Appeal No. UKEAT/0070/19/DA
UKEAT/0183/19/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 16 July 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

DR R HEAL — APPELLANT

THE CHANCELLOR, MASTER AND SCHOLARS OF THE UNIVERSITY OF OXFORD AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	Written Submissions
For the Respondent	Ms Claire Darwin (of Counsel) Instructed by: Penningtons Manches LLP 9400 Garsington Road Oxford Business Park Oxford OX4 2HN

SUMMARY

PRACTICE AND PROCEDURE

The Claimant indicated that he had a disability in his ET1 and requested some adjustments including permission to use a recording device as his condition made it difficult for him to take contemporaneous notes. The Tribunal indicated that an application for permission should be made at the preliminary hearing although it was also stated that the application would be considered before the hearing if the requisite information was provided. The Claimant appealed on the grounds that he should not have to make an application, that the Tribunal erred in failing to consider the matter before the preliminary hearing and in failing to consider that the Claimant would be in contempt of court if he attempted to bring a recording device into the building before permission was granted.

Held, dismissing the appeal, that the Tribunal was entitled to deal with the application at a hearing rather than on the papers. There was no error of law in not considering the matter in advance of the hearing although the Tribunal had not precluded that course in any event. Finally, the Tribunal's direction that the application to record be considered at a hearing implicitly gave permission to bring the equipment to court pending leave to record being given. In any event, there is unlikely to be a contempt of court within the meaning of s. 9 of the Contempt of Court Act 1981 where a person brings a device, e.g. a mobile phone, to court for a purpose other than to use it to record sound or subject to the Tribunal's permission to do so.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. Courts and Tribunals are often requested to make adjustments to remove disadvantages for disabled litigants. This appeal concerns a request for a proposed adjustment to allow the Claimant, who is a litigant-in-person, to make an audio recording of proceedings. The reason for making the request was that the Claimant's disability made it difficult for him to make a contemporaneous written note of the proceedings.

Background

2. The Claimant brings various complaints of discrimination and victimisation against various colleges of the University of Oxford. The details of the underlying claims are not relevant for the purposes of this appeal.

3. The Claimant has several medical conditions. He submits that these conditions mean that reasonable adjustments are required to enable him to participate in proceedings fully. The conditions described in the Claimant's skeleton argument are as follows:

a. Dyslexia: This is said to be characterised by impaired short-term memory processing, which is exacerbated by stress and anxiety. The adjustments required in the light of that condition, according to the Claimant, are extra time for reading and writing; using a font of at least size 12 Arial; and clearly defined, spaced paragraphs.

b. Dyspraxia: The Claimant's writing abilities are said to be impaired. The impairment is exacerbated by long periods of writing and being required to write quickly, as would be the case if a contemporaneous note is being taken of proceedings. The adjustments said to be required are permission to use a computer, additional time for

writing and **a recording device for taking notes**. It is that last adjustment for permission to use a recording device that is central to this appeal.

c. Irritable and inflammatory bowel: This is described by the Claimant as a debilitating bowel condition, which is exacerbated by stress and anxiety. The adjustments sought to address the disadvantages caused by this condition are additional rest breaks and the removal of stressors and factors causing distress and anxiety. One adjustment sought is the transfer of all claims to Bristol, that being nearer to the Claimant's home. The Claimant's claim has in fact been assigned to the London Central Employment Tribunal. The Claimant objects to that assignment and his challenge in that respect is the subject of a different appeal.

4. The Claimant's claim form (ET1) at box 12.1, did indicate that he had a disability and that he would require assistance, including by way of being permitted to use a recording device during any hearing. The conditions giving rise to the need for that adjustment were not set out and nor was there any explanation at that stage as to why that adjustment would assist.

5. By a letter dated 2 August 2018, Employment Judge R Lewis of the Watford Employment Tribunal ("the Tribunal") directed, amongst other things, that there be a preliminary hearing to undertake case management. In relation to the Claimant's request for permission to record the proceedings, EJ Lewis said as follows:

> **"I make no ruling on that application. If he wishes to pursue it, the Claimant should apply to the judge at the preliminary hearing. No party has permission to record proceedings without the permission of the judge."**

6. The Claimant sought a reconsideration of that decision. Employment Judge Gumbiti-Zimuto, in a decision sent to the parties on 14 September 2018, dealt with the application to record proceedings as follows:

> **"5. Recording of the proceedings by the Claimant: I am of the view that the order made by Employment Judge Lewis is a fair way of dealing with the Claimant's application about recording the hearings. The Employment Tribunals Rules of Procedure 2013 include the provision that: "The Tribunal**

> **may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any law relating to the admissibility of evidence in proceedings before the courts." At the preliminary hearing the Claimant can explain to the Employment Judge why the adjustment sought is reasonable.**
>
> **I am not clear why, provided that the Claimant attends with the necessary equipment to record the proceedings, there should be any practical difficulty in proceeding in this way or that it will cause any injustice to the Claimant. If any decision about recording is made against the Claimant interests, and he seeks to challenge the decision by appeal or some other way the Claimant can in such circumstances make such application as he considers appropriate e.g. apply for an adjournment pending an appeal and such application will be considered by the Employment Judge."**

7. The Appellant lodged a Notice of Appeal against both of those decisions. One of his complaints was that the procedure suggested by Employment Judge Gumbiti-Zimuto left the position uncertain in that the Claimant would not know until the day of the hearing whether he would be granted his application to record the proceedings. That might, submits the Claimant, entail delay and disruption, and would exacerbate his stress and anxiety.

8. That appeal was considered by HHJ Shanks of the Employment Appeal Tribunal on 15 November 2018 during the paper sift. HHJ Shanks considered that there may well be very good reasons why the Tribunal should decide well in advance of the preliminary hearing whether the Claimant will be allowed to record the proceedings. The appeal was stayed for a period of 21 days to give the Tribunal the opportunity to reconsider the Claimant's application in the light of HHJ Shanks' remarks. On 15 February 2019, the matter was reconsidered by EJ Gumbiti-Zimuto. He accepted that the Claimant had the disability claimed but maintained that the question of adjustments should be considered at the outset of the preliminary hearing. EJ Gumbiti-Zimuto also went on to state:

> **"…Or if the application is to be considered before the hearing it should be made in a form that allows a practical and effective decision to me made. Among the matters I would need to consider are (a) whether there should be an adjustment; (b) if so, how is the adjustment to be carried into effect; (c) what is the effect on the respondent (e.g. are the respondent (sic) entitled to a copy of any recording or can they make their own recording). These points are all capable of being answered but they cannot be answered by me presently."**

9. The Judge was not, it would appear, thereby precluding an application for adjustments being made and considered prior to the hearing.

10. Upon further consideration on the sift, permission to proceed to a full hearing before the EAT was granted by HHJ Auerbach on 5 March 2019.

11. I also note, as part of the relevant background, that on 31 August 2018, the Newcastle ET (in relation to a different case), sent a letter to the Claimant in the following terms:

> **"Dear Dr Heal,**
> **The Tribunal has noted and granted your request for reasonable adjustments, i.e. at least size 12 Arial font; use of recording device during any hearing; and comfort breaks during any hearing."**

12. It is not possible to say from the documents before me whether that decision was made by a Judge of the Newcastle ET, or whether it was based on any material in addition to the contents of the Claimant's ET1.

Legal Framework

Contempt of Court Act 1981

13. The making of an audio recording of court proceedings without consent amounts to a contempt of court. Section 9 of the **Contempt of Court Act 1981** ("the 1981 Act"), so far as relevant, provides:

> **9 Use of tape recorders**
> **(1) Subject to subsection (4) below, it is a contempt of court –**
> **(a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court;**
> **(b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public, or to dispose of it or any recording so derived, with a view to such publication;**
> **(c) to use any such recording in contravention of any conditions of leave granted under paragraph (a);**
> **…**
> **(4) This section does not apply to the making or sue of sound recordings for purposes of official transcripts of proceedings.**
> **…"**

14. A "Court" for these purposes includes the Tribunal: s.19, 1981 Act, and see also **Peach Grey & Co v Sommers** [1995] ICR 549 at p.558. Whilst it is unlikely that any court user

would these days attempt to use a tape recorder to record proceedings, the kinds of devices that might be used, e.g. mobile phones and portable digital recording devices, would fall within the scope of s.9 as being an "instrument for recording sound". It is notable that the prohibition under s.9(1)(b) of the 1981 Act on publishing a recording or playing it in public cannot be overridden by the consent of the Court or Tribunal. Playing a recording in public would be likely to include posting a recording on a publicly accessible website or social media platform.

