Appeal No. UKEAT/0208/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 January 2019
Judgment handed down on 05 April 2019

Before

THE HONOURABLE MR JUSTICE LAVENDER

(SITTING ALONE)

MISS ROSE MORTON — APPELLANT

EASTLEIGH CITIZENS ADVICE BUREAU — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS ROSE MORTON (The Appellant in Person)
For the Respondent	MR GARY SELF (of Counsel) Instructed by: DC Employment Solicitors 21 Carlton Crescent Southampton Hampshire SO15 2ET

SUMMARY

PRACTICE AND PROCEDURE - Postponement or Stay

The Employment Tribunal was not obliged to adjourn a Preliminary Hearing of the issue whether the Claimant had certain disabilities (in addition to the admitted disability of a binge eating disorder) either: (1) on the basis that the Claimant had not had a proper opportunity to prepare for the hearing; or (2) by reason of the Claimant's medical condition.

A **THE HONOURABLE MR JUSTICE LAVENDER**

(1). Introduction

B 1. This is an appeal against the decision of an Employment Tribunal sitting at Southampton not to adjourn a Preliminary Hearing which took place on 30 October 2017 before Employment Judge Kolanko. The Appellant is the Claimant, Rose Morton, who worked for the Respondent from 2006 until her dismissal on 22 November 2016. The Claimant contends that she was C unfairly and wrongfully dismissed and, *inter alia*, discriminated against by reason of her disability.

2. The Respondent, having initially denied that the Claimant was disabled at all, admitted D that she was disabled in that she suffered from a binge eating disorder. The purpose of the hearing was to decide the issue between the parties whether the Claimant was also disabled by reason of depression, anxiety or agoraphobia. The Employment Judge's decision was that:

E > **"1. … the claimant is not disabled by reason of the conditions of depression, anxiety, agoraphobia, whether cumulatively or in their own right, or as manifestations of the claimant's Binge Eating Disorder."**

(2). The Appeal Hearing

F

3. Before dealing with the issues, it is appropriate to deal with the manner in which the appeal hearing was conducted. The Claimant stated in her skeleton argument that her social phobia has now got worse and is now her major issue. Helpfully, the Claimant said as follows in G the first paragraph of her skeleton argument:

H > **"I have been assisted by a friend in completing this document due to my health issues. I apologise for the length of the document. This is for two reasons. Due to my social phobia and anxiety issues, if I get stressed during the hearing I may not be able to articulate myself. Therefore, I have written down as much as possible and ask that you accept this as a reasonable adjustment. Secondly, my health is variable. Sometimes I cannot write at all but when I do it tends to be long, rambling, repetitive and often difficult to make sense of. This is because of my anxiety and because I suffer from perfectionism. I need to write everything or I worry endlessly about it and also because I lack concentration at times which can make things repetitive."**

4. The appeal hearing was conducted by telephone. At the beginning of the hearing:

(1) I asked the Claimant whether she was well enough to proceed with the hearing. She confirmed that she was and that she had her friend, Amy Westbury, with her to help her to find documents.

(2) I explained that I had read her skeleton argument carefully, and had borne in mind what she said in paragraph 1.

(3) I asked the Claimant to let me know if she needed a break or if she needed me or the Respondent's counsel to repeat anything. The Claimant's submissions in support of her appeal lasted from about 11 am to 1 pm and from 2 pm to 2.30 pm. On a couple of occasions in the morning the Claimant asked for and was given a short time to collect her thoughts. At about noon, a longer break of 10 minutes was taken. A further 10 minute break was taken in her reply submissions, between 3.50 and 4 pm. Thereafter, with my agreement, Miss Westbury made certain points on the Claimant's behalf, before the Claimant made her final submissions, ending at 4.15 pm.

(4) The Claimant said that she was not herself, but that she was in a better situation than she had been during the Preliminary Hearing. She said that she was referred last year to a mental health team, she was under the care of a psychiatrist and she has had better medication since Christmas, with the result that her performance at the hearing before me was not an indication of her ability to represent herself on 30 October 2017. I have not assumed that it was.

(3). The Conduct of the Claimant's Claim

5. I begin by setting out the background to the hearing on 30 October 2017. The ET1 form was issued on 28 April 2017. The Respondent applied for an extension of time for filing the ET3

response form and for an adjournment of the Case Management Preliminary Hearing on the basis, *inter alia*, that the case was complex. As I have said, in its response the Respondent denied that the Claimant was disabled at all. The Respondent explained why it took this position, saying as follows in paragraphs 106 and 108 to 112 of its Response to Statement of Claim ("the Response"), by reference to an occupational health report prepared by a Dr Shand:

> **"106. The OH Report stated that, although the Claimant was, when examined in July 2016, manifesting symptoms of heightened anxiety, low mood, disturbed sleep, loss of confidence and impaired concentration to a variable degree, such symptoms were a form of temporary stress reaction to an ongoing conflict with the Chairman."**
>
> **…**
>
> **"108. The OH report indicated that the Claimant had no fixed impairment of cognition and was of normal mental fortitude. It stated that, once her work-related issues and conflict had resolved, her symptoms would also resolve within a relatively short period of time.**
>
> **109. The OH Report stated that the Claimant was currently fit to undertake her normal role, subject to resolving the apparent conflict between herself and the Chairman, and that "*there is no reason, from an intrinsic psychological perspective as to why Ms Morton would not be able to render regular and effective service in the future.*"**
>
> **110. The Claimant's alleged symptoms were (if and to the extent they existed, as to which no admissions are made) therefore temporary and not 'long-term'.**
>
> **111. The OH Report noted that, although the Claimant had a history of previous anxiety and depressive related symptoms, these were "*well-controlled and have not directly impacted on her capacity for work other than perhaps leaving her slightly vulnerable to stress and conflict*" and that "*she appears to have coped over a sustained period with the normal and inherent pressures or [sic] her role*."**
>
> **112. The Respondent accordingly asserts that the Claimant's alleged symptoms did not amount to an impairment that had a 'substantial' and/or 'long-term' adverse effect on her ability to carry out normal day-to-day activities."**

6. On 21 June 2017 the Claimant was directed as follows by Employment Judge Reed:

> **"The Claimant is directed, in advance of the preliminary hearing, to forward to the Respondent copies of any medical evidence in her possession or power relating to the condition that she says renders her disabled, together with a statement from her setting out the impact upon her of that condition, with particular reference to her ability to carry out day to day activities."**

7. This was not done, apparently as a result of failings on the part of the Claimant's then solicitors, who apologised for their oversight.

8. A Preliminary Hearing took place on 14 July 2017. Employment Judge Harper determined that there should be a Preliminary Hearing to consider whether or not the Claimant was disabled (and certain other matters which, in the event, fell away). He noted that the disabilities relied on were depression, anxiety, agoraphobia and an eating disorder. The Judge made the following directions, with a view to a hearing in the period October to December 2017:

> **"1. Further information on disability**
>
> **1.1 By the 28th July 2017, the claimant supply the respondent with the medical evidence which is relied upon to establish that the condition of amounts to a disability as defined under the Equality Act 2010 (the Act) together with a statement, limited to 750 words, as to the adverse effects the condition has on the claimant's ability to carry out normal day-to-day activities and the date on which the condition started.**
>
> **1.2 By the 4th August 2017, the respondent notify the claimant and the tribunal whether on the basis of the evidence supplied it continues to dispute that the claimant is a disabled person for the purposes of the Act, and, if so, on what basis.**
>
> **1.3 By the 11th August 2017, if the respondent does not concede that the claimant is a disabled person, the parties agree on the identity of, and a joint letter of instruction to, a medical expert to report on the claimant's condition whose fee will be paid jointly by the parties. The claimant is represented under a legal expenses policy.**
>
> **1.4 That expert is ordered to report by 15th September 2017.**
>
> **2. Further information and List of issues**
>
> **2.1. By the 28th July 2017, the claimant supply details of the basis of the claim for, including the dates, actions and names of those involved, sufficient for the respondent to understand the case it has to meet – this is in response to the respondent's request for further and better particulars.**
>
> **2.2 By 4th August 2017 the parties are to file an Agreed List of Issues.**
>
> **…**
>
> **4. Bundle of documents for the Preliminary Hearing**
>
> **4.1. By the 25th August 2017, a common set of core, relevant documents be agreed, assembled into a bundle, indexed and page numbered for use of the witnesses and the Tribunal, and limited without further direction to 100 pages not including the ET1, ET3, and the replies to the further and better particulars. The bundle be prepared by the respondent, one set provided to the claimant and its contents agreed by the parties. The limit on the bundle size may not be exceeded by more than 5% without the express prior consent of the Tribunal.**
>
> **…"**

9. On 27 July 2017 the Claimant provided her impact statement and the medical records which she relied upon. These do not appear to have been all of her medical records, as there were

some, particularly her GP's notes, which she had not received from her GP and/or in respect of which she wished to maintain confidentiality, but the Claimant contended that she had complied with paragraph 1.1 of the case management order, because she had provided all of the medical evidence which she relied on. In paragraph 1 of her impact statement she stated as follows:

> **"Conditions: eating disorder, depression, anxiety with agoraphobia and difficulties socialising."**

10. On 29 July 2017 the parties were notified that the Preliminary Hearing had been listed for 30 October 2017. The notice stated, inter alia, as follows:

> **"Unless there are exceptional circumstances, no application for a postponement will be granted. Any such application must be in writing.**
>
> **If you or anyone coming with you to the Hearing has a disability that makes coming to the Hearing or communicating difficult, please tell the Tribunal office dealing with your case as soon as possible. We will make reasonable adjustments to the way we deliver our service where we can."**

