Appeal No. UKEAT/0164/19/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 January 2020

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR E JAYARAM — APPELLANT

NETWORK RAIL INFRASTRUCTURE LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS CATHERINE CASSERLEY (of Counsel) VIA Direct Public Access
For the Respondent	MS SAFIA THAROO (of Counsel) INSTRUCTED BY: Womble Bond Dickinson (UK) LLP Oceana House 39-49 Commercial Road Southampton Hampshire SO15 1GA

SUMMARY

RACE DISCRIMINATION

In an amended ET1, mention was made for the first time of certain disabilities said to be suffered by the Claimant in these terms: "Depression, PTSD, ADHD. Further details of reasonable adjustments for hearings will be advised at a later stage."

The Claimant was represented at a Preliminary Hearing at which no mention was made of any reasonable adjustments. At the liability hearing the Claimant asked to be permitted to write down questions as they were asked. This was acceded to but after a time it became apparent that the process was slowing proceedings very considerably. When the Employment Judge raised this the Claimant suggested that his wife take over the note taking.

The Claimant's appeal that the ETs change in stance disadvantaged him was dismissed by the EAT which accepted that the ET had allowed the Claimant's initial request on the understanding that this was because he was unrepresented, not because he suffered from a disability. The ET had not failed in its duty to ensure the effective participation of disabled persons.

Moreover, although the Claimant's credibility had been commented on adversely by the ET, the decision turned on its acceptance of evidence of the Respondent's witnesses as to the scoring of the Claimant's interview.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal against the Decision of an Employment Tribunal ("ET") sitting at Ashford, Employment Judge Pritchard sitting with members Mrs Butler and Mr Newlin. The hearing took place from 25 to 27 July 2018 and reasons were sent to the parties on 28 August 2018.

2. The Claimant represented himself at the ET hearing but is represented today by Miss Casserley. The Respondent was represented below by Ms Tharoo who has also represented it today. Each has submitted a helpful skeleton argument augmented by oral submissions for which I am grateful.

3. The ET dismissed the Claimant's claim of direct race discrimination in connection with his unsuccessful application for his job as a Grade 8 Signaller. In fact, the Claimant was successful in his subsequent interview two days later to be a Grade 2 Signaller at another location and at a considerably lower salary, £26,665.00 as against £42,497.00.

4. In his amended ET1 the Claimant (or the person who completed it for him) ticked the "yes" box at Section 12 marked "do you have a disability?". The box was completed as follows in handwriting: "Depression, PTSD, ADHD. Further details of reasonable adjustments for hearings will be advised at a later stage." On the original form the "No" boxed had been ticked.

5. The amended Particulars of Claim began by reciting the Claimant's background as a police officer between 2003 and 2014/15 achieving the rank of Detective Sergeant then leaving for what he described as personal reasons before setting up in business. He described the two

signaller roles for which he applied as being "essentially the same, albeit the (first) interview was for a higher grade." Perhaps unsurprisingly, given the salary difference, the Respondent in its ET3 pointed out that the Grade 8 role was a more complex one and that the Claimant had no previous experience of working on the railway.

6. The Amended Particulars made no reference to the disabilities mentioned or any effects said to have arisen from them. It was at no stage suggested that any of these had any bearing on the two interviews which the Claimant undertook, nor on his ability to carry out the job of a railway signaller. That may be because, as his affidavit makes clear, he was diagnosed with ADHD only in August 2017.

7. There is no reference in the ET's Reasons to any disability or to any adjustment sought in the course of the hearing. It is also apparent that at a Preliminary Hearing, at which the Claimant had been represented, disability was not mentioned neither was the need for any reasonable adjustments to counter the effects of any such disability. So far as I am aware there is nothing in the papers evidencing the nature and the extent of the Claimant's disabilities other than in documents written by and submitted by him after the Hearing.