15. A Practice Direction issued shortly after the coming into force of the 1981 Act confirmed that the discretion given to the court by s.9 to grant, withhold or withdraw permission to use a recording device or to impose conditions on such use is "unlimited", but the following factors may be relevant to its exercise:

(a) the existence of any reasonable need on the part of the applicant for leave, whether a litigant or a person connected with the press or broadcasting, for the recording to be made;

(b) in a criminal case or a civil case in which a direction has been given excluding one or more witnesses from the court, the risk that the recording could be used for the purpose of briefing witnesses out of court;

(c) any possibility that the use of a recorder would disturb the proceedings or distract or worry any witnesses or other participants: **Practice Direction (Tape Recorders)** [1981] 1 WLR 1526 at [2].[1]

16. Factor (b) is of limited relevance in the present context, as the practice in Employment Tribunals (other than in Scotland)[2] is for witnesses not to be excluded from the hearing room before giving their evidence. Factors (a) and (c) may be relevant. In relation to (a) the principal concern will be the applicant's (in this case, the Claimant's) reasonable need for the recording to be made. In relation to factor (c), there may be a need to take account of the effect on other

[1] This guidance was reiterated at 6A.2 of the Criminal Practice Directions 2015.
[2] Where it is the practice to exclude witnesses until they give evidence. Clearly, if such a request is being considered by an Employment Tribunal in Scotland, it will wish to take account of the risk of a recording being used to brief witnesses out of court.

participants (e.g. witnesses) of the knowledge that the Claimant would be making his own recording of the proceedings.

17. The exception under s.9(4) of the 1981 Act in respect of sound recordings made for the purpose of producing an official transcript of proceedings is also currently of limited relevance in Employment Tribunal proceedings as these are not routinely recorded.[3]

Reasonable Adjustments

18. The duty under s.20 of the **Equality Act 2010** ("the 2010 Act") to make reasonable adjustments, where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter, does not apply to the exercise of a judicial function: see paragraph 3 of Schedule 3 to the 2010 Act, and **J v K** [2019] EWCA Civ 5 (where the issue was common ground). However, as also stated in **J v K**, *"...as a matter of general law, the exercise of a judicial discretion must take into account all relevant considerations, and ... the party's mental condition or other disability would plainly be a relevant consideration*.": per Underhill LJ at [33]. Numerous cases have made similar points. These include **O'Cathail v Transport for London** [2012] IRLR 1011, in which Mummery LJ said at [27]:

> **"…[t]he appellant undoubtedly suffers from a recognised disability. Its affects are relevant factors in deciding whether he had a good excuse for not complying with the time limit and whether there were exceptional circumstances justifying an extension of time."**

19. As well as the obligation to take account of all relevant factors, including the fact that a person has a disability, it is now well-established that, as a matter of general law and fairness, the Tribunal has a duty to make reasonable adjustments to accommodate such disability. In **Rackham v NHS Professionals Ltd** [2015] UKEAT 0110/15/1612, Langstaff P said at [32]:

> **"We do not think it could sensibly be disputed that a Tribunal has a duty as an organ of the state, as a public body, to make reasonable adjustments to**

[3] The process of introducing digital recording facilities in all Employment Tribunals commenced in 2019, but is not due to be complete for some time: See Modernisation of Tribunals, Innovation Plan for 2019/2020 at p.9

> **accommodate the disabilities of Claimants. Miss Joffe accepts, and indeed submits, that the particular route by which the obligation rests upon the Tribunal is unimportant, though it might be one of a number, because there can be no dispute there is such an obligation. It may be, as Mr Horan submits, through the operation of the United Nations Convention by the route he suggests. It may be by operation of the Equal Treatment Directive or it may arise simply as an expression of common-law fairness."**

20. The Claimant's submissions referred to alternative sources for that general duty, including Articles 6 and 14 of the ECHCR, and Ms Darwin referred to provisions of the UN Convention on the Rights of Disabled Persons. However, for reasons already set out by Underhill LJ in **J v K**, it is not necessary to explore those potential alternative sources in detail because they are unlikely to add anything of significance to the position as it exists under the general law:

> **"36. I am very willing to accept that in many or most cases those [provisions in International Instruments] will indeed be alternative sources of the same or similar obligations as would arise as a matter of general law; and the Employment Appeal Tribunal made a similar acknowledgment in *Rackham v NHS Professionals Ltd (unreported) 16 December 2015* : see per Langstaff J (President) at para 32. But I am not at present persuaded that anything useful is achieved by referring in detail to these other sources, because, at least in the context of the present appeal, they appear to add nothing to the domestic jurisprudence. I understood Mr O'Dempsey to submit that the international law sources were valuable in as much as they explicitly incorporated the concept of reasonable accommodation. But that concept is very familiar in our domestic jurisprudence, and not only in the specific context of the 2010 Act (see, again, *Rackham* , especially at para 36), and most cases will turn on what was required by way of reasonable accommodation in the particular circumstances of the case. We were not referred to any statement of principle which suggested that a different approach to that assessment was required under the international instruments relied on than would be required in domestic law."**

Tribunal Procedure

21. The **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules") do not deal specifically with the question of audio recordings of hearings. However, as the Tribunal is a Court within the meaning of the 1981 Act, the prohibition, without the leave of the Court, on making an audio recording under that Act applies equally to the Tribunal.

22. The fact that a request for an adjustment, such as permission to use a recording device, is made in the ET1, does not of itself give rise to any specific entitlement to such an adjustment. Whether or not such an adjustment is to be made will be a matter of case management for the Tribunal to consider in accordance with the rules set out in Schedule 1 to the ET Rules.

23. Rules 26 and 27 of the **ET Rules** provide:

> **"Initial consideration**
> **26.—(1) As soon as possible after the acceptance of the response, the Employment Judge shall consider all of the documents held by the Tribunal in relation to the claim, to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal (and for that purpose the Judge may order a party to provide further information).**
> **(2) Except in a case where notice is given under rule 27 or 28, the Judge conducting the initial consideration shall make a case management order (unless made already), which may deal with the listing of a preliminary or final hearing, and may propose judicial mediation or other forms of dispute resolution.**
>
> **Dismissal of claim (or part)**
>
> **27.—(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties—**
> **(a) setting out the Judge's view and the reasons for it; and**
> **(b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.**
> **…**
> **(4) If any part of the claim is permitted to proceed the Judge shall make a case management order."**

24. Rule 29 provides:

> **"29 Case Management Orders**
> **The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30 A (2) and (3) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."**

25. Rule 41 of the ET Rules confers on the Tribunal a general power to regulate its own procedure. It provides:

> **"41 General**
> **the Tribunal may regulate its own procedure and shall conduct hearing in the manner considered fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or**

> **elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."**

26. The Tribunal is, of course, required to give effect to the Overriding Objective in exercising those broad case management and general powers. Rule 2 of the ET Rules provides:

> **"The overriding objective of these Rules is to enable Employment Tribunal is to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –**
> **ensuring that the parties are on an equal footing;**
> **dealing with cases in ways which are proportionate to the complexity and importance of the issues;**
> **avoiding unnecessary formality and seeking flexibility in the proceedings;**
> **avoiding delay, so far as compatible with proper consideration of the issues; and**
> **saving expense.**
> **A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall cooperate generally with each other and with the Tribunal."**

27. The effect of these provisions in the present context, read with the authorities above and the terms of s.9 of the 1981 Act, may be summarised as follows:

a. Tribunals are under a duty to make reasonable adjustments to alleviate any substantial disadvantage related to disability in a party's ability to participate in proceedings.

b. Where a disability is declared and adjustments to the Tribunal's procedures are requested in the ET1 form, there is no automatic entitlement for those adjustments to be made. Whether or not the adjustments are made will be a matter of case management for the Tribunal to determine having regard to all relevant factors (including, where applicable, any information provided by or requested from a party) and giving effect to the overriding objective.

c. The Tribunal may consider whether to make a case management order setting out reasonable adjustments either on its own initiative or in response to an application made by a party.

d. If an application is made for reasonable adjustments, the Tribunal may deal with such an application in writing, or order that it be dealt with at a preliminary or final hearing: see Rule 30 of the ET Rules.

e. Where the adjustment sought is for permission for a party to record proceedings or parts thereof because of a disability-related inability to take contemporaneous notes or follow proceedings, the Tribunal may take account of the following matters, which are not exhaustive, in determining whether to grant permission:

i. The extent of the inability and any medical or other evidence in support;

ii. Whether the disadvantage in question can be alleviated by other means, such as assistance from another person, the provision of additional time or additional breaks in proceedings;

iii. The extent to which the recording of proceedings will alleviate the disadvantage in question;

iv. The risk that the recording will be used for prohibited purposes, such as to publish recorded material, or extracts therefrom;

v. The views of the other party or parties involved, and, in particular, whether the knowledge that a recording is being made by one party would worry or distract witnesses;

vi. Whether there should be any specific directions or limitations as to the use to which any recorded material may be put;

vii. The means of recording and whether this is likely to cause unreasonable disruption or delay to proceedings.

f. Where an adjustment is made to permit the recording of proceedings, parties ought to be reminded of the express prohibition under s.9(1)(b) of the 1981 Act on publishing such recording or playing it in the hearing of the public or any section of

the public. This prohibition is likely to extend to any upload of the recording (or part thereof) on to any publicly accessible website or social media or any other information sharing platform.