11. On 1 August 2017 the Claimant provided Further and Better Particulars of her claims.

12. In an email of 2 August 2017, the Respondent's solicitors stated as follows:

> **"… the Claimant has still not complied with Order 1.1 (to supply the respondent with the medical evidence which is relied upon to establish that the condition amounts to a disability), which makes is impossible for the respondent to comply with Order 1.2 (respondent to notify the tribunal whether it accepts the condition amounts to a disability)."**

13. Nevertheless, the Respondent's solicitors made a number of comments on the medical documents which had been produced, including the following:

> **"The 'PIP Claim Medical Evidence for Rose Morton' only mentions a binge eating disorder (of which the claimant appears to have been diagnosed in September 2014, when she had then suffered from the condition for about a year) and makes no mention of work-related stress or depression/anxiety associated with that. That document was completed by the Claimant and verified by her GP in connection with the claimant's claim for disability benefits in April 2017.**
>
> **Conversely, all Fitness Notes submitted by the claimant's GP to the respondent during the employment made no mention whatsoever of an eating disorder, but instead characterised the claimant's absences as due to work-related stress or "low mood".**

The respondent had no knowledge about the claimant's alleged eating disorder until after her dismissal and, contrary to what the respondent has now claimed in its further & better particulars (attached) at point 6, her alleged conditions of eating disorder and agoraphobia are not mentioned at all in the report of Dr Shand (included within the attached records)."

14. The letter concluded as follows:

"In view of this, the tribunal is requested to order:

1. **that the claimant forthwith fully comply with Order 1.1, to include all of her GP's notes relating to the claimant's mental health during the period from September 2013 (when she first seems to have suffered symptoms of eating disorder) to the present date, coupled with an unless order in view of the claimant's previous failures to provide medical evidence; and**

2. **that the order dated 14th July 2017 be amended so that the respondent has 7 days from the date of receipt of the medical evidence to notify the tribunal whether or not it accepts that the claimant had a disability at the relevant times and that the parties have a further 7 days thereafter to agree a list of issues."**

15. No such order was made. However, at the end of August 2017 the Claimant dismissed her solicitors, and on 30 August 2017 she provided copies of the remainder of her medical records (which she had obtained from her GP) to the Respondent and to the Employment Tribunal. Thus, by the end of August the Claimant had disclosed all of the medical records on which she relied and there was no further complaint by the Respondent that that disclosure was inadequate.

16. Meanwhile:

(1) The deadline of 4 August 2017 for filing an agreed list of issues passed and neither party ever produced a draft list of issues.

(2) The deadline of 11 August 2017 for instructing a joint expert passed and neither then nor at any subsequent stage was a joint expert instructed.

(3) The deadline of 25 August 2017 for agreeing a core bundle passed without either party making any proposals as to its contents. The Claimant told me that she was ill at the time, she was a litigant in person, she had provided the documents on which

she relied and, in any event, she anticipated that the joint medical report would mean that a hearing was not necessary. The first draft bundle index was provided by the Respondent on 26 October 2017.

17. On 12 September 2017 Employment Judge Reed asked the Respondent to indicate its position on disability. On 19 September 2017 the Respondent's solicitors wrote as follows:

> **"We can confirm that we have received the Claimant's medic al evidence and that it shows that she had a binge eating disorder since at least September 2014 and that the condition continues.**
>
> **We are of the view that the disorder is a disability and the Respondent therefore concedes that the Claimant had a disability, namely a binge eating disorder with the meaning of the DSM-V criteria, at all relevant times. Please note that this concession does not extend to any other medical conditions."**

18. On 20 September 2017 the Respondent took the position that, because it had conceded that the Claimant was disabled, it was not required either to state the basis on which it disputed that the Claimant was disabled or to instruct a joint expert. On the same day the Claimant wrote to the Tribunal asking for a direction that:

> **"the Respondent explains why they do not feel that my other conditions meet the criteria to qualify me as a disabled person under the Act;**
>
> **that the joint medical report should still go ahead."**

19. On 2 October 2017 Employment Judge Harper directed as follows:

> **"EJ Harper therefore directs you to confirm by 9 October 2017 whether you rely on the other alleged disabilities – in which case an independent expert would need to be instructed on a joint instruction on a jointly funded basis. If, however, you rely only on the "binge eating disorder" as your disability there is no need to have such further expert evidence."**

20. The Claimant confirmed on 5 October 2017 that she relied on all of her health problems and repeated her request for a direction that the Respondent supply its reasons for disputing that they were all disabilities. At this stage, she assumed that a joint medical report would be commissioned and that the hearing on 30 October 2017 would have to be adjourned.

