providing admirable guidance and undoubtedly correct in the result, in so far as the approach to appellate scrutiny differed from that in **Teinaz** and **O'Cathail**, was an erroneous decision of an appellate Tribunal hearing appeals from a Tribunal of first instance and thus of equivalent status to this Tribunal and would not be followed; **Lock and Another v British Gas Trading Ltd (No. 2)** UKEAT/0189/15/BA, [2016] IRLR 316 applied.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal partly from the Judgment and Written Reasons of an Employment Tribunal ("ET") comprising Employment Judge ("EJ") Postle sitting alone at Norwich on 28 August 2015, the Judgment and Written Reasons having been sent to the parties on 2 October 2015. By them Employment Judge Postle struck out the Appellant's claim of disability discrimination pursuant to Rule 37(1)(a) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules") on the grounds that it had no reasonable prospect of success and pursuant to Rule 37(1)(c) for failure to comply with an Order or direction (to provide further particulars) and pursuant to Rule 37(1)(d) on account of failure to pursue the claim actively (by failing to provide the same particulars). But, as I explain below, it is not that part of his Judgment that is directly under appeal. I say directly because, although there is no appeal as such against the strike out, it has been argued that I should adopt a holistic perspective and consider the matter cumulatively. From what follows it will be seen that I have been prepared to do this to the extent necessary to consider the submissions addressed to me on behalf of the Appellant but strictly speaking the only part of the reasoned decision of EJ Postle with which I am concerned is that he considered correspondence, which it is argued he should not have considered and that he awarded costs against the Appellant. The fact that the matter came before him on 28 August 2015 was because on 27 August 2015 EJ Sigsworth had refused an application to postpone the Preliminary Hearing that day or to substitute a telephone hearing for it. This was a direction sent by letter. In so far as it was reasoned, it referred to an absence of any change of circumstances. Earlier on 26 August EJ Postle had refused an application for an adjournment and indicated that issues as to compliance with Orders would be dealt with at the Preliminary Hearing. Again this was essentially a direction without Reasons being given.

Expanded Reasons have never been requested for either decision but consideration of them forms another part of the appeal.

2. The Respondent has been represented on this appeal by Ms Harrington of counsel, as was the case below. The Appellant has been represented by Mr O'Dempsey of counsel, who did not appear below and who I understand came into this appeal at relatively short notice. Whilst I would have wished to have been able to complete this decision long before now and certainly before what Lord Bridge referred to as "*the statutory presumption of senility*" arrived in my case that has proved not to be possible and I regret and apologise for this very long delay, which has resulted from my inability to deal with this Judgment before now. As it is, this appeal has the unique character of being my last Judgment in this Tribunal.

The Facts

3. The Appellant was employed as a Biomedical Scientist by the Respondent NHS Trust between 19 May 2014 and 18 December 2014 when she was dismissed. In her subsequent complaint to the ET (by an ET1 form received on 14 May 2015) the Claimant asserted that she had been discriminated against on the grounds of disability. In its grounds of resistance attached to the ET3 form (see paragraph 13 at page 37 of the main appeal bundle) the Respondent accepted that the Appellant was a disabled person within the definition of disability in the **Equality Act 2010** ("EqA") but for reasons which are unclear to me the ET appears to have regarded disability as an issue and on 7 July 2015 directed that the Appellant should obtain a medical report dealing with the issue as to whether she was a disabled person (see pages 64 to 67 of the main bundle). On 10 July 2015 the Respondent sent an e-mail to the ET pointing out that it had always accepted the Appellant was a disabled person and on 3 August

2015 EJ Laidler revoked the requirement to obtain a medical report (see page 61 of the supplementary bundle).

4. A Preliminary Hearing had been ordered to take place on 9 July 2015 "*to make case management orders including orders relating to the conduct of the final hearing*" (see the directions letter dated 20 May 2015 at page 1 of the supplementary bundle). On 2 July 2015 by e-mail, sent to both the Appellant and the ET, the Respondent gave notice of its intention to seek a Deposit Order at the forthcoming Preliminary Hearing, expressed the view that the complaint as set out in the ET1 form lacked sufficient particularity and attached a request for further information (see pages 32 to 37 of the supplementary bundle) and on 8 July 2015 EJ Laidler ordered the Appellant to provide further and better particulars within a period ending on 28 July 2015 (see pages 46 to 48 of the supplementary bundle). On the same day the same Judge directed that the Preliminary Hearing listed for the following day be postponed and relisted for 28 August 2015 so as to enable the request for further particulars to be answered (see pages 44 and 45 of the supplementary bundle).

5. On 24 July 2015, before the time limit for providing the further information expired, the Appellant requested an extension of 11 weeks to provide this information, although it should be noted that in her request she referred only to the Order of 7 July 2015. At the same time she requested an extension of time until 13 November 2015 for the holding of any Preliminary Hearing. She relied upon her own ill-health and that of her husband, who was advising her, as the reason for such extensions (see pages 51 and 52 of the supplementary bundle). She said this about her own condition:

> **"On account of various types of pains and discomforts associated with my various Long term ill health conditions and Disabilities, I am not able to draft, and finalize the required Disclosures, Further and Better particulars of [the] claimant's claim and other details of [the] claimant's claim within the current deadline of by [sic] Tuesday 28 July 2015."**

As to her husband's condition she referred to him not having fully recovered from two emergency admissions to hospital. She also pointed out that she did not have an appointment with her GP until 11 August 2015 and that she could not expect to receive any written statement from her GP about her health until five weeks after such a visit. Consequently, she suggested the time for complying with the Order of 7 July 2015 should be extended until 13 October 2015.

6. She also enclosed letters from various doctors, which both pre-dated and post-dated her employment by the Respondent (see pages 54 to 58 of the supplementary bundle). A letter from a locum GP dated 13 October 2012 referred to her having suffered fatigue since cancer in 2007 and her having developed arthralgia, particularly affecting the left hand. A letter from another locum GP dated 23 March 2013 referred to her having been newly diagnosed as diabetic. A letter from a GP dated 28 February 2014 described the side-effects of medication taken to reduce the pain consequent upon her having undergone surgery for cancer in 2007 as being "*sleepiness & fatigue*". A letter from her GP dated 17 February 2015 (see page 82 of the main bundle) confirmed that a diagnosis of fibromyalgia been made in January 2015 and that this was a condition which could "*lead to generalised body pains and also affect a person's mood*". It could also "*impact on a person's ability to write a witness statement in a timely manner*". A further letter from another GP dated 22 March 2015 referred to the diagnosis of fibromyalgia and described her symptoms as "*pain all over the body … widespread pain … increased sensitivity to cold, fatigue, muscle stiffness, difficulty sleeping*".

7. The Appellant also included information about her husband's emergency admissions to hospital in June 2015 and again in July 2015. In fact, the condition referred to in the letters was

redacted and the letters contained no information as to diagnosis, prognosis or disability (see pages 59 and 60 of the supplementary bundle).

8. In response to that application the Respondent sent an e-mail on 7 August 2015 to both the ET and to the Appellant (see page 63 of the supplementary bundle) expressing some understanding of her difficulties but opposing both postponement of the Preliminary Hearing and such a long extension to answer the request for further particulars. The author pointed out that the Appellant was no longer required to provide the medical evidence directed by the ET Order of 7 July 2015 and only had to supply information about her case, which the Respondent suggested should be possible by 20 August 2015. On 10 August 2015 EJ Postle refused the application for an extension on the basis that there was an "*absence of a full medical report/ evidence indicating the medical reasons the Claimant is unable or incapable of complying with those directions*" (see page 65 of the supplementary bundle). The directions referred to were explicitly stated to be those of 8 July 2015.

9. The Appellant renewed her application for postponement of the Preliminary Hearing due to take place on 28 August 2017 by e-mail of 19 August 2015 (see pages 96 to 103 of the main bundle). In this application, relying on fibromyalgia, which she said made it impossible for her "*to comply with the order that I draft my further particulars in a timely manner, within the deadline given to me*", and also relying on chronic dyspepsia, in respect of which she attached considerable detail of the medication she was taking, she sought a postponement of the Preliminary Hearing by a period of between five and seven weeks; alternatively she sought "*a Telephone CMD/PHR*" so she could give some "*further particulars*" of the claim. The Respondent stated its opposition to the further application in an e-mail dated 20 August 2015 (see pages 104 and 105 of the main bundle). In doing so it gave notice that at the forthcoming

Preliminary Hearing an application would be made for the claim to be struck out under Rule 37(1)(a), (c) and (d) of the **Rules** and if such an application was successful the Respondent would apply for an Order that the Appellant "*pay it's wasted costs to date under Rule 75 of the ET Regulations*".

10. EJ Postle refused the Appellant's further application on 26 August 2015 saying "*[t]he matters of compliance with Tribunal Orders will be dealt with at this hearing*" (see page 78 of the supplementary bundle). This was, of course, less than two days before the Preliminary Hearing was due to start. On 27 August 2015, in an e-mail to the ET timed at 17:42 hours, the Appellant forwarded written submissions opposing the application to strike out, which was to be made by the Respondent at the Preliminary Hearing the following day (see pages 109 to 112 of the main bundle) and the making of any Wasted Costs Order. It seems reasonable to infer that by then she would have received a Schedule of Costs, which was attached to an e-mail timed at 16:22 hours on 27 August 2015 sent on behalf of the Respondent to the Appellant (see page 124 of the main bundle).

11. In her e-mail of 27 August 2015 the Appellant stated that both she and her husband were too ill to attend, complained about the postponement of the Preliminary Hearing from its original date of 9 July 2015 and, amongst other things, repeated her request that she be given between about five and seven weeks in order to provide the further and better particulars. This appears to have been treated by EJ Sigsworth as an application for a postponement and on 27 August 2015 he refused to grant any postponement, giving his reasons as "*the Employment Judge has refused the application previously and there has been no change in circumstances*" (see page 122 of the main bundle).