8. In the original Notice of Appeal ground 1 read as follows:

> **1.Point 42 of the Employment Tribunal (ET) decision states" The Claimant appeared unwilling to answer straightforward questions during cross examination"**
>
> **The Claimant suffers from ADHD and in the absence of his barrister the tribunal agreed to allow him write down questions asked of him to enable him to answer the questions to the best of his ability. However, having previously been allowed to write the questions down he was then criticised for taking too long. This had a detrimental effect on the Claimants ability to answer questions during the cross examination. The tribunal does have duty to ensure the effective participation of disabled persons its proceedings so that failure to do so may be an error of Law as held in Rackham v NHS Professionals Ltd UKEAT/0110/15LA.**

9. The other grounds were concerned with other matters none of which has been permitted to proceed. As will appear below, the grounds were subsequently amended.

10. At the Rule 3(10) Hearing, the matter having been rejected at the sift, steps were ordered to obtain statements or affidavits from persons present at the hearing. Following that, the appeal was permitted to proceed to a full hearing by Heather Williams QC sitting as a Deputy Judge of the High Court. Ms Williams found it reasonably arguable that the ET failed to provide the Claimant with a fair hearing, having allowed him to take notes whilst giving evidence as a reasonable adjustment for his ADHD, but then making him feel pressured into speeding up his note-taking with a consequential adverse impact on the quality of the evidence.

11. However, she warned that this would not be an easy appeal, pointing to the comments of the lay members of the ET to the effect that they did not detect a change in the way that the Claimant gave evidence as it progressed and to the fact that the Claimant did not explain the growing pressure he described to the ET.

12. I shall set out relevant extracts from the evidence which was gathered in connection with the appeal, beginning with the Claimant's affidavit. He says that he was diagnosed with ADHD in August 2017, and that its effects include difficulty staying focused, forgetfulness and acute anxiety. He says that, although only recently diagnosed with the condition, it is something he has had throughout his life. He says (at paragraph 8) that he still has those symptoms but not to the same degree.

13. I quote in full what he says happened on the day of the Hearing:

> **"18 I was however feeling extremely anxious on the day of the Employment Tribunal. I became very fidgety, bouncing my right leg up and down, and a wave of thoughts began bombarding me in an illogical way at the prospect of being cross examined;**
>
> **19. I was sitting in to the claimant's room at the ET, when I was approached by a lady who introduced herself as a court clerk and said that there was a delay to the start of my hearing as Employment Judge Pritchard was still dealing with another matter;**
>
> **20. I was also informed about what would happen throughout the day and asked if I needed anything;**
>
> **21. I asked the clerk if she could get a message to Mr Pritchard;**

22. I told her that I wanted to be able to make written notes during the cross examination, as I have ADHD, which affects my concentration and focus;

23. I said I needed such written notes should I need to explain a point to the ET at a later point, that I failed to explain well enough during cross examination;

24. I also said that it would really help me if I could refer back to a question asked of me by the defendant's counsel, so that I could refresh my mind about any question that I may have lost track of;

25. I was informed by the clerk that she would ask Mr Pritchard if this was possible;

26. I was sitting in the claimant's room, when the clerk returned about an hour later. She said that she had spoken to Mr Pritchard about my request and that he thought that it should be fine;

27. I was then called into the tribunal room about an hour later, where I was first to be cross examined;

28. I walked over to the witness table, with my notebook and pen in hand, at which point Mr Pritchard noticed the items I was carrying and immediately asked counsel for the respondent whether she had any objections to me making notes during the cross examination- she replied that it was up to him;

29. I was informed by Mr Pritchard that I could make notes whilst I was being cross examined;

30. I gave an affirmation to tell the truth and I was then cross examined.;

31. I wrote down each question before answering it;

32. I gave as complete an answer I could each time;

33. I would read the question again at the end of my answer to ensure I had said everything I needed to ensure I had given the most complete answer;

34. I used the notepad to jot down any "buzzwords" that would assist me in making further points I deemed important to my answer;

35. I also used the writing time to steady my nerves and to focus my mind on the task;

36. I was about halfway through my cross examination when Mr Pritchard informed me that I was taking far too long writing my notes and asked if my wife could write the notes for me instead;