21. On 19 October 2017 Employment Judge Reed made the following direction:

> **"I would assume that the issue of disability, in respect of all the conditions in question, can be satisfactorily addressed on the basis of the existing medical evidence and the Claimant's testimony (including oral testimony). I therefore propose that the matter be listed for a half day Preliminary Hearing to address disability and the other matters referred to in the case management summary. If either party objects it should let us know within 7 days."**

22. There was no appeal against Employment Judge Reed's Order. On 23 October 2017 the Claimant stated that she objected to this Order and contended that a medical report was still required. She pointed out that she was representing herself. She claimed that she would be unable adequately to prepare for a hearing if the Respondent did not provide in advance its reasons for disputing her disability. She also asked for the hearing on 30 October 2017 to be adjourned, saying, *inter alia*, as follows:

> **"4. Once a medical expert has addressed these specific issues there is unlikely to be a need for a preliminary hearing. I suffer from agoraphobia so having to attend any hearings will be very stressful for me and I do therefore ask that you give consideration to this in making your decision.**
>
> **…**
>
> **8. The preliminary hearing scheduled for 30th October be postponed to allow time for a medical report and for the Respondent to provide their reasons for disputing my disability/diagnosis. Even if the Tribunal decides not to direct a joint medical report I wish to obtain my own medical evidence and need additional time to obtain this."**

23. The Claimant confirmed that in her email of 23 October 2017 she was not applying for an adjournment of the hearing on medical grounds. However, the Claimant told me that by this stage she was getting pretty ill, in part because unexpected events tended to increase her stress levels, and that she was getting worse and worse during the week beginning 23 October 2017. She told me that she spent most of the week in bed, because when she gets really stressed she cannot got out of bed, and that she did not contact her doctor because: (a) she was ill and her condition makes her confused; (b) she did not receive a decision on her adjournment application until Friday 27 October, when it was too late to see her doctor; and (c) no-one had asked her to obtain a note from her doctor.

24. In an email sent at 6.23 pm on Tuesday 24 October 2017 the Respondent set out at some length (over 4 pages) why it contended that the Claimant's alleged anxiety, depression and agoraphobia were not disabilities. The Claimant attached considerable importance to this letter and, in particular, the Respondent's contention that her alleged conditions were no more than the "medicalization of work problems or adverse life events". She claimed that this was a contention which was first made in this email. However, the substance of this contention had been made, by reference to Dr Shand's report, in the Respondent's Response. Moreover, the Respondent had made clear both in its Response and its solicitors' email of 2 August 2017 its contention that there was no evidence for the Respondent's alleged conditions, other than the binge eating disorder.

25. In an email sent at 8.47 pm on Thursday 26 October 2017 the Respondent provided a copy of the index for the proposed hearing bundle. With the exception of 5 documents, this bundle consisted of 3 categories of documents: (1) pleadings and orders; (2) emails passing between the parties; and (3) the Claimant's medical records.

26. As for the 5 exceptional documents, the Claimant said, and I accept, that she had not seen these documents recently before the hearing, and that she had never seen one of them before. There is a dispute about whether any of these documents were put to the Claimant in cross-examination. Mr Self said that he did not put any of these documents to the Claimant. The Claimant said that she thought that he did, but she could not remember which documents were put to her. None of them were mentioned in the Judge's Judgment. The Employment Judge noted in his Judgment that some documents in the bundle were not drawn to the Tribunal's attention.

27. I have read these documents. They have no bearing on the question whether or not the Claimant was disabled by reason of depression, anxiety or agoraphobia. The Claimant agreed that these documents were not relevant to the issue whether she was disabled. It is inherently unlikely that Mr Self would have cross-examined the Claimant on these documents. There is no indication in the Judgment that they had any bearing on the Employment Judge's decision, and I do not see how they could have done.

28. In an email sent at 11.54 am on Friday 27 October 2017, the Claimant again requested the adjournment of the hearing, saying as follows:

> **"…..**
>
> **There have been long delays in dealing with this matter both by the Respondent and The Tribunal Service. I've only just received the Respondent's lengthy reasons for disputing my disability and the list of documents that they have requested that I check for 12 o'clock. It is now 11:45 and I will not be able to do this. We have not had the opportunity to agree on witnesses so I will not be able to call any to the hearing and I do not have adequate time to prepare for it.**
>
> **I suffer from mental health issues including agoraphobia and anxiety and in order to attend a hearing which will be very stressful for me I need time to prepare not just my arguments but also time to prepare mentally for this. I will not be able to attend on Monday because of the short notice so I would be very grateful if you could put this forward to the Regional Judge to consider. I am feeling very stressed about this at the moment.**
>
> **…."**

29. The request for an adjournment was opposed by the Respondent and was refused by EJ Pirani, whose reasons were given as follows:

> **"The Judge's reasons for refusing the request are that the claimant has had adequate notice of and time to prepare for the hearing."**

30. The bundle index had to be re-sent to the Claimant by email at 10.01 am on 29 October 2017 so that she could read it. She was sent a pdf copy of the bundle, but was unable to open it. She was first given a physical copy of the bundle at the hearing.