The Reasons

12. The Appellant did not attend the Preliminary Hearing held on the following day. EJ Postle considered her written submissions, which he dealt with at paragraphs 2 to 9 of the Reasons. The Appellant had relied upon what she described as the "*worsening symptoms*" of both herself and her husband. EJ Postle took the view that despite a request by him for further medical information, none had been forthcoming in respect of the Appellant (see paragraph 3 of the Reasons); nor was there any medical evidence to support the assertion that the Appellant's husband was too ill to attend (see paragraph 6 of the Reasons). He did not accept the Preliminary Hearing originally set for 9 July 2015 had been adjourned as a result of any application by the Respondent, as had been contended by the Appellant in correspondence (see paragraph 4 of the Reasons), nor did he think that a proposed tube strike in London on 26 August 2015, which had in fact been cancelled some days previously, provided any explanation for the Appellant being unable to attend on 28 August 2015. EJ Postle observed that what the Claimant had been asked to do was "*to provide … a precise breakdown of each type of complaint she was bringing, the detail, dates etc*". He did not regard the request for that as raising "*difficult questions*" or that providing such detail was "*a difficult exercise*" (see paragraphs 9 and 11 of the Reasons). Furthermore, the Appellant "*had failed to provide full medical evidence identifying the medical reasons why she was incapable of complying with the Tribunal's orders*" (see paragraphs 12 to 14 of the Reasons).

13. EJ Postle directed himself as the law at paragraph 18 of the Reasons, both in terms of the text of Rule 37 and a decision of a division of this Tribunal presided over by the then President, Langstaff J, in **Chandhok and Another v Tirkey** UKEAT/0190/14/KN, [2015] IRLR 195, [2015] ICR 527. In that case this Tribunal was mainly concerned with whether the features of discrimination on the grounds of "caste" fell within the scope of discrimination as

defined by the terms of the **EqA** but that had led to discussion of the importance of the ET1 and ET3 forms in defining the dispute and a further discussion as to the use of strike out applications in discrimination cases. EJ Postle regarded two principles emerging from **Chandhok** as significant. Firstly, that some discrimination cases might be struck out, particularly where only a possibility of discrimination was disclosed by the pleadings, leaving the essential details to be made good by the evidence. Secondly, therefore, the Claimant's case had to exist in the pleadings and not elsewhere. None of that, however, has been at the heart of this appeal. Mr O'Dempsey did not challenge the principles which EJ Postle derived from **Chandhok**. It was the ET's cumulative approach to the need to make adjustments to the procedure so as to take proper account of the Appellant's disability that he challenged.

14. EJ Postle's conclusions are in strong terms. At paragraph 25.1 of the Reasons he expressed amazement that some Claimants allege discrimination in "*vague terms*" in the ET1 form and when asked to be more definite then fail to provide further information. He concluded that this was also the situation in the instant case and consequently that the claim had no reasonable prospect of success because "*at best … [she] is alleging a difference of treatment and a difference of the protected characteristic but that is not sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent has committed an unlawful act of discrimination*" (paragraph 25.3).

15. Secondly, he concluded that "*the facts speak for themselves*", namely that the Appellant had "*failed to comply with the Tribunal orders*" (paragraph 25.4) and he went on to say:

> **"25.4. … The order was made on the 8th July to be complied with by the 28th July. Here we are the 28th August and all the Claimant has done has asked for originally an 11 week extension then a 5 to 7 week extension. She says she cannot provide the information because of her various conditions but that is entirely at odds to her being able to work as a locum in July before she was struck off and then attend to the Health and Care Professional Council's misconduct hearing on the 29th July. Her various conditions did not prevent her clearly from preparing for that hearing and attending it."**

16. Thirdly, he found at paragraph 25.5 from the facts as he understood them to be that the Appellant "*for reasons best known to … [herself] … she simply does not want to tell the Tribunal and the Respondent the detail of her claim*". Therefore, he also concluded that she was "*not actively pursuing the claim*" and stated he had "*grave reservations she will ever properly pursue the claim or provide the detail of her claim*".

17. Consequently, "*[f]or those reasons*" (i.e. all three reasons set out above at paragraphs 14, 15 and 16 of this Judgment) he struck out the claim. Before deciding to do so he had considered the alternative of making a Deposit Order and an Unless Order. He had not done so, however, because he had concluded that he "*had no grounds for believing the Claimant would ever comply with the unless order or the deposit order*" and that to do so would be "*simply delaying the inevitable and would add to the Respondent's costs*" (see paragraph 25.6).

18. After succeeding in the strike out application the Respondent applied for costs on the ground set out in the **Rules** at Rule 76(1)(a), namely that the Appellant had "*acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted*". The Respondent relied not only on the Appellant having brought the proceedings but also on her unreasonable conduct "*in making repeated applications and failing to particularise her claim*" (see paragraph 26.1). Costs of £3,338.60 were ordered to be paid by the Appellant to the Respondent by EJ Postle. In making the Order he considered correspondence marked "*without prejudice save as to costs*", although there is an issue as to whether he first saw this material before he was considering the application for costs.

19. This appeal proceeded to a Full Hearing on the direction of Kerr J on 29 June 2016 after a Preliminary Hearing. He allowed it to proceed only on the following grounds:

a. that the ET erred in law in its decision to refuse the Appellant's request for a telephone hearing instead of the personal oral hearing listed to take place on 28 August 2015;

b. that the ET erred in law in its decision to refuse the Appellant's application for a postponement of the hearing fixed for 28 August 2015;

c. that there was a procedural irregularity at the hearing on 28 August 2015 in that the EJ Postle may have read "*without prejudice save as to costs*" correspondence when determining an issue other than costs;

d. that there was a procedural irregularity by reason of insufficient notice of the Respondent's costs application and insufficient opportunity to make representations in opposition to that application on 28 August 2015.

The Submissions

20. As I mentioned above, Mr O'Dempsey took over the conduct of this appeal at short notice and so it is perhaps not surprising that his submissions travelled over ground not identified in the skeleton argument, which had been submitted by the Appellant herself before his late involvement in the appeal. Nevertheless, because his arguments seemed to me to address the grounds which Kerr J had permitted to proceed to the Full Hearing, grounds which might be regarded as elastic enough to cover rather more than the specific decisions referred to in them, and because it seemed to me it did not unfairly disadvantage the Respondent, I was prepared to allow him to develop them even though they were essentially new.

21. They had two themes, which, as it seems to me, in the end really merged into one. Firstly, that the approach of this Tribunal to appeals against some case management decisions made by ETs should be regarded as changed by the decision of the Supreme Court in **R (Osborn) v Parole Board** [2013] UKSC 61, [2014] 1 AC 1115. This derives from an article by Ms Claire Darwin of counsel starting at page 423 of the *Industrial Law Journal 2016*. Essentially, the argument is that in some cases the scrutiny on appeal should not be confined to whether the first instance decision was unreasonable but should extend to whether it was wrong. In **Osborn** one issue was how on judicial review the Court should scrutinise the decision of a single member of the Parole Board, who had decided an application on paper and then refused an oral hearing at which the application could be reconsidered. Lord Reed said this at paragraph 65 of the judgment:

> **"65. The first matter concerns the role of the court when considering whether a fair procedure was followed by a decision-making body such as the board. …**
>
> **[Some judicial pronouncements] might be read as suggesting that the question whether procedural fairness requires an oral hearing is a matter of judgment for the board, reviewable by the court only on *Wednesbury* grounds. That is not correct. The court must determine for itself whether a fair procedure was followed … Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness requires."**

Ms Darwin's article argued that the Court of Appeal's decisions in **O'Cathail v Transport for London** [2013] EWCA Civ 21, [2013] ICR 614 and **Riley v Crown Prosecution Service** [2013] EWCA Civ 951, [2013] IRLR 966, both of which approached appellate scrutiny of case management decisions from the point of view of reasonableness, had been impliedly overruled by **Osborn**.

22. Ms Darwin had taken the opportunity to press that argument before this Tribunal in **U v Butler & Wilson Ltd** UKEAT/0354/13/DM but that division (presided over by Wilkie J) in effect concluded that whatever the test, the EJ had erred in not adjourning an application for a review so as to give the Appellant an opportunity to reflect on what course he wished to pursue.

Consequently, it was not necessary for this Tribunal to decide what was now the correct approach in the light of **Osborn** and it declined to do so.

23. Mr O'Dempsey, like Ms Darwin in her article, also relied on the decision of a division of this Tribunal in **British Broadcasting Corporation v Roden** UKEAT/0385/14/DA, [2015] ICR 985 as providing support for the proposition that the approach in **O'Cathail** was no longer the correct approach on appeal to a case management decision made at first instance. The decision in question was the refusal of the EJ to set aside an Anonymity Order after promulgation of the substantive Judgment. A division of this Tribunal comprising Simler J, sitting alone, allowed the appeal. The conclusion in that case was put on an alternative basis. Firstly, Simler J did not accept that the making (or setting aside) of an Anonymity Order was "*to be seen as a case management decision involving the wide discretionary powers generally attributed to such decisions*". It was "*not an exercise of discretion at all*" rather it was a question to which there was "*a right or wrong answer*" (see paragraph 34). Secondly, if she was wrong as to that, then she could only set the decision aside if there was an error of law, which she concluded there had been because she accepted the argument that the EJ's conclusion the public cannot distinguish between allegations and proven charges ran contrary to high authority and was, therefore, wrong in law (see paragraphs 38 to 48). This part of her analysis seems to me to have been a conventional appellate analysis as to whether the correct balancing exercise carried out had been erroneous in point of law (see in particular paragraph 48).

24. Mr O'Dempsey also relied on a decision of a division of this Tribunal presided over by its then President, Langstaff J, in **Rackham v NHS Professionals Ltd** UKEAT/0110/15/LA. Langstaff J had pointed out at paragraph 42 of his judgment that in another decision of this Tribunal decided after the Supreme Court decision in **Osborn**, **Pye v Queen Mary University**

of London UKEAT/0151/15/MC, Elisabeth Laing J had confirmed the approach in **O' Cathail** as correct. Mr O'Dempsey submitted, however, that Langstaff J cannot really have accepted that as correct because his judgment then continued at paragraphs 43 to 50 with a significant discussion as to the nature of decisions about adjustments.