37. I felt extremely distressed by this, but as a 41 year old man, I have found ways of hiding my emotions caused by the ADHD very well and so my distress at that moment would not have been noticeable;

38. I remember the palms of my hands becoming wet, a wave of pains in the pit of my stomach and a huge urge to fidget and bounce my leg up and down, but I resisted this in order to keep a professional look on the witness stand;

39. I informed Mr Pritchard that I would do my best to write faster, however his criticism threw me off course and I found it extremely hard to focus.;

40. I had to deal with all these emotions and fight the urge not to fidget which in turn meant 1 may have unknowingly hesitated when giving my answers to the cross examination (and this may have been reflected in paragraph 42 of the tribunal's decision);

41. I was still being cross examined a short while later, when Mr Pritchard's comments were still playing on my mind and so, I put my pen down and asked my wife to take over the note taking;

42. I then began to answer the questions directly, but was still trying to hide the emotions I felt and the physical need to fidget;

43. I was unable to fully focus on the questions asked and as a result I do not feel that I was able to present my evidence properly"

14. Employment Judge Pritchard commented as follows so far as relevant:

With regard to paragraphs 19 to 26 of the Appellant's affidavit:

"1 Mr Jayaram's amended ET1 showed that his disability was depression, PTSD, ADHD and that further details of reasonable adjustments for hearings will be advised at a later stage. I do not recall any adjustments being advised or requested save for Mr Jayaram asking to take notes as set out below.

2 I have no recollection of the clerk informing me that Mr Jayaram. wanted to take notes while he was being cross-examined. However, I have no reason to think the clerk did not do so, not least because Mr Jayaram was permitted to take notes.

3.I think Mr Jayaram might be confused if he is suggesting at paragraph 19 of his affidavit that there was a delay to the start of his case on the first day of the hearing. Having discussed the issues with the parties, the tribunal spent the remainder of the morning of the first day reading the statements and documents:- Mr Jayaram-was the first to give evidence; my-notes recording that he-affirmed at 2.07 pm--¬on the first day. It is true that I was required to sit on a preliminary hearing at 10.00 am on the second day which caused a delay in the commencement of proceedings on that second day. My notes record that the hearing resumed at 11.10 am on the second day.

With regard to paragraphs 39 to 43 of the Appellant's affidavit:

2 Although Mr Jayaram had been permitted to take notes as he requested, what he was actually doing during cross-examination was studiously writing out each question asked of him in full before answering. It was clear that if the proceedings continued in such a manner, three days would be wholly inadequate for the claim to be considered. Although I raised my concerns, I reject the idea that I would have "criticised" Mr Jayaram as he states in paragraph 39 of this affidavit.

My notes record that the Tribunal took a break during Mr Jayaram's cross-examination at 3.07 pm. My notes record the following:

> **T [Tribunal] permitted C [the Claimant, Mr Jayaram] to make notes at the W [witness] table upon his application to do so on the basis that he was unrepresented and needed to be able to address points which wld [would] otherwise be dealt with in re-ex [re-examination] if he were represented.**
>
> **During hrg [hearing] above it became clear progress was slow. C [the Claimant] agreed he would speed up and that he was writing the q [question] and his wife the answers. In fact his wife confirmed she would do her best to write both the qq [questions] and answers. The C [Claimant] continued to be slow in his responses however and s/times [sometimes] did not answ [answer] q [questions]**

4 I do not recall asking Mr Jayaram if his wife could take notes on his behalf rather than Mr Jayaram suggesting it himself, but I may have suggested it as a reasonable solution to the problem. Regardless, I do not recall Mr Jayaram complaining in any way about this course of action, namely his wife noting both questions and answers. Had Mr Jayaram expressed any dissatisfaction, it is highly likely that I would have noted it accordingly. I do not recall thinking at the time, or now, that Mr Jayaram was in any way prejudiced by this course of action at any time during the hearing.