The Grounds of Appeal

28. The Notice of Appeal contains numerous grounds of appeal, but these can be reduced to the following four principal grounds:

a. The Tribunal erred in using the ET Rules to deal with the question of adjustments. Instead, the Tribunal ought to have recognised that it was bound by duties under the 2010 Act and the **Human Rights Act 1998** to make the adjustments in question;

b. The Tribunal erred in requiring the Claimant to make an application for reasonable adjustments;

c. The Tribunal erred in refusing to make adjustments that had already been made by the Newcastle ET; and

d. The Tribunal erred in failing to determine the question of adjustments in advance of the hearing. In particular, it is said that the Tribunal erred in failing to take proper account of the fact that, without a decision in advance of the hearing, the Claimant would be refused access to the Tribunal building (or risk being in contempt of court) if carrying recording equipment.

Submissions

29. The Claimant did not attend the hearing before the EAT, instead electing to provide written submissions. In relation to the issues before me, those submissions may be summarised as follows:

a. The Claimant submits that there is a statutory duty pursuant to the 2010 Act and Article 14 of ECHR to make reasonable adjustments. He contends that as the Newcastle ET has already confirmed in writing that the reasonable adjustments sought, including that he be permitted to make an audio recording of proceedings, have been granted, it cannot be a contempt of court for him to bring a recording device to the Tribunal and it was not open to the Tribunal to take a different course from the Newcastle ET.

b. The Claimant refers to duties imposed upon the judiciary to treat litigants fairly and equally, and submits that in light of these duties, it was not open to the Tribunal to use the ET Rules to refuse reasonable adjustments. He submits that the treatment he received from the Tribunal failed to comply those duties in that:

> **"the provision of a record (sic) device for me is essential to enable me as a litigant person to present my claim; and to enable me to attend to what is being said rather than trying to record in writing what is being said; which would be an impossible task given my disabilities".**

c. He notes that the Respondents will have persons present to make a written note of proceedings and that it would be unfair not to permit him to make a digital recording in circumstances where it is impossible for him to make a written note whilst conducting his case as a litigant-in-person.

d. Finally, the Claimant submits that the failure to reach a decision on the adjustment in advance of the preliminary hearing was inequitable and unfair given the extreme distress and anxiety caused to him. He contends that, having notified the Tribunal via his ET1 that this adjustment was required, provision ought to have been made in advance of any hearings/proceedings to accommodate the adjustment.

30. The Respondents were represented by Ms Darwin of counsel. In a helpful written skeleton argument, Ms Darwin sets out the legal framework applicable to the making of audio recordings in various fora. She submits that there is nothing in the ET Rules that would require

a decision on an adjustment to be made in advance of a preliminary hearing in every case. The particular decision made by the two Employment Judges in this case fell within the broad case management discretion available to the Tribunal and did not amount to an error of law. It is quite clear, she submits, that the complexities of such an application, including the consequences for the other participants and the need to consider their rights, whether under ECHR or data protection law, mean that an oral hearing, at which there could be further exploration of all the relevant issues, was far more appropriate than a determination on the papers. In any event, she submits that it cannot be said that the decision that the Claimant's application be considered at the hearing was wrong in principle or perverse.

Discussion and Analysis

Ground 1

31. As can be seen from the legal framework set out above, the Tribunal is empowered by the ET Rules to consider matters of case management either on its own initiative or upon application by a party. Case management orders may be made on the papers, or the Tribunal may direct that they be considered at a hearing. Whilst there is no duty arising from the terms of the 2010 Act to make reasonable adjustments, it is clear that such a duty does exist (whether arising out of the general common law duty of fairness or from obligations arising from international instruments such as the ECHR). Furthermore, the kind of adjustment in question, which relates to the way in which the hearing is to be conducted, is a matter of case management that may be considered in accordance with the ET Rules.