25. A full understanding of the then President's analysis can only be gained by considering all the paragraphs but for the sake of brevity I highlight some of what I consider to be the salient points. At paragraph 43 Langstaff J said "*there are some cases in which it is plain that a Tribunal has nothing that might sensibly be called a case management discretion to exercise in order to secure fairness*". He gave as an example the need for an interpreter. This is not a matter of discretion; either an interpreter is needed to enable the litigant to participate fully in the proceedings or an interpreter is not necessary. To deny an interpreter, when proper participation in the proceedings required an interpreter, amounted to a procedural irregularity akin to bias. He supported this analysis by reference to paragraph 41 of the judgment of this Tribunal in **Hak v St Christopher's Fellowship** UKEAT/0446/14. By analogy failure to make adjustments for disability "*would therefore be an essential matter of fairness open to review on appeal*" (see paragraph 45 of the judgment in **Rackham**).

26. But in **Rackham** the stark clarity of the above example was obscured, if not distorted, because it was "bound up necessarily with the consequential decision whether the case should be postponed to enable further enquiries to be made". Whether or not a case should be adjourned "viewed on its own, would normally be treated as a case management decision". Counsel for the Respondent, seeking to support the decision made by the EJ, suggested that, therefore, what had been decided in **Rackham** could be regarded as a "hybrid" decision and she referred to the speech of Lord Steyn in **R (Daly) v Secretary of State for the Home**

Department [2001] UKHL 26, [2001] 2 AC 532 at paragraphs 27 and 28, which emphasised the need for "proportionality" when **Convention** rights were engaged. The result of considering proportionality, Lord Steyn thought, was that "*the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions*". Given that "*the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight according to interests and considerations*" the consequence might be "*differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results*". In other words, whereas consideration as to whether a decision was "within the range of rational or reasonable responses" might result in a decision being upheld on appeal, consideration as whether a decision was proportionate might result in the opposite conclusion, namely that it should be altered or set aside on appeal.

27. Whilst recognising that at the end of the arguments in **Rackham** this Tribunal concluded that both counsel had really reached common ground it seems to me the argument as to which approach was to be adopted by this Tribunal was not actually resolved by Langstaff J and his colleagues. Mr O'Dempsey argued, however, that it was clear what his view was because he said this at paragraph 49 of his judgment:

> **"49. In this case, though we are attracted to the proportionality analysis that Miss Joffe proposed and that Mr Horan in reply adopted, we do not think that the decision actually depends upon the approach we take, though we would observe that we would be very hesitant before suggesting that a pure *Wednesbury* approach was appropriate in any case in which it appeared to the reviewing court that it would have been reasonable to have to make an adjustment if that adjustment appeared necessary to obtain proper equality of arms for someone with a relevant disability."**

A Consequently, the case was decided by asking "*whether there was any substantial unfairness to the Claimant in any event*" (see paragraph 50 of the judgment of Langstaff J) and it seems to me the above passage must be *obiter dictum*.

B

28. All of the above leads directly to, and, indeed, is dependent upon, the second main strand of the argument in relation to grounds 1 and 2, namely that in cases where the Claimant is suffering a disability it will be an error of law on the part of the ET not to recognise the C adverse impact of that on the disabled litigant's ability to comply with procedural steps and directions. In such circumstances failure to make the necessary reasonable adjustments so as to place the disabled litigant in a position where s/he can comply with procedural requirements D and by that means eliminate the disadvantage, which would otherwise be suffered, will render the decisions substantially unfair. At the core of this argument Mr O'Dempsey placed Articles 1, 13(1) and (2) of the **United Nations Convention on the Rights of Persons with Disabilities**. These provides as follows:

E

> **"1. The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.**
>
> **…**
>
> **13(1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.**
>
> **13(2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff."**

F

G

The need to comply with this kind of right, whether it derived from the **ECHR** or the **UN Convention** (or, as more often than not will be the case, both), submitted Mr O'Dempsey, had been recognised in **U v Butler & Wilson Ltd** (cited above), in **Rackham** (cited above) and

H

most particularly by the Court of Appeal in Northern Ireland ("NICA") in the case of **Galo v Bombardier Aerospace UK** [2016] NICA 25.

29. In **U** Wilkie J's division of this Tribunal agreed and accepted "*that the fact of the appellant's disability, as known to the EJ, was an important factor to which she had to have regard when making case management decisions in accordance with the overriding objective and reflecting good practice as advised by the Equal Treatment Bench Book*" (see paragraph 65 of the judgment).

30. In **Rackham** it was common ground there was a duty to make reasonable adjustments (see paragraph 31 of the judgment). In any event, Langstaff J accepted that it could not "*sensibly be disputed that a Tribunal has a duty as an organ of the state, as a public body, to make reasonable adjustments to accommodate the disabilities of Claimants*" (see paragraph 32 of the judgment). The purpose of reasonable adjustments was said to be "*to overcome such barriers so far as access to court is concerned*", and in particular "*to enable a party to give the full and proper account that they would wish to give to the Tribunal, as best they can be helped to give it*" (see paragraph 36 of the judgment).

31. In **Galo**, the NICA was "*satisfied … that the issues in this case are governed by the obligation of every tribunal and court to act fairly*" and the Court went on to consider **Osborn**, the **Human Rights Act 1998** (and thus the **ECHR**), the **EU Equal Treatment Directive**, the **UN Convention**, the **EU Charter on Fundamental Rights**, the **Disability Discrimination Act 1995**, the **EqA**, and case law, including **Rackham**, and having done so set out a series of principles and guidelines (see paragraphs 47 to 53), all of which, no doubt, will be helpful to ETs in future. The test applied at paragraph 54:

> **"54. We must determine for ourselves whether a fair procedure has been followed in this instance and ensure that we are not merely reviewing the reasonableness of the decision-maker's judgement of what fairness required."**

was relied upon by Mr O'Dempsey as indicating that I must approach the decisions which are challenged by grounds 1 and 2 not on the basis of whether they were reasonable but on the basis of whether they were fair and just. Nor should they be looked at in isolation but what should be under scrutiny, as it had been in **Galo**, was the cumulative treatment by the ET not simply the isolated decisions of individual EJs. Putting it another way, if I did not think the Appellant had been fairly and justly treated overall, then I could and should interfere.

32. In support of grounds 1 and 2 Mr O'Dempsey argued that the ET was aware that the Appellant was disabled; that had been conceded by the Respondent on 3 August 2015. Consequently, the ET had revoked the requirement that the Appellant provide medical evidence. This had led to confusion on her part. From the moment of the concession she believed, quite correctly, that disability was not an issue and so, when required to provide medical evidence, she had done so against the background that it was accepted she was a disabled person. In that context, what she then provided by way of medical evidence included that she had difficulty in completing the written material due to her fibromyalgia. Thus, she had clearly raised the need for a reasonable adjustment in respect of procedural requirements and time limits so as to enable her properly and fully to participate in the litigation.

33. The ET had simply ignored that very important piece of evidence, which should have operated as a "red flag" to the ET. Although EJ Postle in his Reasons had referred to the material submitted (see paragraphs 12 and 13 of the Reasons) he never attempted any analysis of the adverse impact of her various conditions upon her ability to comply with procedural requirements and deadlines. Nor did he consider whether the fact that she had been told she did not need to provide evidence of disability confused her into thinking that the subsequent

A requirement to produce medical evidence was a secondary consideration. Similarly, he never considered, as he should have done, clarifying for the Appellant that the Preliminary Hearing was no longer simply a matter of case management and procedure but would involve the more important substantive topic of a strike out. It was only when it was far too late that the Appellant had been informed that the Preliminary Hearing would be a public hearing and, thus, a hearing at which a strike out could be considered.

34. Moreover, no reasons had been given for the refusal of the Appellant's request for a postponement or her request for the substitution of a telephone hearing for an oral hearing. In the absence of reasoning and, in particular, in the absence of any analysis of the need to make adjustments, I should infer, as a matter of fairness to be decided by myself, that the Appellant had not been given proper access to justice. Put another way, this was not simply a question of procedure and discretion but an issue of human rights and fundamental fairness. The nature of the error was revealed by the approach of EJ Postle, which had been to ask what the Appellant could do but had completely ignored what she could not do.

35. So far as the third ground of appeal was concerned, Mr O'Dempsey accepted that there was a factual issue. It was disputed as to what material had been placed before EJ Postle. If I concluded that EJ Postle had not seen the contents of without prejudice save as to costs correspondence before he started to consider whether costs should be awarded, then Mr O'Dempsey accepted ground 3 must fail. He did not argue that the Appellant's disability was of any relevance in this context.

36. But in the context of the fourth ground of appeal, he submitted disability was again crucial. In the context of litigation in the Civil Courts he accepted that the **CPR** regarded 24

hour's notice of details of the amount of costs claimed to be adequate. Not only did that not apply in the ET but also it could not be regarded as an appropriate period of notice in the case of a litigant who was agreed to be suffering from a disability and who asserted that disability had an impact on her ability to comply with deadlines. Mr O'Dempsey submitted that whether approached as a matter of substantive unfairness or as a scrutiny of the reasonableness of the exercise of discretion, the notice given was so inadequate as to amount to an error of law.

37. Ms Harrington submitted that the ET had exercised its discretion in a way that could not be characterised as unreasonable or beyond the ambit within which reasonable disagreement was possible and, consequently, no error of law had been demonstrated to exist in EJ Postle's decision making or in that of his colleagues. Such medical material as had been produced was out of date and insufficiently specific to support the alleged impact of the Appellant's variety of medical conditions on the conduct of the proceedings. In particular, it did not establish that she was too ill to travel and EJ Postle cannot be criticised for requiring detailed medical evidence, as he did on 10 August 2015. Likewise, there was no medical evidence before the ET to establish the inability of the Appellant's husband to travel or be present.