5 As to Mr Jayaram's comment at paragraph 40 of this affidavit, it is correct that the tribunal generally preferred the credibility of the Respondent's witnesses as expressed at paragraph 42 of the tribunal's reasons. The tribunal accepted the submission of the Respondent's counsel that:

C [Claimant] unwilling to accept simple s/frwd [straightforward] qq [questions] [put]to him in xx [cross-examination]."

15. The lay members commented rather more briefly. Mr Butler said as follows:

> **"I have checked my notes and would comment as follows:-**
>
> **Paras 19-26**
>
> **Agreed as per Mr Newlyn's comments.**
>
> **Paras 39-43**
>
> **Although in my 55 pages of notes I haven't written anything about the Claimant being asked to speed up his note taking, I do recall from memory Mr Pritchard asking him to try to speed up, otherwise there was the risk of going part heard and his wife then took over the note taking. In my opinion I didn't notice any difference with the Claimant's responses to questions thereafter."**
>
> **From my notes I would respond as follows;**
>
> **Paras 19-26**
>
> **I obviously do not know what was said in the claimant's waiting room but the tribunal did start later than normal as EJ Pritchard was dealing with another case. Pritchard did agree that the claimant could make notes but we had limited time and still had to finish within that.**
>
> **Paras 39-43**
>
> **The claimant was taking a considerable time making notes and progress was extremely- slow. It appeared to me that he was writing down the questions: he was being asked more or less verbatim rather than making a brief note. I think we were all concerned that the timetable that had been agreed at the start of the hearing would not be met. EJ Pritchard did ask the claimant to try _ and speed up. Eventually the claimant's wife did start taking the notes,**
>
> **I cannot say what the claimant's emotional state was but in my opinion the clarity of his answers did not change throughout all the time he was giving evidence.**
>
> **I have limited my comments to the matters raised in the quoted paragraphs and hope this is sufficient for the EAT."**

16. Finally, Chloe Doltis an HR Business Partner employed by the Respondent who attended the first day of the Hearing said the following in her affidavit:

> **"1. I am providing this affidavit on behalf of the Respondent and in response to paragraphs 39 to 43 of the Appellants affidavit dated 1 March 2019, as directed by the Employment Appeal Tribunal by Order dated 29 March 2019 and sealed on 11 April 2019.**
>
> **2.I am a Human Resources Business Partner for the Respondent's South-East Route. I attended the first day of the Employment Tribunal Hearing in Ashford on 25 July 2018 and listened and watched the evidence being presented from the Appellant.**
>
> **In response to the Appellants affidavit dated 1 March 2019:**
>
> **3. Paragraph 39: I do not specifically remember the Appellant using the exact words to inform Judge Pritchard that he "would do my best to write faster". However, I recollect there were long pauses in between cross examination as the Appellant was writing down both the questions and his own responses. After a while Judge Pritchard did address this with the Appellant; I cannot remember the exact wording that Judge Pritchard used, however it related to the length of time the Tribunal had to hear the claim and Judge Pritchard's concerns that the excessive breaking caused by the Appellant's notetaking would impact on this. I am not in a position to comment if the Appellant was finding it hard to focus.**

4. Paragraph 40: I am not in a position to comment on whether the Appellant was 'fighting the urge to fidget. The Appellant was pausing in between cross examination. After every question he paused for about 3 minutes to write the question. He would in turn answer the question and subsequently write down his answer.

5. Paragraph 41: I am not in a position to comment on what was in the Appellant's mind when he was being cross-examined. I do remember the Appellant putting his pen down and asking his wife take over the notetaking. However, I believe that the Appellants wife was also taking notes throughout the Tribunal Hearing and she had pen and paper to hand before any concerns relating to time were raised by Judge Pritchard.

6. Paragraph 42: I am not in a position to comment on the emotions the Appellant was feeling and/ or his need to fidget. There was no change to the Appellant's behaviour before or after his wife took over notetaking.

7. Paragraph 43: I am not in a position to comment on whether the Appellant was able to fully focus on the questions asked and/ or how he was feeling about the presentation of his evidence.

8. For completeness, I do not recollect any reference made by the Appellant to his ADHD condition during the course of the Tribunal Hearing on the day I attended."