32. In these circumstances, there is no discernible error of law in the Tribunal approaching the matter as one of case management in accordance with the ET Rules. Ground 1 of the Claimant's Grounds of Appeal must therefore fail and is dismissed.

Ground 2

33. Ground 2 of the Appeal is that the Tribunal erred in requiring the Claimant to make an application for reasonable adjustments. The Claimant contends that it is enough that the request for reasonable adjustments was made in the ET1 and that it was unfair to demand anything further from him before the Tribunal considered the request. However, the mere fact that a disability is declared in the ET1 accompanied by a request for adjustments does not give rise to an automatic entitlement to those adjustments. There is nothing in the ET Rules that so provides. An adjustment that could have an impact on the conduct of the hearing will be a matter of case management that will need to be considered by the Tribunal in the usual way having regard to all the relevant circumstances.

34. The adjustment sought in this case, namely the use of a recording device to record proceedings, gives rise to an additional reason why such an adjustment could not be made automatically or as a matter of routine. The express consent of the Tribunal is required for such an adjustment otherwise there could be a breach of s.9 of the 1981 Act. The Tribunal has a broad discretion to grant such consent, but in doing so it will generally be relevant to consider whether there is a reasonable need for proceedings to be recorded, or whether the claimed disadvantage would be alleviated by the use of a recording device. The difficulties involved in taking a contemporaneous note of proceedings are likely to be experienced by many self-represented litigants. The taking of such notes is not an everyday skill and even those who do not have any physical or cognitive disability may find it difficult to keep a meaningful or helpful contemporaneous note of proceedings. The Tribunal will therefore be unlikely to accept that a slight limitation on the ability to take notes would lead to the adjustment of permission being granted for a recording device; a cogent explanation of the precise nature of the difficulty and why other adjustments alone, such as additional breaks or time, would not suffice, could normally be expected before consent is given.

35. Furthermore, the position of the other parties may be relevant. A recording device would be likely to record everything that is said in the hearing room, including (depending on the sensitivity of the equipment) conversations between parties and their advisers. Whilst any consent to record proceedings would almost invariably be on terms that limited any other use being made of the recording, the Tribunal may wish to consider the other parties' positions on whether the Claimant can record proceedings using his own device.

36. All of these factors - and these are no more than a selection of those that may be relevant[4] - would usually mean that any decision as to whether or not such an adjustment should be made would normally be taken at a hearing where all parties are present, or, at the very least, on the basis of a fully set out written application and response.

37. In the present case, EJ Lewis considered the Claimant's request for adjustments on his own initiative and without an application being made by the Claimant. He then, quite properly in my view, declined to make a ruling on the request, and instead directed that if the Claimant wished to pursue it, he should apply to the Judge at the preliminary hearing. Given the range of factors that would need to be taken into account before the Tribunal would be able to reach a decision on the recording of proceedings, I see no error of law in that approach. For EJ Lewis to have simply granted consent at that stage without more would have been to treat the declaration of disability and the request for adjustments in the ET1 as giving rise to an automatic entitlement to such adjustments. For reasons already explained, there is no such entitlement.

38. As for EJ Gumbiti-Zimuto, he considered that EJ Lewis's Order that the Claimant's request be pursued by way of an application at the preliminary hearing was a fair way of dealing with the request. That view was correct. No error of law is disclosed in EJ Gumbiti-Zimuto's approach either.

[4] See paragraph 27 above for other potentially relevant factors.

39. Accordingly, Ground 2 of the appeal fails. There was no error of law in inviting the Claimant to proceed by way of an application if he wished to pursue his request. Such an application would give the Claimant the opportunity to explain the need for proceedings to be recorded and why other adjustments – such as additional breaks and/or time - would not be reasonable or sufficient.

Ground 3

40. The complaint here is that the Tribunal acted unfairly in refusing to make adjustments that had already been consented to by the Newcastle ET. It is not clear to me that either EJ Lewis or EJ Gumbiti-Zimuto was aware of the Newcastle ET's decision. However, even if they were, there is nothing to suggest that that decision was made by the Newcastle ET having considered all relevant factors and/or having taken account of the Respondents' position. A case management decision made by one tribunal region in respect of a particular case, does not bind another tribunal to make the same case management decision in respect of another case. Of course, a carefully considered decision with reasons in respect of a very similar claim may be something that a subsequent tribunal will wish to consider, but, in the absence of a direction that the relevant case management decision applies to all tribunal proceedings brought by the Claimant, there is no unfairness or error of law in that subsequent tribunal considering the matter for itself.