38. This was a fact specific and fact sensitive forensic exercise. Repeated opportunities to provide medical evidence had been offered to the Appellant and she had repeatedly failed to provide any such evidence. Moreover, as EJ Sigsworth had pointed out there had never been any evidence of change of circumstances put forward and the ET had been entitled to stand by its previous decisions not to postpone. She referred to the decision of a division of this Tribunal presided over by HHJ Richardson in **Iqbal v Metropolitan Police Service and Another** UKEAT/0186/12/ZT. There this Tribunal had reversed the decision of an ET refusing an adjournment on the grounds of ill-health by reference to the principles established by the Court

of Appeal in **Teinaz v London Borough of Wandsworth** [2002] EWCA Civ 1040, [2002] ICR 1471. **Iqbal**, she submitted, was a case in which a discretion had been an erroneously exercised because the Tribunal had failed to take account of evidential material. The instant appeal fell on the other side of the line and, absent any demonstrable error, such as had occurred in **Iqbal**, the basis for interference sanctioned by **Teinaz** did not exist.

39. Ms Harrington submitted that the answer to ground 3 was to be found in an analysis of the chronology. EJ Postle had not read any without prejudice save as to costs correspondence at the hearing until the point when it became necessary for him to decide issues relating to costs. Indeed, as a matter of fact, the correspondence had been redacted for the purpose of enabling the Respondent to make the point that the Appellant's illness had not prevented her from engaging in without prejudice correspondence. The unredacted version of the correspondence had only been handed up to EJ Postle after the issue of strike out had been decided and when it became necessary for him to consider costs. Accordingly, that ground must fail on the facts.

40. Ground 4 should also be regarded as misconceived. The Appellant had been clearly told that the Respondent would apply for costs in the e-mail of 20 August 2015. Details of those costs had been given to her in an e-mail on 27 August in a Costs Schedule. She had responded to it by e-mail. Insofar as she argued that she did not have the means to pay, that was a matter that the Rules permitted the ET to take into account but it was not mandatory for it to do so.

Discussion and Conclusions

41. The request for indulgence in respect of time tables set by a Court or Tribunal, as well as the need for postponement of hearings and the non-attendance of a party at hearings,

A resulting from ill-health, is a recurrent feature of modern litigation, affecting all manner of litigation in all manner of cases not just those heard by the ET. Given that ill-health has always been part of the human condition it must have always been a feature of litigation but it appears to be more frequent nowadays; perhaps it has just become more recognisable since the need to acknowledge and take account of disability became a part of modern jurisprudence. Mr O'Dempsey's submissions rest on the proposition that when a person is disabled they should be regarded by the ET as being in a different category to other litigants and not be subject to the same procedural constraints.

42. Adjournments on the grounds of ill-health are not a new phenomenon in employment law. In **Teinaz** (citation above) the Court of Appeal agreed with the Employment Appeal Tribunal that the Employment Tribunal had erred in law in a case where an employee applying for an adjournment had medical advice to the effect that he should not attend an imminent hearing because he was suffering from severe stress. The ET had refused his application for an adjournment because it doubted the soundness of that medical advice, concluded the Claimant was choosing not to attend the hearing, believed his absence simply reinforced that suspicion of deliberate non-attendance, and consequently not only refused the application for an adjournment but also dismissed his case. Before dealing with the specific facts of that case, at paragraphs 20 to 22 of his judgment Peter Gibson LJ made some general observations on the question of adjournments on the grounds of the ill-health of one of the parties:

> **"20. Before I consider these points in turn, I would make some general observations on adjournments. Every tribunal or court has a discretion to grant an adjournment, and the exercise of such a discretion, going as it does to the management of a case, is one with which an appellate body is slow to interfere and can only interfere on limited grounds, as has repeatedly been recognised. But one recognised ground for interference is where the tribunal or court exercising the discretion takes into account some matter which it ought not to have taken into account: see, for example, *Bastick v James Lane Ltd* [1979] ICR 778 at 782 in the judgment of Arnold J giving the judgment of the EAT (approved as it was in *Carter v Credit Change Ltd* [1980] 1 All ER 252 and page 257 per Lord Justice Stephenson, with whom Cumming-Bruce and Bridge LJJ agreed). The appellate body, in concluding whether the exercise of discretion is thus vitiated, inevitably has to make a judgment on whether that matter should have been taken into account. That is not to usurp the function of the lower tribunal or court: that is a necessary part of the function of the reviewing body. Were it otherwise, no appellate body could find that a discretion was wrongly exercised through the tribunal or court taking into**

account a consideration which it should not have taken into account or, by the like token, through failing to take into account a matter which it should have taken into account. Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. As was said by Atkin LJ in *Maxwell v Keun* [1928] 1 KB 645 at page 653 on adjournments in ordinary civil actions:

> **"I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."**

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."

Arden LJ made observations about appellate interference with the exercise of discretion in these terms at paragraphs 37:

> **"37. It is to be noted that the standard of review as respects the exercise of discretion involves the grant of considerable deference to the inferior tribunal. In particular, where several factors going either way have to be balanced by the inferior tribunal, the appellate tribunal does not interfere with the balancing exercise performed by the inferior tribunal unless its conclusion was clearly wrong."**

And she also said in paragraph 39:

> **"39. … While any tribunal will naturally want to be satisfied as to the basis of any last minute application for an adjournment and will be anxious not to waste costs and scarce tribunal time or to cause inconvenience to the parties and their witnesses, it may be that in future cases like this a tribunal or advocates for either party could suggest the making of further enquiries and a very short adjournment for this purpose. …"**

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43. Shortly afterwards the Court of Appeal, also including LJJ Peter Gibson and Arden, considered a similar problem in **Andreou v Lord Chancellor's Department** [2002] EWCA 1192, [2002] IRLR 728. Less than two weeks before a 10 day hearing was due to commence the Claimant applied for an adjournment because of ill-health. She had a certificate from her GP that she was unfit for work. She did not attend but her solicitor did. His application for an adjournment was allowed to the extent that the hearing was postponed for a week with directions that she produce a medical report within a stipulated time giving details of her condition and why she could not attend. A report was sent by her doctor but apart from enclosing a medical report, which was by then over two years old, it answered none of the questions posed by the Employment Tribunal, although it did mention that the Claimant had been referred to a Consultant Psychiatrist. It did not, however, disclose when that reference had been made. A subsequent letter from the relevant psychiatric hospital did indicate that a report could not be prepared in time for the resumed hearing. The Claimant did not attend the resumed hearing but her solicitor did attend on her behalf and sought a further adjournment. He was, however, only instructed to make that application and not to conduct the hearing if it proceeded. The Employment Tribunal decided to proceed and the Respondent applied to strike out the claim, which the Employment Tribunal did.

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44. The Claimant appealed successfully to this Tribunal but on a further appeal by the Respondent the Court of Appeal restored the decision of the Employment Tribunal. The Court of Appeal regarded the case as distinguishable from **Teinaz**. In **Andreou** the Appellant had been given a chance to comply but had failed to do so. Peter Gibson LJ said this at paragraph 46:

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> **"46. The Tribunal in deciding whether to refuse an adjournment had to the balance a number of factors. They included not merely fairness to Mrs Andreou (of course, an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take**

very seriously what is alleged against them. It is rightly considered that complaints such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The Tribunal had to take into account the fact that other litigants are waiting to have their cases heard. It is notoriously how heavily burdened employment tribunals are these days. Fairness to other litigants may require that indulgences given to those who have had the opportunity to justify an adjournment but not taken that opportunity adequately are not extended. It was a matter of particular concern that no indication was given in the evidence of Mrs Andreou either as to when the medical evidence which she required from the consultant would be available, nor as to when it might be that this case could come on for trial. Viewing the case in the round and considering all the circumstances referred to by the Tribunal, I cannot see how it could be said that in refusing the application the Tribunal was perverse or otherwise plainly wrong in refusing a further adjournment."

45. It can be seen from the above that in both appeals the Court was alert to the need to consider the **ECHR** right to a fair hearing. Nevertheless, whilst bearing that in mind, the analysis of the Court of Appeal was the conventional one on the challenge to an exercise of judicial discretion of scrutinising the balancing exercise carried out by the Tribunal. But these cases were some time ago and Mr O'Dempsey's submissions suggested that in the case of disability the law has moved on.

46. I entirely accept that the background against which the **Teinaz** and **Andreou** decisions were made has changed. As Elisabeth Laing J pointed out at paragraph 28 of her judgment in the case of **Pye v Queen Mary University of London** UKEAT/0151/15/MC (also, like **Rackham**, an appeal against a decision by EJ Postle) some of the above remarks about business in the Employment Tribunal, although accurate when made at the beginning of the last decade may not represent the position in 2015 when she gave her judgment in that case. But I think care needs to be taken about such historical ebb and flow or, more appositely, flow and ebb. It may be true that there has been a statistical decline in the volume of cases being heard in Employment Tribunals but that position may be in the process of being reversed and, in any event, it must not be assumed that even when the tide is on the ebb the working environment of the EJ is one of relaxation and ease in which there is all the time in the world to accommodate

A the wishes, whether understandable or capricious, of litigants who want to be afforded more time and, as in this case, alternate methods of hearing.

B 47. In any event it is clear Elisabeth Laing J never placed much reliance on that as a factor. After all she was dealing with the second occasion when the issue of an ill-health adjournment in the same case had reached this Tribunal, albeit after an interval of a further three years, without the dispute have been resolved on the merits. Behind such a history is almost always a C personal disaster for one of the litigants and usually, at least, an expensive inconvenience for the other. In **Pye**, as Langstaff J noted in **Rackham**, Elisabeth Laing J regarded the issue of the standard of review on appeal as having been settled by **O'Cathail** and in **Iqbal** HHJ D Richardson's decision is firmly rooted in **Teinaz**. Mr O'Dempsey's submission is that in cases involving a disabled litigant that approach is too limited. I think it is helpful in examining that argument by considering a broader perspective than just litigation in the ET.