(4) The Hearing on 30 October 2017

31. There is a dispute as to what happened at the hearing on 30 October 2017. It is common ground that at the beginning of the hearing the Claimant asked for the hearing to be adjourned and that the Judge refused that application. What is disputed are the grounds advanced by the Respondent for that application. It is accepted that the Claimant contended that she had not had adequate time to prepare for the hearing and that a joint medical report ought to be prepared before the hearing went ahead. It is disputed whether she raised her mental health issues as a ground for seeking an adjournment. I will come back to that dispute.

32. The Employment Judge refused the application for an adjournment. I have not seen any notes of the hearing after the dismissal of the application for an adjournment. The Claimant's impact statement was treated as the Claimant's evidence in chief. There was a dispute before me as to whether she was given the opportunity to supplement her impact statement. She was cross-examined. No other witnesses were called. Mr Self made his closing submissions. The Claimant started to make her closing submissions. She told me that she was prevented from relying on a letter from her doctor. The Judge stated as follows in the answers, dated 17 August 2018, which he gave to a number of question posed pursuant to the **Burns-Barke** procedure:

> **"I have referred to in the Reserved Judgment reasons, that the Appellant introduced an extract apparently from a book by Professor Fairburn in her closing submissions. Save for this the Appellant did not seek to introduce additional documents prior to the commencement of submissions."**

33. The Claimant did not complete her closing submissions. She told me that there was no time for her to go through all of the documents in chronological order, as she proposed. She told me that the Judge became impatient with her and she went silent. Mr Self put it as follows in his skeleton argument:

> **"6. … the Claimant indicated that she was struggling and began for the first time that day (from my perspective) not to be fully focussed…"**

34. The Employment Judge said as follows in paragraph 12 of his judgment:

> **"Whilst the claimant was presenting her closing submissions, she indicated that she could not continue, and it was agreed between the parties that she would have an opportunity to provide additional submissions, …"**

35. The Employment Judge adjourned the hearing and directed that the Claimant's closing submissions should be made in writing within 14 days. The Claimant put in written submissions. I was not shown those submissions, as the Claimant objected to my seeing them. The Claimant initially told me that she said everything which she wanted to say in those submissions. On reflection over lunch she qualified that by saying she did not have the opportunity to put in additional evidence.

(5) The Judgment of 14 December 2017

36. The Employment Judge reserved his Judgment, which was sent to the parties on 14 December 2017. In summary, he found that the medical evidence did not support the Claimant's claim that she was disabled by reason of depression, anxiety or agoraphobia. He quoted a number of passages from Dr Shand's report, including passages which had been relied on by the Respondent in its Response. He rejected the Claimant's evidence that she had told her GP or Dr Shand what to put in the GP's fit notes or in Dr Shand's report. He stated, *inter alia*, that:

> **"23. … I judge that the report of Dr Shand fully supports a state of affairs where it was these work events which caused the stress and anxiety to exacerbate, and that such condition would subside as soon as the work issues were addressed…"**

37. The Employment Judge was, in effect, agreeing with the case advanced by the Respondent in its Response.

38. He dealt with the application for an adjournment in paragraph 2 of his Judgment. He said as follows:

> **"At the outset of this hearing, the claimant sought a postponement in order to obtain a joint medical report on this issue. It is correct that there was reference in an earlier case management to the possibility of a joint expert report being obtained, in the event of the respondent not accepting that the claimant was disabled. Subsequent correspondence from the tribunal indicated, that Employment Judge Reed on 19 October 2017 wrote to the parties expressing the view that the remaining issues of disability could satisfactorily be addressed on the basis of the existing medical evidence and the claimant's testimony, and proposed this preliminary hearing address that issue. The parties were invited to express their views on the matter. The claimant repeated her view that a joint report should be obtained, and in the interim the preliminary hearing should be postponed, and the respondent proposed that Judge Reed's suggestion should be adopted. The matter came before Employment Judge Pirani, who having considered the documentation, refused the application on the grounds that the claimant had adequate notice, and time to prepare for this hearing. Having heard representations from the parties I saw no basis for interfering with Judge Pirani's determination."**

(6) The Adjournment Application

39. I have seen the Judge's notes of that part of the hearing which dealt with the adjournment application, which are not easy to read, and the notes prepared by a trainee solicitor, Laura Kelleher, who accompanied Mr Self.