41. In these circumstances, Ground 3 of the Appeal also fails.

Ground 4

42. This is a complaint that the Tribunal erred in failing to consider the question of adjustments in advance of the hearing. It is directed at the decision of EJ Gumbiti-Zimuto who stated that he did not understand why it was necessary for this issue to be addressed before the

hearing. However, the Judge did go on to say, "*Or if the application is to be considered before the hearing it should be made in a form that allows a practical and effective decision to me made*." The Judge then sets out what further information would be required for that purpose. In other words, the Judge was not precluding the possibility of an application being considered before the preliminary hearing. If that was the course that the Claimant wished to take, the Judge gave a clear indication as to the further information he would require before he would be in a position to reach a decision. In my judgment, that was a perfectly proper course to take and one that was open to the Tribunal in the exercise of its broad case management powers. The Tribunal did not therefore fail to determine the question of adjustments before the hearing; the Claimant was given a clear opportunity to have that issue determined in advance of the hearing if he provided the Judge with the relevant material. The Claimant appears not to have taken that opportunity. Accordingly, this ground of appeal is based on a false premise and discloses no arguable error of law.

43. Even if the Judge had insisted on the application being dealt with only at the preliminary hearing, I do not consider that that would have been unfair in these circumstances, or that it would have amounted to an error of law. The Tribunal is not obliged to deal with case management applications in writing. Pursuant to Rule 29 of the ET Rules, the Tribunal may order that such an application be dealt with at a preliminary or final hearing. Clearly, some adjustment requests would have to be considered in advance of any hearing; an adjustment without which a party would be unable to access the Tribunal building, for example, or for the hearing to be held at a particular location to enable the Claimant to attend, would necessarily have to be dealt with in advance. The adjustment in question is not one that, if not made, would prevent the Claimant from attending the hearing. It is true that if the adjustment is refused at the hearing then, if the Claimant considered that he could not proceed without it, he may have to seek an adjournment pending an appeal. That uncertainty might add to his stress and anxiety.

However, that does not necessarily preclude the Tribunal from directing that the matter be dealt with at a hearing. If that were not the case, then the Tribunal's discretion to deal with matters either in writing or at a hearing as it sees fit would be severely curtailed. Clearly, in circumstances where a Tribunal is presented with cogent and credible reasons as to why the application should be determined in advance, it may be acting unfairly if it were to reject those reasons out of hand, and the exercise of discretion may be unlawful as a result. However, in the present case, the Claimant had not, prior to the Judge's consideration of the matter, presented the Judge with any of the material that he might need to consider the application properly. As such, there was no error in the Judge stating that the application should be made at the hearing (although the Judge clearly did not insist on that being the only available way forward).

44. The Claimant contends that the Tribunal also erred in failing to take account of the fact that, without a decision in advance of the hearing, the Claimant would be refused access to the Tribunal building if carrying recording equipment. This is another challenge that appears to be based on a false premise. That is because the Judge, both implicitly in his first decision and expressly upon his reconsideration on 3 January 2019, consented to the Claimant attending with the necessary equipment. It was implicit in the Judge's direction that the application to be permitted to record proceedings be made at the hearing that the Claimant would be able to attend with the equipment at the ready. In his latter decision, the Judge expressly stated that "*the Claimant can be assured that he is permitted to bring the recording equipment with him into the building without committing an offence*." In those circumstances, the Claimant's concern about being refused access is without substance.

45. As set out above, s.9 of the 1981 Act provides that it is a contempt of court "*to use in court, or bring into the Court for use, any tape recorder or other instrument for recording sound, except with the leave of the Court"*. The prohibition is not on simply bringing such recording equipment into Court; if it were then any person taking a mobile phone with

recording capability into Court would be in contempt. The prohibition is on bringing such equipment into Court or the Tribunal "for use". The term "*for use*" is to be read with the use referred to a few words later in the same provision, namely "*for recording sound*". If a mobile phone is simply brought into court, it would not be in order to use it to record sound and no contempt would arise. Similarly, if equipment is brought in for use only with the Court's or Tribunal's leave, then no contempt would be likely to arise in doing so pending such leave being obtained. Of course, the position would be otherwise if the equipment is already recording as it is brought into the building. In those circumstances, the equipment would be brought into court for recording sound and a contempt would arise.