E 48. The problem facing EJ Postle is by no means confined to the jurisdiction of the ET. That it is frequently to be found in the Civil Courts is confirmed by the facts underlying the judgment of the Court of Appeal in **Bank of Scotland plc v Pereira** [2011] 1 WLR 2391 and F by paragraph 32 of the judgment of Norris J in **Levy v Ellis-Carr** [2012] EWHC 63 Ch. The guidance given in the latter, particularly that in paragraph 26 of the judgment, was expanded on by Warby J in a lengthy passage covering paragraphs 21 to 31 of his judgment in **Decker v** G **Hopcraft** [2015] EWHC 1170 QB. In between these two cases in **Governor and Company of the Bank of Ireland v Jaffery** [2012] EWHC 734 Vos J had followed and applied what Norris J had said in **Levy** and the Court of Appeal in paragraph 26 of the judgment of Lewison LJ in **Forrester Ketley v Brent** [2012] EWCA Civ 324 had also approved the judgment of Norris J. H Since Warby J decided the case of **Decker**, the judgment of Norris in **Levy** has been approved

again explicitly by the Court of Appeal in **TBO Investments Ltd v Mohun-Smith and Another** [2016] EWCA Civ 403, [2016] 1 WLR 2919 (see paragraphs 18 to 30) and, at least by implication, by another decision of the Court of Appeal in **Emojevbe v Secretary of State for Transport** [2017] EWCA Civ 934, which also analysed and applied the **Pereira** and **TBO** decisions.

49. These passages from cases decided in the Civil Courts cover extensive ground, some of which is specific to the **CPR** and is not directly relevant to this appeal. Moreover, there is no discussion of disability in general although there is reference to the need to take account of fundamental rights.

50. I do not think lengthy citations from these judgments should burden an already long Judgment and so I offer the following summary:

a. granting or refusing an adjournment and the concomitant decision as to whether to continue with proceedings in the absence of a party is a case management decision (paragraph 21 of **Decker**);

b. when an application is made to adjourn on medical grounds for the first time the Court may be reluctant to refuse (paragraph 22 of **Decker**, referring to the judgment of Neuberger J in **Fox v Graham Group Ltd**, The Times, 3 August 2001) but that is subject to a number of qualifications:

    i. when such decisions involve medical evidence it is for the Courts to evaluate it and to make its own decision about it (paragraphs 32 and 36 of the judgment of Norris J in **Levy v Ellis-Carr**) rather than it being a decision that can be forced upon the Court (paragraph 23 of the judgment of Warby J in **Decker**);

ii. such medical evidence needs to be specific to the application (i.e. identifying the reason why the medical condition described supports the need for an adjournment and it also needs to be clear, independent and cogent (see paragraph 36 of the judgment of Norris J in **Levy v Ellis-Carr** and the introductory comment to its citation at paragraph 24 of the judgment of Warby J in **Decker**));

iii. inability to attend work is not necessarily to be equated with inability to attend Court (paragraph 26 of the judgment of Warby J in **Decker**, citing comments made by Vos J at paragraph 19 of his judgment in the **Bank of Ireland** case);

iv. other evidence, such as the apparent ability to communicate with the Court in correspondence, can be taken into account (also paragraph 26 of the judgment of Warby J in **Decker**, citing comments made by Vos J at paragraph 58 of his judgment in the **Bank of Ireland** case);

c. although it will be a matter for the Court to decide on the medical evidence, it may be possible to make "*reasonable accommodations*" to procedure to enable a party to participate fully and without disadvantage in proceedings (paragraph 27 of the judgment of Warby J in **Decker**);

d. the need for effective participation will vary according to the circumstances which will include the nature of the proceedings, the extent to which argument will be necessary and whether the party could be represented, all of which are relevant considerations when deciding on an application to adjourn (paragraph 28 of the judgment of Warby J in **Decker**);

e. the relative merits are important; for example, if it is obvious to the Court on a cursory examination of the arguments and the issues that one party must succeed,

then the more likely it will be that proceeding as opposed to adjourning is the justifiable course (paragraph 29 of the judgment of Warby J in **Decker**);

f. the Court's approach, however, may be affected, according to "*whether the matter involves applications of a case management nature, or final determinations on the merits such as an order striking out a statement of case or part of it, where Article 6 of the Convention is engaged*"; in the latter "*[t]he court will need to be more cautious*", although the above factors will be "*relevant in both contexts*" (paragraph 30 of the judgment of Warby J in **Decker**).

51. Whether there should be a difference in approach according to the nature of the proceedings formed the basis of the discussion in both the subsequent Court of Appeal decisions of **TBO** and **Emojevbe**. Was a distinction to be drawn between the approach of the Court to an application to adjourn a trial on medical grounds and an application to set aside a judgment in the absence of a party pursuant to **CPR** Part 39.3? In terms of the **ET Rules** there is no direct equivalent to **CPR** Part 39.3 but the broad equivalent would be reconsideration pursuant to Rules 70 to 73 of the **Rules**.

52. In order to understand the passage cited below from the judgment in the **TBO** case, it is necessary to set out what Lord Neuberger MR said in his judgment in the Court of Appeal in the earlier case of **Pereira** at paragraphs 24 to 26[1]:

> **"24. First, the application to appeal Judge Ellis's refusal under CPR 39.3 to set aside the Order. An application to set aside judgment given in the applicant's absence is now subject to clear rules. As was made clear by Simon Brown LJ in *Regency Rolls Ltd v Carnall* [2000] EWCA Civ 379, the court no longer has a broad discretion whether to grant such an application: all three of the conditions listed in CPR 39.3(5) must be satisfied before it can be invoked to enable the court to set aside an order. So, if the application is not made promptly, or if the applicant had no good reason for being absent from the original hearing, or if the**

[1] NB There is also an interesting but lengthy passage at paragraphs 36 to 48 of the judgment discussing the relationship between **CRP** Part 39.3 and appeals, but even though it has some explanatory relevance in relation to **Emojevbe** it is not important enough to this appeal to warrant citation.

applicant would have no substantive case at a retrial, the application to set aside must be refused.

25. On the other hand, if each of those three hurdles is crossed, it seems to me that it would be a very exceptional case where the court did not set aside the order. It is a fundamental principle of any civilised legal system, enshrined in the common law and in article 6 of the Convention, that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representatives are present and are heard. If the case is disposed of in the absence of a party, and the party (i) has not attended for good reasons, (ii) has an arguable case on the merits, and (iii) has applied to set aside promptly, it would require very unusual circumstances indeed before the court would not set aside the order.

26. The strictness of this trio of hurdles is plain, but the rigour of the rule is modified by three factors. First, what constitutes promptness and what constitutes a good reason for not attending is, in each case, very fact-sensitive, and the court should, at least in many cases, not be very rigorous when considering the applicant's conduct; similarly, the court should not pre-judge the applicant's case, particularly where there is an issue of fact, when considering the third hurdle. Secondly, like all other rules, CPR 39.3 is subject to the overriding objective, and must be applied in that light. Thirdly, the fact that an application under CPR 39.3 to set aside an order fails does not prevent the applicant seeking permission to appeal the order. It is not very convenient, but an applicant may be well advised to issue both a CPR 39.3 application and an application for permission to appeal at the same time, or to get agreement from the other party for an extension of time for the application for permission to appeal."

And it is also necessary to refer to what Etherton J had said in **Estate Acquisition and Development Ltd v Wiltshire** [2006] CP Rep 32, [2006] EWCA Civ 533 at paragraph 25:

"25. I recognise that it is undesirable to seek to define a "good reason" within the meaning of CPR 39.3(5)(b). But as Mummery LJ pointed out at para 12 of *Brazil's* case, it is necessary to interpret CPR 39.3(5)(b) (as all other rules) so as to give effect to the overriding objective of deciding cases justly: CPR 1.2(b). Moreover, it must be interpreted so as to comply with article 6 of the European Convention on Human Rights (right to a fair hearing). I refer to the judgment of Brooke LJ in *Goode v Martin* [2001] EWCA Civ 1899, [2002] 1 WLR 1828 para 35. In my view, it is necessary to have both article 6 and the overriding objective in mind when interpreting and applying the phrase "good reason". It should not be overlooked that the power to set aside an order made in the absence of the applicant may only be exercised where all three of the conditions stated in CPR 39.3(5) are satisfied. In addition to the need to show a good reason for not attending, the applicant must have acted promptly and that he has a reasonable prospect of success. If the phrase "good reason" is interpreted too strictly against an applicant, there is a danger that the interpretation will not give effect to the overriding objective and not comply with article 6."

53. In the **TBO** case a written application to adjourn the five day trial, made on the day the trial was due to start by letter from the Defendant on the grounds of the ill-health of a director, who his doctor had certified as unfit for work during the period of the trial and who was due to represent it at trial, was refused. The Judge went on to strike out the defence and give judgment and costs against the Defendant.

54. The subsequent application by the Defendant to set aside under **CPR** Part 39.3(5) was refused by the Judge. The Defendant appealed. Of the three factors relevant to an application under **CPR** Part 39(5) - the timely nature of the application, a good reason for non-attendance and reasonable prospects of success at trial - the third was not in dispute and the second not relevant to the instant appeal. The significance of the judgment for present purposes lies in the discussion as to how the issue of whether there was a good reason for non-attendance was approached by the Court on the set aside application. The Court of Appeal had no difficulty in concluding that the Judge had erred in finding that the Defendant could just as well have been represented by another director; that was a fact specific issue also not relevant to the present appeal. But the other basis of the Judge's conclusion that here was no good reason does have a bearing on the instant appeal.