40. According to Ms Kelleher's notes, the hearing began before 10.20 am, the Claimant said that the hearing should be postponed, there was a short adjournment from 10.20 am to 10.40 am (seemingly to allow the Claimant to consider the bundle of documents) and then the Claimant made lengthy submissions in support of her application for an adjournment. According to the Employment Judge's notes, it appears that the Claimant's submissions lasted for about 25 minutes, from about 10.40 am to about 11.05 am. Mr Self replied and the Claimant responded. These submissions took almost an hour in total, until about 11.35 am, when there was another short adjournment, following which the Employment Judge announced his decision. I note that Mr Self assisted the Claimant in finding copies in the bundle of documents to which she wanted to refer.

41. Neither set of notes records the Claimant as saying that she was unable adequately to represent herself by reason of ill health. The Judge said as following in his answers of 17 August 2018:

> **"(1)(a). The Appellant did not state that she was making her application for a postponement because her health prevented her from coping with the hearing…"**

42. I am not persuaded that the Claimant expressly stated that she was unable adequately to represent herself by reason of her medical condition. If she had done so, then this would have prompted, for example, consideration of why she had not produced a note from her doctor to that effect.

43. However, the Claimant did say that she had not been able adequately to prepare for the hearing. The Judge also said as follows:

> **"My notes record that nearing the end of her representations in respect of the postponement, the Appellant stated "*All very stressful – I would prefer video conference, I could not ask a friend to come with me. They have three people here, - intimidating*." I did not treat this as an indication that her health prevented her from presenting her case, or that this was a further ground for a postponement."**

44. It is by no means unusual for litigants in person to find the experience of representing themselves stressful. In this case, it was well known to the Tribunal that the Claimant claimed to be suffering from anxiety, depression and agoraphobia. The Claimant contends that the Tribunal ought in any event to have considered of its own initiative whether an adjournment was required by reason of the Claimant's health, whether by way of a reasonable adjustment to the Tribunal's procedure or otherwise.

45. The Judge's notes record the Claimant as saying that she had not been given an opportunity to call other witnesses, specifically Dr Shand and Ms Westbury. The Judge also stated in his answers of 17 August 2018 that the Claimant said at one stage that she required further medical evidence to rebut the suggestions made in the Respondent's solicitors' email of 24 October 2017.

(7) The Grounds of Appeal

46. The decision whether or not to adjourn a hearing is a case management decision. A Tribunal making such a decision has a discretion. This Tribunal will not often interfere with the exercise of that discretion, and will not do so unless it can be shown that the Tribunal has taken account of irrelevant considerations, has failed to take account of irrelevant considerations, had taken a decision which can properly be described as perverse, or had so conducted itself that a litigant was deprived for a fair hearing.

47. There may be circumstances in which an Employment Tribunal is obliged to adjourn a hearing, even of its own motion, on the grounds that a litigant in person with mental health issues would otherwise be deprived of a fair hearing. The law on this point is helpful summarised in paragraphs 26 to 34 of the Judgment of HHJ Eady QC in this Tribunal in **Shui v University of Manchester** [2018] ICR 77.

48. It is unnecessary for the purposes of this appeal for me to address the issue whether it is, as stated in paragraph 54 of the Judgment of the Court of Appeal in Northern Ireland in **Galo v Bombardier Aerospace UK** [2016] NICA 25, for this Tribunal to determine whether a fair procedure was followed, or whether that statement was manifestly wrong and is not binding on this Tribunal, as held by HHJ Hand QC in this Tribunal in paragraph 78 of its Judgment in **Leeks**

v Norfolk and Norwich University Hospital NHS Foundation Trust (2018) UKEAT/0050/16/DA. For reasons which I will explain, I consider that a fair procedure was followed by the Employment Tribunal.