46. For these reasons, Ground 4 of the Appeal also fails and is dismissed.

47. That deals with each of the Claimant's grounds of appeal, none of which succeeds.

Recording Proceedings and Reasonable Adjustments

48. Before concluding, I shall deal with one final matter that arose out of Ms Darwin's submissions, and that is the Respondents' suggestion that the appropriate adjustment in the present case would have been for the Tribunal to make available to both parties an official transcript of some or all the hearings before the Tribunal. Ms Darwin submitted that consent to record proceedings pursuant to section 9 (1) of the 1981 Act should very rarely, if ever, be necessitated by the duty to make reasonable adjustments. She submits:

a. Firstly, that the granting of leave to make an audio recording is likely to cause considerable disruption to Courts and Tribunals. There is a real risk, submits Ms Darwin, that a considerable amount of Tribunal and Appellate time may be taken up in considering recordings of proceedings where there is some dispute as to their contents or their meaning.

b. Secondly, the granting of permission to make an audio recording is likely to distract or worry other participants in the Tribunal proceedings. There may be real concerns about loss of control over the recording containing their personal data.

c. Thirdly, given that most Tribunal proceedings are not currently recorded, any recording made by a party would be the only recording of those proceedings, and that could result in unfairness to the other parties who would only have access to their own notes.

d. Fourthly, the existence of an audio recording is likely to lead to confusion about whether or not the Employment Judges' notes are the conclusive record of a hearing in the Tribunal. Furthermore, it is likely that some litigants would seek to rely on audio recordings for the purposes of challenging the Judges' notes.

e. Fifthly, the provision of an official transcript of the hearing to both parties would be a far more effective means of overcoming the disadvantage faced by the Claimant as a result of the disability.

49. In my judgment, it would not be appropriate to limit the Tribunal's broad discretion to grant leave pursuant to s. 9 of the 1981 Act in the manner suggested by the Respondents, and nor would the provision of a transcript be likely to be a reasonable adjustment in the circumstances. I say that for the following reasons:

a. As has been the case since the 1981 Act came into force, the Tribunal has an unlimited discretion to grant leave having regard to factors that may be relevant, such as the needs of the party making the request to record and the potential effect on others of a recording being made. The fact that recording technology is now ubiquitous and highly portable in the form of mobile phones does not alter that basic starting point.

b. Permission to record proceedings is unlikely to be granted on a routine or regular basis. Each case will have to be determined on its own facts. However, it seems very unlikely that permission would be granted where the applicant fails to demonstrate that, for reasons related to a disability or medical condition:

   i. there is a complete or partial inability to take contemporaneous notes; and

   ii. such inability will result, in the circumstances of the particular case, in a substantial disadvantage.

c. The risk that a recording will be used for purposes other than that for which leave is granted can be mitigated by the Tribunal issuing strict limitations on other use. If a recording is permitted simply to relieve a person of the burden of taking notes, then that recording will generally have no greater status in proceedings than that of any other set of notes. In particular, Tribunals will no doubt wish to remind parties that the restriction under s.9(1)(b) of the 1981 Act on publishing a recording by playing it in the hearing of the public would also apply to the posting of any recording or extract thereof online.

d. The Tribunal's notes of evidence will continue to be the conclusive record of the hearing before it, certainly whilst it remains the position that Employment Tribunal proceedings are not routinely the subject of official digital recording. The fact that a Tribunal has consented to a recording being made by a party, and the undisputed content of that recording appears to conflict with the Tribunal's written notes of evidence, would not mean that the recording automatically takes precedence. Whether or not it should take precedence in respect of any issue will be a matter for the Tribunal to determine having regard to all the circumstances.

e. It seems to me that the Respondent's proposed adjustment of providing the Claimant with a transcript of the official recording of the hearing would not address the

disadvantage being claimed here. The Claimant's difficulty, as I understand it, is that he is unable to take a contemporaneous note, and is therefore unable to consider and respond to the evidence and submissions as they emerge. The provision of an official transcript, possibly long after the hearing has concluded, would not alleviate that difficulty at all. A more effective adjustment (if permission to record is granted) might be to permit the Claimant additional time at the conclusion of a witness's evidence or a party's submissions, to playback a recording of the evidence or the submissions (most likely during a break) and to formulate his questions and/or submissions. It will be for the Tribunal to carefully manage such proceedings so as to avoid unreasonable delay or disruption to the flow of evidence and/or submissions.

Conclusion

50. For the reasons set out above, this appeal is dismissed.