55. The application to set aside was supported by a rather more specific statement from the GP in the form of a letter opining that the director had not been fit to attend Court at the time of the trial but was now fit to do so. The Judge had directed himself in terms of the judgment of Norris J in **Levy**. It was argued on behalf of the Appellant that this was too rigorous an approach under **CPR** Part 39(5) and essentially this was accepted by the Court of Appeal. The correct approach was discussed in the following terms at paragraphs 24 to 26 of the judgment of Lord Dyson MR (effectively the judgment of the Court):

> **"24. I recognise that an appellate court should be slow to interfere with a decision of a lower court on the question of whether a litigant had a good reason for not attending a trial. Such a decision is a fact-sensitive evaluation made in the light of all the circumstances. It is the kind of decision that an appellate court will only strike down for reasons analogous to those which justify interfering with an exercise of discretion. But in making that assessment, the judge must have regard to the guidance given in *Pereira* and *Estate Acquisition* and the need, when applying rule 39.3(5)(b), to seek to give effect to the overriding objective of dealing with cases "justly" and to comply with article 6 of the European Convention on Human Rights ("the Convention"). This is particularly important where, as in the present case, the party has a reasonable prospect of success at the trial. In such a case, the court should usually not adopt a very rigorous approach to the question whether the litigant has shown a good reason for not attending.**
>
> **25. At first sight, it might appear that there is a conflict between the *Pereira* guidance (which is similar to that given in *Estate Acquisition*) on the one hand and the guidance given in *Levy* on the other hand. Nothing that I say in this judgment should be interpreted as casting doubt on**

> **the guidance given in *Levy*. Generally, the court should adopt a rigorous approach to scrutinising the evidence adduced in support of an application for an adjournment on the grounds that a party or witness is unfit on medical grounds to attend the trial. In *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 at para 89, Jackson LJ emphasised the general undesirability of adjourning trials in the context of applications under CPR 3.9. I entirely agree with what he said.**
>
> **26. But I accept the submission of Mr Burgess that there is a material distinction between an application under rule 39.3(3) and an application for an adjournment of a trial. If the court refuses an adjournment, there will usually be a trial and a decision on the merits, although the unsuccessful applicant will be at a disadvantage, possibly a huge disadvantage, by reason of the absence of the witness or the party himself. Despite their absence and depending on the circumstances, it may still be possible for the disadvantaged claimant to prove the claim or the disadvantaged defendant to resist it. I accept that, in some cases, the refusal of an adjournment will almost inevitably lead to the unsuccessful applicant losing at trial. That is a factor that must be borne in mind when the court exercises its discretion in deciding whether or not to grant an adjournment. But if the application to set aside a judgment under rule 39.3(3) fails, the applicant will have had no opportunity whatsoever to have an adjudication by the court on the merits. This difference between an application under rule 39.3(3) and an application for an adjournment of the trial is important. Although it has not been articulated as the justification for generally adopting a more draconian approach to an application for an adjournment than to an application under rule 39.3(5), in my view it does justify such a distinction. It follows that the judge should have applied the *Pereira* guidance rather than the *Levy* guidance in so far as there is a difference between the two."**

56. **CPR** Part 39.3 was also under consideration by the Court of Appeal in **Emojevbe**. There the County Court had refused an application on the grounds of ill-health for an adjournment of a trial and then, in the absence of the Claimant/Appellant, had granted, what is described in paragraph 2 of her judgment (effectively the judgment of the Court) by King LJ as, "*summary judgment*". But the Claimant had not applied to set aside under **CPR** Part 39.4. Instead he had appealed to the High Court where Jay J had refused his appeal.

57. It had been agreed by the parties that Jay J should determine the appeal by himself considering it as if an application were being made to him under **CPR** Part 39.3. King LJ (at paragraph 11 of her judgment) summarised paragraph 47 of the judgment of Lord Neuberger MR in **Pereira** as sanctioning that course. Jay J, applying the judgment of Norris J in **Levy**, dismissed the appeal. The Claimant/Appellant made a second appeal, in which it was accepted by the Court of Appeal that the appeal turned on **CPR** Part 39.3 (see paragraph 3 of the judgment).

58. After citing passages from the judgments in **Pereira**, **Levy**, **Forresters** and **TBO** at paragraphs 14 to 20 of **Emojevbe**, King LJ summarised the position thus at paragraph 21 of her judgment:

> **"21. Following *TBO Investments* the position seems to be that:**
>
> > **i) Where the refusal of an adjournment will almost inevitably lead to the unsuccessful applicant losing at trial that is a factor which must be borne in mind when the court exercises its discretion in deciding whether or not to grant an adjournment. In the present case the consequence of the refusal of the application for an adjournment was that summary judgment was entered;**
> >
> > **ii) Where, as here, the application is under CPR r39.3(3), the judge should have applied the less rigorous guidance found in *Pereira* rather than that found in *Levy*. Mr Hare QC on behalf of the DVLA accepts that is the only interpretation available following *TBO Investments* which had not been decided when Jay J heard the case with which the court is now concerned."**

59. By the time the matter came before the High Court there was considerably more medical history available to the Court than had been the case in the County Court three years earlier. Jay J decided that even though there was now more medical evidence, there was still no reason to think that the Claimant/Appellant was unable to attend and it was that factor upon which the case turned. The Court of Appeal decided that he was wrong and, in doing so rejected the argument put to it by the Respondent that Jay J was right in his conclusion because the County Court could have made reasonable adjustments to enable somebody with a bad knee to attend the hearing (see paragraph 28 of the judgment). The Court of Appeal considered that Jay J had been wrong to focus on the medical evidence before the Judge at trial and that although Jay J said he had taken the subsequent medical evidence into account, he had failed to take account of the pain in which the Claimant/Appellant must have been in. Therefore the appeal was allowed.

60. That concludes this (rather long) summary of the current position in the Civil Courts. I repeat that none of the cases cited above deal explicitly with disability and although there are references to "*reasonable accommodation*" in **Decker**, nothing turned on that. Also the

possibility of "*reasonable adjustments*" in **Emojevbe**, is, rather ironically, suggested by counsel to be a reason for supporting the decision below and rejected by the Court of Appeal as not realistic.

61. Appeals in the Civil Courts are governed by **CPR** Part 52. By **CPR** Part 52.21(1) every appeal comprises a review of the judgment below unless the Court considers it in the interests of justice to conduct the appeal by way of re-hearing. In none of the cases cited above has it been suggested that the Court of Appeal was conducting the appeal by way of a re-hearing. By **CPR** Part 52.21(3)(a) and (b) the appellate Civil Courts must allow an appeal where it concludes that the decision of the Court below was wrong or was unjust because of a serious procedural or other irregularity.

62. This Tribunal has jurisdiction "*on any question of law*" (section 21(1) of the **Employment Tribunals Act 1996**) and in most appeals this Tribunal reviews the decision of the ET to see whether there has been an error of law. Generally, that involves a critique of the analysis of the ET but not a re-making of any part of its decision[2]. I do not think that statutory framework puts this Tribunal in a different a position to an appellate Civil Court reviewing the decision of the lower Court and, pursuant to **CPR** 52.21, allowing an appeal where it concludes that the decision was wrong or unjust because of a serious procedural or other irregularity.

63. In a passage of my judgment in **Galilee v Commissioner of Police of the Metropolis** UKEAT/0207/16/RN (see paragraph 82 to 93), which is far too long to quote in full, I attempted an analysis of the nature of an appeal against the exercise of judicial discretion both in the Civil Courts and in this Tribunal. At paragraphs 85 and 86 I said this:

[2] Although that might happen on disposal in the circumstances identified at paragraph 21 of the judgment of Laws LJ in **Jafri v Lincoln College** [2014] EWCA Civ 449, [2014] ICR 920 after an error of law has been identified.

> **"85. In my judgment, challenging the exercise of judicial discretion on appeal depends on exactly the same principles as any other challenge on appeal to this Tribunal: if the challenge is to succeed, it must be based on an error of law and if there is such an error then the appeal will succeed notwithstanding that the order under appeal is a case management decision. In *Broughton v Kop Football (Cayman) Ltd and Others* [2012] EWCA Civ 1743 Lewison LJ said this:**
>
> > **"51. Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."**
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> **At paragraph 13 of his judgment in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and Another* [2014] UKSC 64, [2014] 1 WLR 4495 Lord Neuberger referred to that passage in these terms:**
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> > **"13. … The essential question is whether it was a direction which Vos J could properly have given. Given that it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it, unless it was "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree" as Lewison LJ expressed it in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743, para 51."**
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> **86. The provenance of the above quotation is actually much older than the *Broughton* case. Its origin is the observations of Asquith LJ in *Bellenden (formerly Satterthwaite) v Satterthwaite* [1948] 1 All ER 343:**
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> > **"… It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere. …" (Page 345B)"**

And in part of paragraph 89, part of paragraph 90, and part of paragraph 91 I added this:

> **"89. The exercise of judicial discretion occurs in many different contexts, but in my judgment the same approach applies whatever the context, even though the analysis of that approach has sometimes been differently expressed. The approach Asquith LJ articulated, and the House of Lords approved in *G v G*, is a specific perspective as to how one might approach the issue of deciding whether the Judge was wrong and not just wrong but "*plainly wrong*", as Lewison LJ has suggested in the passage cited above. In effect, the words of Asquith LJ are a powerful antidote to the natural impulse to interfere from which an appellate tribunal might suffer when its own inclination might have led to a different conclusion. …**
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> **90. But the scope of appellate scrutiny is much wider than "*the generous ambit within which reasonable disagreement is possible*" as the passage from the judgment of Lewison LJ in *Broughton* shows. …**
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> **91. These broader expressions of the basis upon which an appellate court can interfere with the exercise of discretion derive from … [a series of Court of Appeal decisions are cited]. … These all emphasise that misdirection as to law, perversity, consideration of the irrelevant and lack of consideration of the relevant are just as much a basis for interference as concluding that the decision was "*plainly wrong*"."**

64. **Galilee** was concerned with the discretion to permit or refuse an amendment and in my judgment I was endeavouring to make clear my view that even though a decision could be described as a case management decision, on appeal to this Tribunal it fell to be scrutinised on the same principles as any other appeal, namely an examination of the decision to identify whether or not there had been an error of law. Various authorities in this Tribunal and in the Civil Courts might have described an error of law in various ways but, despite different choices of words, each was an expression of the same thing. I rejected the idea that some different test might apply because the decision could be characterised as one of case management.

65. My instinct would be also to reject the idea that where a litigant is disabled then this Tribunal might adopt the different approach of making a different decision to that made below but, in essence, that is what Mr O'Dempsey seeks to persuade me to do. He argues, relying on Ms Darwin's article, **Osborn** and **Rackham**, that the law has taken a wrong turn in this jurisdiction in terms of the standard of review and that the NICA in paragraph 54 of its judgment in **Galo** (see above at paragraph 31 of this Judgment) have shown the way forward. He might also have relied on **Emojevbe**, because on one view that case might be interpreted as suggesting the appellate Court can re-make the decision.