17. It is of note that there is no reference in the Claimant's affidavit to the question as to whether the disabilities mentioned in the ET1 of depression and/or PTSD were ever diagnosed.

18. I turn now to findings of fact made by the ET. The Claimant had had an interview for the Grade 8 job on 15 May 2017. He was unsuccessful. He subsequently sought and received feedback, which was unsatisfactory, then asked for more constructive feedback which as it turned out was "probably made up" by the person providing it, a Mr Boxall, who had not been one of the interviewers." The ET made an express finding that this was not an act of discrimination; other successful applicants having received the same feedback.

19. On 17 May, the Claimant was interviewed elsewhere and by different people for the Grade 2 job in respect of which he was successful. The ET went through the interview and selection process of the Grade 8 position in considerable detail, analysing the data by reference to the declared ethnicity, where available, of the candidates. Such an exercise was not, of course, required for the second process, the Claimant having been successful, although the relevant scores were noted.

20. Having set out the facts the Tribunal self-directed itself on the applicable law. In its conclusions the Tribunal stated as follows:

> **"41. The Tribunal has given careful consideration to the Respondent's submission that the Claimant has failed to show a prima facie case such that the burden of disproving discrimination should shift to the Respondent. There is much force in Miss Tharoo's submission that the Claimant has failed to show "something more" than a difference in treatment and a difference in race, colour or ethnic origins. Nevertheless, the Tribunal is troubled by the fact that Ian Boxall simply made up an explanation as to why the Claimant was not successful at interview for the Three Bridges role and concerned by the fact that the Claimant achieved significantly better scores when interviewed for the Cuxton role. The Tribunal is mindful that it is unusual to find direct evidence of discrimination and, without reaching a conclusion as to whether the Claimant has shown a prima facie case of discrimination, the Tribunal proceeds on the assumption that the Claimant has done so. The Tribunal therefore considers the Respondent's explanation for the treatment and whether it has shown a non-discriminatory reason for it. As set out in the case law referred to above, the Claimant is not prejudiced by this approach.**
>
> **42. The Tribunal heard extensive evidence as to why Sam Long and Lucy Phipps awarded the various scores to the Claimant. They gave evidence which was clear, consistent and measured. This was in contrast to that of the Claimant who appeared unwilling on occasions to answer straightforward questions asked of him.**
>
> **43. None of the scores, apart from that awarded for speaking and listening skills, appear to be remarkable or even particularly low; indeed most of the scores might be thought to reflect a respectable performance.**
>
> **44. In respect of the individual competencies, the Tribunal accepts the Respondent's evidence that the Claimant did not achieve scores of five (full marks) because:**
>
> **44.1. Conscientiousness — his pre-prepared answer did not specifically answer the question asked;**
>
> **44.2. Attention management — he had not provided the level of detail required or explained in sufficient detail how he remained focussed;**
>
> **44.3. Relationships with people — he could have explained in more detail the strategies used to resolve the conflict;**
>
> **44.4. Multi-task capacity — he did not go on to show how, in response to a prompt question, he dealt with anxiety in more depth;**
>
> **44.5. Controlled under pressure — he did not explain how he would have calmed down others;**
>
> **44.6. Planning and decision making — his answer was fairly short and there was no mention of techniques or methods of planning;**
>
> **44.7. Communications — he did not answer the question in depth and had to be prompted to tease out the information;**
>
> **44.8. Willingness and ability to learn — in response the question asked, he gave short responses which were fairly short and not in depth;**
>
> **44.9. Safety — the Tribunal accepts that Lucy Phipps and Sam Long used the high/positive and low score/negative indicators in order to reach a fair score of four.**
>
> **45. The Tribunal is satisfied on the basis of the evidence it heard that the reasons for the scores are genuine and do not disclose either conscious or unconscious racial discrimination.**
>
> **46. With regard to the overview questions which were asked at the commencement of the interview, the Tribunal is satisfied that the Claimant gave a fair account as to why he wanted to leave his current position (his business had ceased) and why he had applied for the Signaller role for which he was fairly awarded a score of four. Again, this does not disclose either conscious or unconscious racial discrimination.**

47. Turning to the score awarded to the Claimant for speaking and listening skills, the Tribunal prefers the evidence of the Respondent's witnesses that the Claimant was repeatedly asked to listen fully to the conscientiousness question but that he interrupted and tended to rush into delivering his answer.