49. In paragraphs 8 to 12 of her Notice of Appeal, the Claimant submits as follows:

> **"8. In paragraph 2 of the judgement it states that the only reason that I requested a postponement was "in order to obtain a joint medical report". I did not ask for a postponement only on that ground, I also asked for a postponement because:**
>
> > **a. I had explained that I was stressed due to my mental health problems which had been exacerbated by the way the Tribunal Service had dealt with my requests for orders to be made and a postponement. Because of this stress I was unable to adequately represent myself. Due to my disability I get very easily stressed and cannot cope with this stress. During such periods my ability to think, act and communicate clearly is affected. This could have affected the Tribunals perception of me and it affected my ability to represent myself on that day.**
> >
> > **b. I also asked for the postponement because I had not seen the bundle prepared by the Respondent until the hearing, despite a previous order that both parties should agree the bundle contents. This meant that information was included that should not have been included because it was not relevant to the case. It also meant that I did not have the normal minimum time frame of at least 7 days in which to prepare my response.**
> >
> > **c. I had also requested a postponement because in the case management hearing on 14th July 2017, it was directed that the parties cooperate to prepare a list of issues for the hearing. The respondent wrote to me on 20/10/2017 saying that "Paragraph 2.2 of the same Order requires the parties to file an Agreed List of Issues. Now that disability is conceded, I will prepare a draft List of Issues for your comments." They never did compile the list. There was therefore no list of issues for the hearing. Nor were several other orders complied. There was no chronology relevant to the medical issues or cast list. The confusion caused by three separate judges making three separate decisions with regards to the postponement of the hearing meant that there was insufficient time for me to prepare these documents myself as I had been initially led to believe that the hearing would be postponed to allow time for a medical report. The Respondent admitted during the hearing that they knew that the hearing had not been postponed yet they did not prepare the necessary documents. The lack of these details at the hearing no doubt contributed to the substantial errors made about the basic facts of the case.**
> >
> > **d. I had also requested a postponement because my request for an order that the Respondent explain their reasons for disputing my disabilities had never been dealt with.**
>
> **9. The reserved judgement did not take into account the decision of Judge Harper and the confusion that had been caused by the involvement of three separate judges.**
>
> **10. The reserved judgement stated that Judge Pirani "refused the application on the grounds that the claimant had adequate notice, and time to prepare for this hearing. Having heard representations from the parties I saw no basis for interfering with Judge Pirani's determination" (point 2). This statement confirms that the Tribunal did not take into account that I had not seen the bundle or any of the evidence or witness statement presented by the Respondent within the minimum period of seven days.**
>
> **11. The lack of provision of this information within the minimum period meant that there was not sufficient time for me to prepare and submit a witness statement, skeleton arguments and chronology of relevant events and so I was unable to present all relevant issues. No doubt this led to the many errors of fact made in the decision.**

A

> **12. The lack of minimum notice of the Respondent's evidence, witness statement and bundle also meant that I did not have sufficient time to obtain evidence from witnesses or additional medical evidence that would discredit the Respondent's arguments."**

(8) Paragraphs 8(b) to 12 of the Grounds of Appeal

B

50. Putting on one side for the moment the Claimant's health issues, I do not consider that any of the other matters relied on by the Claimant required the Tribunal to adjourn the hearing. I address briefly the issues raised in paragraphs 8(b) to 12 of the Grounds of Appeal.

C

(8)(a) Paragraph 8(b): The Bundle of Documents

51. The bundle of documents prepared by the Defendants consisted largely of documents which ought to have been familiar to the Claimant. The Claimant was given assistance to find documents to which she wanted to refer. The five documents which the Claimant had either not seen before or not seen recently were of no significance in relation to the issue to be decided at the hearing.

D

E

52. In considering the significance of the late production of the bundle of documents, it is relevant to note that: (1) the Clamant had prepared a witness statement: that was what the impact statement was intended to be; and (2) the Respondent did not rely on any witnesses, so the Claimant did not have to cross-examine any witnesses.

F

G

53. In relation to the late production of the bundle, the Judge said as follows in his answers of 17 August 2018:

H

> **"(1)(b). The Appellant at the conclusion of her representations regarding her postponement application, did complain that she had received the documents from Mr Dunn late in the day, and that she had difficulties opening some electronic files sent by Mr Dunn. I treated this as a general complaint regarding the conduct of the Respondent's representative, and not that she was prejudiced by any late arrival of documents, or that as a consequence she was seeking a postponement of the Preliminary Hearing…"**

54. I am not persuaded that the Judge was wrong in his understanding of the Claimant's submissions but, in any event, the late production of the bundle did not cause the Claimant any irremediable prejudice. It contained documents which with she ought to have been familiar, save for five documents which were of no relevance to the issue which the Judge had to decide.

(8)(b): Paragraph 8(c): List of Issues and Chronology

55. The issue to be dealt with at the hearing was clear. It was whether the Claimant suffered from the alleged disabilities. A formal list of issues would have made no difference. The absence of a chronology was not a substantial handicap to the hearing proceeding. The issue for determination involved a consideration of the medical evidence. That evidence had been in the Claimant's possession for some time. The Claimant's case from the commencement of the claim had been that the medical evidence supported her claim that she suffered from the alleged disabilities. The Claimant was able to identify the medical evidence on which she relied.

(8)(c): Paragraph 8(d): The Respondent's Reasons for Disputing Liability

56. The Respondent had set out on the evening of 24 October 2017 its detailed submissions as to the reasons why the medical evidence did not establish the alleged disabilities. These developed similar submissions made in its Response and in its solicitors' email of 2 August 2017.

57. The Claimant gave evidence, as had been anticipated since July. As I have said, her impact statement stood as her evidence in chief and she was cross-examined. She had had an opportunity to prepare herself for the line of questioning to be pursued by Respondent, since the email of 24 October 2017 indicated why the Respondent disputed her claim to be disabled.

(8)(d): Paragraph 9: Earlier Orders

58. The Claimant had known since she received Employment Judge Reed's direction of 19 October 2017 that the hearing might proceed without a joint medical report. The Claimant had had ample opportunity in which to prepare her arguments that the issue of disability could not be decided without a further medical report. The Tribunal considered the Claimant's argument that a joint medical report was required and was entitled to conclude that the hearing could go ahead without one. Any medical report would be based on the medical records which were before the Court.