66. I do not accept his argument. Firstly, I repeat that instinct suggests to me that generally appellate Tribunals ought not to be re-making decisions. The temptation to think that one could make a better decision should be resisted firmly by the appellate Tribunal. "*Plainly wrong*" does not mean "*it is wrong because I would not have made that decision on those facts*"; it means "*outside the generous ambit where reasonable decision makers may disagree*" (per Lewison LJ echoing Asquith LJ) and it also means wrong in law in the sense of a misdirection as to law, a perverse decision, a decision which critically fails to take account of a relevant/

significant factor or takes account of an irrelevant/insignificant factor or a decision which is unjust because it is tainted by a serious procedural irregularity.

67. Secondly, I do not think there should be two approaches, according to whether fundamental rights and freedoms might be engaged or not. Some of the civil cases referred to above in this Judgment at paragraphs 48 to 59 (in particular **Pereira**, **Decker**, **TBO** and **Emojevbe**) identify the need for first instance decision makers to recognise fundamental rights and freedoms but I see nothing in any of the judgments to suggest this need be more than a factor (albeit an important factor) to be balanced in the exercise of the judicial discretion as to whether or not to adjourn a case or modify the procedure by which the case should be heard.

68. Thirdly, I confess to being somewhat bemused by the difference in approach suggested in **Pereira**, and espoused in **TBO** and **Emojevbe**, as between appeals relating to decisions to refuse adjournments and appeals relating to refusals to set aside under **CPR** Part 39.3. If, as seems to me possible, **Pereira** was really directed to disposal after an erroneous approach to the exercise of discretion has been established, then the two subsequent cases have developed it and I must, of course pay due deference to them. But it is worth pointing out that ultimately all of these cases, including **Emojevbe**, are decided on the conventional basis of scrutinising the balancing exercise carried out by the Court below. In the latter case, for instance, it seems to me the appeal was allowed because Jay J left out of account the degree of pain the Appellant would have been suffering at the time of the trial.

69. In this context it may be important to bear in mind that the disposal of appeals in this Tribunal is governed by the statute and by paragraph 21 of the judgment of Laws J in **Jafri v Lincoln College** (cited above in the footnote to paragraph 62 of this Judgment). Thus the scope

of disposal may be narrower than in the Civil Courts and this may be one area where the procedure in this jurisdiction differs from that in the Civil Courts.

70. Also, whatever the position might be under **CPR** Part 39.3, as a matter of practical reality I think it would be a recipe for disaster if this Tribunal were to approach an appeal against the refusal of an adjournment on the basis that it should be conducted as if there had been an application for reconsideration on the basis of further medical evidence obtained at a later stage when, in fact, there had been no such application. In my view statute obliges this Tribunal to consider only the appeal that is made to it. If it thinks that there should be a reconsideration, it has the power to stay an appeal and direct the ET to receive an application for reconsideration and then if a reconsideration is refused or accepted but the outcome is adverse, there can be a further appeal. **Emojevbe** may well be a decision on its own particular facts but in my judgment there should be no room in this jurisdiction for any replication of that approach.

71. Fourthly, I have to acknowledge the enthusiasm of Langstaff J in **Rackham** for adopting proportionality as the test where adjustments might be necessary to ensure as full participation as possible for a disabled litigant. But, in fact, as pointed out above, what he said is *obiter dictum* because the actual decision of this Tribunal was reached on a conventional analysis of the balancing exercise undertaken by EJ Postle and not solely by an analysis of the proportionality of his decision. I also acknowledge that the examples Langstaff J gives of right and wrong decisions, bias and the need for an interpreter, are examples of this Tribunal having to make up its own mind as to whether the ET was biased or whether the case required an interpreter but it seems to me these are both examples of procedural irregularity. As Peter Gibson LJ observed in **Teinaz** an appellate Tribunal will often have to form a view about what

should have been put into the balance (see paragraph 20 of his judgment set out above at paragraph 42 of this Judgment) but that is very far from the Tribunal re-making the decision of the ET.

72. Whether adjustments should have been made at first instance might be viewed, in extreme and obvious cases, as raising matters of procedural irregularity but that is not the only way to look at it. Some cases might simply be examples of the exercise of discretion that was "*plainly wrong*" and in less extreme cases reasonable adjustments can be, and in my judgment, should be, viewed as a factor (an important factor) to be placed in the balancing exercise that ought to comprise the exercise of judicial discretion. In other words, reasonable adjustments will need to be considered against the factual matrix in which they arise and on appellate scrutiny they do not represent an automatic portal through which the appellate Tribunal can pass en route to making its own decisions in substitution for those made at first instance.

73. **Roden** is cited by Ms Darwin in her article and relied on by Mr O'Dempsey as an example of this Tribunal replacing the decision of the EJ with its own decision and it is true that Simler J regarded the continuation of anonymity in **Roden** as permitting only of a right and wrong answer. But she decided the appeal also on the alternative and conventional basis that there had been an error of law and I do not think the case can provide the support for Mr O'Demsey's argument that he claimed for it. Whether or not the continuation of an anonymity Order permits of only one correct answer tells us nothing as to whether or not it would be categorically unfair and unjust not to make a reasonable adjustment.

74. Fifthly, I have to accept that in **Galo** the NICA regarded the matter as being governed by an overarching duty on the Court or Tribunal to act fairly and by the judgment of the

Supreme Court in **Osborn** (see paragraphs 47 to 49 of the judgment in **Osborn**). Nobody can quarrel with that proposition. That there is an overarching duty to act fairly is plainly articulated in the overriding objective in **CPR** Part 1 and in Rule 2 of the **Rules**. But the NICA drew from **Osborn** that it must determine the fairness of the decision made below itself and not only consider its reasonableness (paragraph 54 of that judgment quoted above at paragraph 31 of this Judgment). This is the high water mark of Mr O'Dempsey's argument.

75. In **Rackham** (referred to by the NICA at paragraph 53 of its judgment) Langstaff J had said that this Tribunal "*would be very hesitant before suggesting that a pure **Wednesbury** approach was appropriate*" (paragraph 49 of the judgment in **Rackham** quoted above at paragraph 27 of this Judgment). Langstaff J was there rejecting an approach that asked only whether the decision was so unreasonable that no reasonable person acting reasonably could have made it and I would agree that is too narrow a scrutiny. Indeed, despite its repeated appearance (often in judgments of high authority like that of Mummery LJ in **O'Cathail**; there are many others in both the civil jurisdiction and in employment law cases) I think "***Wednesbury** unreasonableness*" is too often read as meaning that the judgment is in a category almost immune from appellate scrutiny. I think this is an unfortunate shorthand and a companion piece to the equally unfortunate tendency to regard "*case management*" decisions as being in such a category, something with which I disagreed in **Galilee** (see above).

76. Appeals to this Tribunal are rigorously screened by a sift procedure and a large number are filtered out because they do not reach the necessary threshold. Many of these are case management decisions, where it is obvious that the EJ has exercised a broad discretion perfectly properly. Others, like this appeal, proceed eventually to a Full Hearing because it is thought that the decision requires careful scrutiny to see whether there is any error of law. When they

have got this far, I agree with Langstaff J that to examine them only for "***Wednesbury*** *unreasonableness*" might not be a rigorous enough level of scrutiny but to my mind that does not mean the usual search for an error of law should be replaced by an entirely different examination of proportionality to be conducted by this Tribunal on the way to making its own decision about the matter. Any decision of the ET must be just and fair and in that sense fulfil the "*overriding objective*", but if it is manifestly unjust and unfair then that is an indication that something is profoundly wrong and I would suggest that the right course is to discover where the error is rather than to start making the decision afresh. This seems to me to be more consistent with the statutory framework by which this Tribunal is bound and, accordingly, within which it is obliged to operate.

77. In short, although I acknowledge the persuasive effect of the judgment of the NICA and, for that matter, that of Langstaff J in **Rackham**, for the reasons set out above I regard the latter as *obiter dictum* and for that reason I do not think it binds me and although I think there is much in the former to command attention and provide valuable guidance, I do not regard paragraph 54 as the correct approach to appellate scrutiny. In **Lock and Another v British Gas Trading Ltd (No. 2)** UKEAT/0189/15/BA, [2016] IRLR 316 a division of this Tribunal comprising Singh J was invited to take a different course to that which had been adopted by another division of this Tribunal. The NICA seems to me to be the equivalent of this Tribunal and I regard the same principles as applying.

78. At paragraphs 72 to 75 of his judgment there is a very helpful exposition of, and explanation as to how, "*stare decisis*" or "*the hierarchy of precedent*" applies to this Tribunal. Normally, previous decisions of this Tribunal are of persuasive authority and will generally be followed by subsequent divisions of this Tribunal unless one of the established exceptions

applies. These are identified in paragraphs 72 to 75. The second exception is where there are two or more inconsistent decisions of this Tribunal. It seems to me that **Pye** is inconsistent with **Rackham**, which may not be a real conflict because the latter is *obiter dictum*, but also with **Galo**, where the relevant passage is *ratio decidendi*. The fourth exception arises where it is possible to say a previous decision is manifestly wrong and with reluctance I take that view of paragraph 54 of **Galo** and I do not regard myself as bound to follow it for that reason. By that I do not mean that I think the result of the appeal in **Galo** was wrong; to my mind it was obviously correct. But I do not think that paragraph 54 represents a correct view of the law.

79. I do not know whether Ms Darwin's article was cited to the NICA. If it was, at paragraph 65 of the judgment in **Galo** the NICA sidestepped the obvious difficulty of reconciling judgments in the Court of Appeal of England and Wales with **Osborn** (something which Ms Darwin had not done by saying that earlier cases must be taken to have been overruled by **Osborn**) by drawing a distinction:

> **"65. One final matter, Counsel cited to us some authorities on the question of the discretion of a tribunal/court to grant or refuse adjournments. In particular our attention was drawn to *Cathail v Transport for London* [2013] IRLR 3010, *Teinaz v Wandsworth London Borough Council* [2002] ICR 1471 and *Kotecha v Insurety t/a Capital Health Care* UKEAT/0537/09 [2010] All ER (D) 94. We do not need to deal with these matters in detail simply because the issue of procedural fairness goes much wider than the narrow issue of failing to adjourn. We simply pause to observe that we do not accept the assertion of Mr Potter that it is unlawful for a tribunal to insist that a condition for adjournment is that a medical report is produced outlining the reasons why the appellant is unfit to attend, together with a prognosis as to when he will be fit to attend. There is nothing improper per se in a court doing this where otherwise a court would be in the impossible position of having no idea when the court could be convened for a hearing. Moreover in circumstances where no adequate medical evidence can be produced, it would not of itself be unlawful for a tribunal to take a view as to the litigant's fitness to present a case based on seeing and hearing from him in person, albeit that would probably be a rarity."**

80. I accept that factually **Galo** did not turn on a single matter such as the refusal of an adjournment or the failure to supply a medical report, but I regard the distinction drawn in the passage above as a difficult one. It creates a different category of an accumulation of errors justifying a different appellate approach. But to my mind there is no need for this additional

A category; a single refusal of an application to adjourn might be unjust and unfair or a series of steps, viewed cumulatively, might also be unjust and unfair. Each will be erroneous in point of law and justify appellate intervention. But I do not accept that any error, single or cumulative, justifies this Tribunal doing what I think it is not entitled to do, namely making the decision itself.