48. As stated above, speaking and listening skills are vital attributes required of a Signaller to ensure the safety of those using and working in the rail network and it is inevitable that the interviewers will examine those attributes carefully.

49. The Claimant submitted that it is a stereotypical assumption that South Asians - Indians, Pakistanis and Bangladeshis in particular - have poor listening skills and he referred the Tribunal to an extract of a learned work on the subject. The Claimant asserted that this stereotypical assumption was operating on Sam Long and Lucy Phipps' minds, either consciously or unconsciously. It is a nice question as to whether a putative discriminator would have to be aware of such a stereotypical assumption in the first place before it could operate on their mind at all, either consciously or unconsciously — in this case Sam Long and Lucy Phipps said that it was not a stereotypical assumption known to them. Regardless, the Tribunal is satisfied that the reason for the score awarded for speaking and listening was for that stated and not because such a stereotypical assumption was operating on their minds."

21. These conclusions were augmented by other detailed conclusions which I will not set out, all of which, the ET held, supported its primary conclusions.

22. The two grounds of appeal permitted to proceed are at page 90 of the bundle and read as follows:

"(1) The tribunal erred in failing to provide the Claimant with a fair hearing by:

(a) having given the Claimant permission to take notes as a reasonable adjustment for his ADHD whilst giving evidence, telling him that it was taking too long and asking him to ask his wife to take notes instead, this making him feel pressured into speeding up and ultimately to ask his wife to take over the writing for him

(b) this affected the Claimant's confidence and ability to participate in the hearing as a disabled person

(2) The tribunal failed to take any or any sufficient account of the Claimant's disabilities and/or any adjustments in its conclusions as to, and/or to provide reasons for, the way in which he gave his evidence."

23. On behalf of the Claimant, Ms Casserley stressed paragraph 42 of the ET's decision submitting that the Claimant's credibility was critical to its determination. She then went on to set out in considerable detail in her skeleton argument the legal structure under which a fair hearing is a prerequisite to anyone bringing a civil claim. The skeleton argument covered the

Human Rights Act 1988, the UN Convention, the Equal Treatment Bench Book, Council Directive 2000/78 and case law both domestic and of the European Court of Human Rights. It seems to me unnecessary to rehearse the wider background here, as the relevant principles are clear from that case law to which I will refer in a moment. There is undoubtedly a duty imposed on any court to ensure that a fair hearing is held and that adjustments are undertaken to assist those suffering a disability to overcome, so far as is possible, its effects.

24. Miss Casserley cites **Rackham v NHS Professionals Limited** UKEAT/0110/15/LA and in particular paragraph 36 when Langstaff J then President said:

> **"It is well known that those who have disabilities may suffer from social, attitudinal or environmental difficulties. There may be barriers to their achieving the rights to which as human beings they ought to be entitled. We therefore take the purpose of making an adjustment as being to overcome such barriers so far as access to court is concerned, in particular to enable a party to give the full and proper account that they would wish to give to the Tribunal, as best they can be helped to give it. We accept that practical guidance as to the way in which the court upon whom the duty to make adjustments for those purposes is placed should achieve this is given by the Equal Treatment Bench Book."**

25. Miss Casserly also cites the Northern Ireland Court of Appeal case of **Galo v Bombardier Aerospace UK** [2016] IRLR 703 in which the Court observed at paragraph 56 that:

> **"…it is not a sufficient argument to state that, even when the appellant was represented, no application for adjustment was made on his behalf. The duty is cast on the Tribunal to make its own decision in these matters. There were clear indiciae of observed agitation and frustration on the part of the appellant. These should have put the Tribunal on notice of the need to investigate the precise nature and diagnosis of his condition."**