(8)(e): Paragraph 10: Matters not taken into Account

59. In my judgment, the Employment Judge was entitled to conclude that that the Claimant had had adequate notice of, and time to prepare for, the hearing. The Employment Judge expressly stated that he had taken the Claimant's submissions into account when he said, "Having heard representations from the parties I saw no basis for interfering with Judge Pirani's determination".

60. It was not necessary for the Employment Judge to rehearse the Claimant's submissions in detail. I am not persuaded that the Employment Judge failed to take into account when arriving at his decision any of the matters relied on by the Claimant. He considered them and dismissed them. That is what he meant when he said that he saw no basis for interfering with Judge Pirani's determination.

61. Even if there was a misunderstanding and the Employment Judge failed to appreciate that the Claimant was relying on, for example, the late production of the bundle as a reason for seeking an adjournment, there was no good reason for granting an adjournment.

(8)(f) Paragraph 11: Witness Statement, Skeleton Argument and Chronology

62. As I have said, the Claimant did submit a witness statement, i.e. her impact statement, she had sufficient time in which to respond (by way of a written skeleton argument or otherwise, e.g. in her written closing submissions) to the Respondent's solicitors' letter of 24 October 2017 and a chronology would have made no difference.

(8)(g) Paragraph 12: Additional Witnesses

63. The Claimant had not at any stage prior to the hearing suggested that she wanted to call any additional factual evidence. An application for an adjournment on that ground could not have succeeded without some indication of the nature of the proposed additional evidence and why it was required. The Claimant did not identify any proposed witnesses other than Dr Shand, Ms Westbury and her own GP. The Claimant had not taken any steps to obtain evidence from these potential witnesses, although Ms Westbury was her friend and the Respondent had been saying since it submitted its Response that Dr Shand's report did not support the Claimant's case and had been saying since 2 August 2017 that her GP's fit notes did not support her case.

(9) The Claimant's Medical Condition

64. I am not persuaded that the Employment Judge was obliged to adjourn the hearing any sooner than he did by reason of the Claimant's medical condition.

65. In the first place, I am not satisfied that the Claimant applied for an adjournment on the basis of her medical condition.

66. Secondly, I am not persuaded that the Employment Judge was obliged to raise any earlier than it was in fact raised the question whether the Claimant was fit to continue with the hearing. There was no medical evidence which stated that the Claimant was unfit to conduct the hearing, that she needed any more time to prepare for the hearing or that she required any adjustments to the Tribunal's procedure. The Claimant was able to make lengthy submissions and then to answer questions when cross-examined. There came a point at which the Respondent accepts that the Claimant was struggling. That was the point at which the Judge adjourned the hearing, so that the Claimant could put her closing submissions in writing. This was an adjustment to the Tribunal's procedure. It allowed the Claimant to take her time to formulate her submissions and to do so away from the hearing room and away from the stresses associated with being in the hearing room. I am not persuaded that any further adjustment was required.

67. Another way in which the Claimant put her case was to submit that the Employment Judge, in deciding the case, relied on the manner in which she gave evidence, which she contends was affected by her medical condition in a way which it would not have been if the hearing had been adjourned. The Claimant has not produced any medical evidence to support this proposition. More significant, however, is the fact that the Employment Judge did not decide the case on the basis of the Claimant's demeanour, but rather on the basis that, in effect, he agreed with what the Respondent had said in its Response, to the effect that the medical evidence, and in particular Dr Shand's report, did not support the Claimant's claims of disability and instead indicated that her symptoms were a form of temporary stress reaction to the conflict which she faced at work.

68. The Claimant's answer to that case was, at least in part, that Dr Shand's report did not disclose the true nature of her condition, because she had asked him to say one thing rather than another in his report. This is, clearly, an inherently incredible claim. Moreover, it is appropriate to note that: (a) it is an inherently incredible claim whatever the demeanour of the person who makes it; and (b) its credibility was not assisted by the fact that, notwithstanding the terms of the Respondent's Response, the Claimant took no steps between 16 June and 30 October 2017 to obtain any evidence from Dr Shand to support it. It was those factors which led the Employment Judge to dismiss the Claimant's evidence on this point.

(10) Summary

69. For the reasons which I have given, I dismiss this appeal. For all of the lengthy submissions and grounds of appeal which the Claimant has produced, the simple fact is that the Employment Judge agreed, and was entitled to agree, with the Respondent's submission that the medical evidence did not support the Claimant's claim that she was disabled on the grounds of depression, anxiety or agoraphobia. In reaching that conclusion, I am grateful both to the Claimant, assisted by Ms Westbury, and to Mr Self, on behalf of the Respondent, for their clear and helpful submissions.