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81. Indeed, if I may make so bold, it seems to me the combination of errors and unfortunate circumstances in **Galo** could equally have been regarded by the NICA as amounting cumulatively to a serious procedural irregularity on the part of the Industrial Tribunal ("IT") and even if it was one which could not be exposed by "*reviewing the reasonableness of the decision-maker's judgment of what fairness required*" (see paragraph 54 of the judgment), then I see no difficulty in the appellate Tribunal interfering on the basis there had been an error of law.

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82. In any event, it seems to me that in the following paragraphs, by which the NICA sets out its reasons for reaching that conclusion of injustice and unfairness (paragraphs 56 to 64) there is an entirely conventional analysis of the shortcomings of the IT in failing to recognise the extent of the Appellant's medical disabilities and adapting the procedure accordingly. I do not think that the NICA was really departing from established principles to anything like the extent that it believed or that Mr O'Dempsey submitted was the case. An appellate Tribunal is able to scrutinise the decision subject to appeal and the factual matrix surrounding it in order to ascertain whether there has been a serious procedural irregularity (see the observation made in **Teinaz** by Peter Gibson LJ referred to above in the last sentence of paragraph 71 of this Judgment). To my mind there is nothing unorthodox in such an approach and I do not regard it

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as a basis upon which I can be asked myself to decide whether the hearing in this case should have been postponed or a telephone hearing substituted for it.

83. Having rejected the proposition that I should myself re-make the decisions, which are the subject of grounds 1 and 2, as identified by Kerr J in permitting the case to proceed to a Full Hearing, I still need to consider whether the reasoning of the ET betrayed any error of law. I accept that as part of the factual matrix EJ Postle and the other EJs who made decisions leading to the Preliminary Hearing proceeding on 28 August 2015 must be taken to have been aware of the Appellant's disability and that she was asserting difficulty in supplying written material due to fibromyalgia. But, even though **Galo** suggests the whole management of the case can be under consideration, what can be scrutinised in the instant appeal is governed to a significant extent by the current grounds of appeal. I accept that ground 2 can be regarded as covering not only what happened at the Preliminary Hearing but also the decision by EJ Sigsworth on 27 August and the earlier decisions of EJ Postle and even EJ Laidler. Ground 1, on the other hand, is less elastic and relates only to EJ Sigsworth's refusal to postpone or substitute a telephone hearing.

84. But whether viewed broadly or narrowly I do not see any equivalence between the factual matrix in **Galo** and that in the present appeal. To recapitulate, the factual matrix here was as follows in relation to grounds 1 and 2. The Appellant applied for a lengthy extension on 24 July 2015 on the basis that she did not have time to comply with EJ Laidler's Order of 8 July 2015. But the Appellant never contended at any stage before the ET that it was her belief she did not need to supply medical evidence in support of her applications to postpone or extend because on 3 August EJ Laidler had revoked the Order requiring medical evidence in support of

the contention made by the Appellant that she was disabled. Also, the Respondent had pointed out on 7 August 2015 that it wanted nothing more elaborate than further particulars of her case.

85. The medical evidence that she supplied subsequently was stated on 10 August 2015 by EJ Postle not to be adequate to justify postponement or an extension in respect of the directions given by EJ Laidler on 8 July 2015 that further particulars of her case be supplied. When the Appellant applied on 19 August 2015 for a postponement of five to seven weeks or for a telephone hearing as an alternative, the stated purpose of the latter was so she could give "*some further particulars of my claim*". It was never her contention that the Preliminary Hearing should be conducted by telephone but that it be replaced by a further case management discussion ("CMD") by telephone. The response of the Respondent was to object to extension of, postponement of or substitution of a telephone CMD for, an oral Preliminary Hearing and also to indicate that it would apply for a strike out. EJ Postle refused the Appellant's application on 26 August 2015, the Appellant opposed the strike out application in written submissions sent by an e-mail on 27 August 2015 and on the same day the Respondent forwarded a Schedule of Costs it intended to seek on 28 August 2015. The Appellant then sent an e-mail stating that both she and her husband were too ill to attend the Preliminary Hearing listed for the following day and also sought the same extension of between five and seven weeks, which had been applied for and refused earlier. EJ Sigsworth refused that application stating there had been no change of circumstances since the previous refusal to extend or postpone. Most significantly of all, to my mind, EJ Postle on 28 August was in possession of several facts, which he obviously thought significant because he summarised them at paragraphs 25.4 of his Reasons (see above at paragraph 15 of this Judgment). These are just the sort of factual observations upon which EJs are entitled to base decisions and why I regard with

misgiving the concept of this Tribunal casting them to one side in order to make its own decision.

86. To my mind, although it might be said there is a very broad similarity between this case and **Galo**, in the sense that both involve attempts by a Tribunal to bring a case to a hearing, the resemblance is entirely superficial. Moreover, there is nothing in the factual matrix here to support the suggestion made by Mr O'Dempsey that the Appellant had been confused by the revocation of the requirement for a medical report by EJ Laidler on 3 August 2015 and the failure to supply the particulars required by the same Judge on 8 July 2015 resulted from that confusion. The Appellant was clearly informed by EJ Postle on 10 August 2015 that the medical evidence submitted did not support her application for an extension or a postponement.

87. By then she had submitted a good deal of medical material but much of it was historic and that which related to her husband was unintelligible due to redaction. I accept that she did explain that her forthcoming scheduled appointment with her GP might not result in a written report until September and Mr O'Dempsey is right to describe the decisions of the ET as essentially unreasoned. But letters recording directions given by the ET are usually brief and without any, or any detailed, Reasons and there has been no request for Reasons to be provided. In any event, it is not difficult to discern the reasoning process. EJ Postle thought the medical evidence was inadequate on 10 August 2015 and subsequently there was never any significant addition to it. It can be inferred that his refusal of an adjournment on 26 August 2015 was on the same basis and EJ Sigsworth thought there had been no change of circumstances on 27 August 2015. On 28 August 2015 I regard it as clear from paragraph 25.4 of the Reasons that EJ Postle doubted the extent of the difficulties being put forward by the Appellant as excusing her non-compliance and non-attendance.

88. In **Galo** the NICA go so far as to suggest that in some circumstances the Tribunal may wish to obtain its own medical evidence. I know nothing of the position in Northern Ireland but from what I know of the resources of the ET in England and Wales I would regard that as a wholly unrealistic expectation for this jurisdiction. Both in the civil jurisdiction and in the ET, it seems to me that the party asserting that illness precludes compliance with Orders or necessitates a postponement or extension or an adjournment bears the burden of adducing medical evidence in support. Here the Appellant did not do that. I do not regard it as in any way erroneous in law for EJ Postle and EJ Sigsworth to have taken the view that nothing new was being said and nothing new was being proffered by the Appellant in her consecutive applications. Also scanning the Reasons for clues as to prior thinking, it is clear that EJ Postle was unimpressed by some of what the Appellant had said in her correspondence. He thought the tube strike irrelevant and the ability to attend a disciplinary tribunal significant. I cannot see anything wrong in law in that thinking.

89. Nor does it seems to me any sustainable criticism can be made of EJ Sigsworth's refusal to substitute a telephone CMD for a Preliminary Hearing. This was only a request for an adjustment in the sense that it suggested it might be possible to give the outstanding particulars of the claim orally. I cannot see why EJ Sigsworth erred in law in refusing that on the basis that nothing had changed.

90. Therefore, on a conventional approach my conclusion is that the appeal must be dismissed in respect of grounds 1 and 2. I ought to add that even if I had accepted the radical approach suggested by Mr O'Dempsey I would still reach the same conclusion because on the facts I do not think there has been unfairness or injustice to the Appellant. I reiterate that to my mind this is a different case to **Galo** and if I were making the decision I would not have

regarded the evidence here as establishing that fairness or justice called for a reasonable adjustment of postponing the hearing and/or allowing the particulars to be supplied orally in a telephone hearing, a process which I regard as fraught with difficulty and not liable to result in the Appellant being able to participate any more fully in the litigation process.

91. So far as the third ground is concerned, I cannot see any factual basis for the contention that EJ Postle considered without prejudice save as to costs correspondence before he came to the issue of costs. Accordingly, that ground also fails.

92. As to the fourth ground I have given careful consideration to Mr O'Dempsey's argument that the Appellant ought to have an opportunity to set out her means. I do not accept Ms Harrington's argument that an ET has any kind of discretion as to whether or not to consider means in the sense that it can ignore obvious evidence of inability to pay a Costs Order. The ability of a party to pay costs seems to me to be an important aspect of a judicial decision about costs.

93. But all of that said, I cannot see that any disadvantage has been suffered by the Appellant. I accept that in some cases receiving a Schedule of Costs not long before the hearing might create a difficulty. But in this case although the Appellant had a limited opportunity to deal with the Schedule of Costs, nevertheless she was able to make submissions about it. Therefore submissions about lack of means could have been put before EJ Postle on 28 August 2015 had the Appellant chosen to do so and it seems to me that he was entitled to make a decision on the material that was before him. I do not regard his Costs Order as being erroneous in point of law and I will also dismiss the fourth ground of appeal. Accordingly, the whole appeal will be dismissed.