26. Galo is also noticeable for its citation of the Judgment of Lord Reed in **R(Osborn) v Parole Board** [2012] AC 115 which makes clear that, when considering whether a fair procedure has been followed, the Appellate Court must not merely review the reasonableness of the decision-maker's judgements of what fairness is required, but must also determine for itself whether a fair procedure was followed. I was also taken to **Anderson v Turning Point Eespro** [2019] IRLR 731 in which Underhill LJ said at paragraph 27:

> **"….In the generality of cases it is entirely appropriate for a tribunal to leave it to the professional representatives of a party who is under a disability, or indeed otherwise vulnerable, to take the lead in suggesting measures to prevent them suffering any disadvantage. The representatives**

> **can be expected to have a better understanding than the tribunal of what the party's needs are, and access to appropriate medical advice; and there is also a risk that if the tribunal itself takes the lead in seeking to protect a party (or witness) it may give the impression of taking their side. This involves no abdication of responsibility by the tribunal. Of course it retains ultimate responsibility for seeing that a disabled party receives a fair hearing, and I do not rule out the possibility that there may be cases where a tribunal should take steps for which the party's representative has not asked; but those will be the exception, and the default position is that the tribunal can expect a party's interests to be looked after by his or her representatives."**

And at paragraph 30:

> **"…There is no rule that in every case where there is a disabled or vulnerable witness there must be something specifically labelled a "ground rules hearing" (which has its origin in the rather different world of criminal procedure); or that a specific check-list must be gone through in every such case, whether relevant or not. As Langstaff P went out of his way to emphasise in Rackham, what fairness requires depends on the circumstances of the particular case."**

27. Miss Casserley urges me to find (and this is my summary of her submissions) that the ET was on notice of the disability and should have given greater consideration to the Claimant's needs at that stage. She concedes that he was not told to stop making notes and points out that while the Employment Judge did not consider that he was being critical when asking if he, the Claimant could speed up the process, the Claimant believed that he was. She submits that there was not a fair hearing particularly given the importance of credibility. She argues that the Judgment was neither **Meek** compliant nor in accordance with Articles 6 and 14 in failing to explain how, if at all, the ET had taken the Claimant's disabilities into account so as to discount the possibility that it - the disability - made it responsible for the adverse impression created of the Claimant's evidence.

28. Two authorities relevant to Section 20 of the **Equality Act 2010** were served yesterday afternoon. I have not found the late submitted material of any assistance. The cases add nothing to **Rackham** and **Galo**.

28 On behalf of the Respondent, Miss Tharoo points to the absence of any request at the Preliminary Hearing where the Claimant was represented by counsel and solicitors to adjustments

being needed or of the need for a "ground rules" hearing. She also submits that there is no evidence that the Claimant made reference at the liability hearing to his ADHD being the reason for his request to take notes. She says that it is common ground that, after initially being allowed to make notes, it became clear to all that the pace at which cross-examination was proceeding was very slow and that, rather than making brief notes, the Claimant was in fact writing down each question "in full" as per the EJ or "more or less verbatim" per Mr Newlyn. Paragraph 31 of the Claimant's affidavit accepts that he wrote down each question before answering it, which I infer to mean "in full". At paragraph 24 he says that he used the notepad to jot down any "buzz words" that would assist in making any further points he deemed important to his answer, but also used the writing time to steady his nerves and to focus his mind on the task.

29 Taking me through the evidence served, Miss Tharoo notes the EJ's lack of recollection of being told by the clerk of the Claimant's request to take notes. She points to the Judge's contemporaneous note at the foot of page 100 of the bundle (the paragraph numbers have been repeated) as to the reason for allowing the making of notes, namely that he was unrepresented and needed to address points which would otherwise need to be dealt with in re-examination.

30 She argues that this chimes with the Claimant's affidavit at paragraph 28, the Judge noticing the items which the Claimant was carrying as he moved to the witness table and asking if there was any objection to his making notes. I am not convinced that this is of any great assistance to determining when and how the request was first made. What does seem clear, however, is that there was no reference in the course of the hearing to ADHD or to the reason for taking notes being other than as noted by the EJ one hour into the Claimant's cross-examination when it became clear the progress was very slow.

31 Miss Tharoo also records that when the Claimant was asked if he could "speed up" in order to ensure that the hearing could be completed within the time allowed for it, he raised no objection, neither did anyone else present notice any change in the way in which he answered questions, half the cross-examination having elapsed under the first regime. In the absence of any evidence as to the nature and extent of the disability and of the reasons for the adjustment sought, she argues, it was entirely appropriate for the EJ to raise the issue how long cross-examination was taking and how the time taken might be ameliorated. There was, she nothing to suggest that a fair hearing did not take place.

32 As to the second ground of appeal, she points to the fact that the case was essentially about the scoring of the Claimant at interview and the credibility of the answers which the interviewers gave was key. The ET accepted that the burden of proof had passed to the Respondent and thus the Claimant's evidence was of little if any relevance to the ultimate issue. The contested issue referred to at paragraph 47 is, she says, is resolved at paragraph 49. The evidence of the interviewers was accepted as truthful and the Claimant's case, namely that stereotypical assumptions had been made, was rejected.

Conclusion

33 The ET was in a highly unusual position. In drafting an amended ET1, the Claimant's representatives made a handwritten note pointing to disabilites said to be suffered by him but noting only that reasonable adjustments for hearings would be advised at a later stage. They never were, despite continued representation at the Preliminary Hearing. It is not clear what was said to the ET, the Claimant having communicated via a clerk immediately before the hearing. No mention has ever been made as to the other disabilities quoted in the ET1 of which the ET

might be said to be "on notice" although whether the handwritten entry on the box on the form was ever really looked at is uncertain.

35 A process was agreed which I am satisfied, having looked at the evidence, was on the basis of the Claimant being unrepresented rather than by his suffering a disability. While I accept that the ET had a duty to be aware of disability-related issues, they did not arise. The lay members commented that there was, objectively, no difference in the manner of the Claimant giving evidence before or after the change in note-taking, which was a suggestion made by the Claimant not one imposed by the ET. This militates strongly against the suggestion that the hesitancy in evidence occurred only after the Claimant had passed the note-taking role to his wife.

36. On the face of the papers the ET was dealing with a Claimant who was a university graduate, had worked as a police officer for 11 years and had applied for a job as a railway signaller. The ET noted at paragraph 8 of the reasons the Respondent's unchallenged evidence that "whenever there have been safety incidents putting staff or passengers in danger due to human error it has always been a result of poor communication, the signaller having either misunderstood what was asked or failed to communicate effectively." This was in the context of the Claimant having been awarded just one out of five for speaking and listening skills at the first interview.

37 The present case is markedly different from those referred to above where the issue of disability was known and had been properly established by evidence at the time of the hearing. This did not happen in this case. I have no idea what instructions the lawyers then acting for the Claimant received in this regard and will not speculate as to why the issue was never followed up. Although the Equal Treatment Bench Book makes clear that ADHD is likely to affect an

individual adversely, the measures which might be taken, to use its words, make clear that there is a wide scope of actual disadvantages which a sufferer could face. Applying the label "ADHD" does not automatically generate a list of required adjustments. Taken as a whole, I am satisfied that, looked at objectively, a fair procedure was followed in this case.

39 In any event the task for the ET was to determine the Claimant's complaint of race discrimination. Despite the adverse finding as to his credibility, I reject the submission that this was "critical" to its determination. The issue before the ET in relation to the Grade 8 interview was whether the interview process and the scores given to the Claimant's performance were tainted by race discrimination. The Claimant was never likely to be able to give objective evidence as to his own performance.

40 As to ground 2, the duty to explain was not engaged given my findings as to the evidence before the ET. Paragraph 49 is an adequate explanation of the reasons for the ET's findings taken together with its acceptance of the evidence of the Respondent's witnesses. For the above reasons both grounds of appeal fail, and the appeal is dismissed.