Appeal Nos. UKEAT/0169/19/JOJ (V)
UKEAT/0170/19/JOJ (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 January 2021
Judgment Handed down on
12 March 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MISS O PHELAN — APPELLANT

RICHARDSON ROGERS LIMITED — RESPONDENTS
MR MICHAEL ROGERS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADAM OHRINGER (of Counsel) MS HELOISE RAMAGE-HAYES (Representative) Instructed by: Free Representation Unit 5th Floor Kingsbourne House 229-231 High Holborn
For the Respondents	MR PETER LOCKLEY (of Counsel) Instructed by: Keystone Law Ltd 48 Chancery Lane WC2A 1JF

SUMMARY

PRACTICE AND PROCEDURE – postponement

When an appeal concerns a decision of the Tribunal on an application to postpone a hearing because the applicant is not fit to attend, the Employment Appeal Tribunal may only intervene on *Wednesbury* grounds. **O'Cathail v Transport for London** [2012] ICR 614 remains good law, and has not been implicitly overruled by **R(Osborn) v Parole Board of England and Wales** [2014] AC 1115. The **O'Cathail** line of authorities co-exists with authorities such as **Rackham v NHS Professionals Limited**, UKEAT/0110/15 and **Galo v Bombardier Aerospace UK** [2016] IRLR 703, which concern the question of adjustments to secure a fair Hearing, and in respect of which the appeal Court must decide for itself what fairness requires.

Where an application to postpone a Hearing, the outcome of which may determine the complaint, is made by an applicant who is unfit to take part, their right to a fair trial is engaged, and proper weight must be given to the serious implications for them of refusing a postponement. This will usually outweigh the inconvenience and cost to the other party of granting the postponement: **Teinaz v London Borough of Wandsworth** [2002] ICR 1471. But the implications for the other party's right to a fair trial, and the wider public interest, of not postponing, must also be weighed in the balance, and may tip it the other way.

The Tribunal's assessment of when, realistically, the matter is likely to come to an effective Hearing if the application is granted, and what the medical evidence indicates about that, will often be of crucial importance. **Andreou v Lord Chancellor's Dept** [2002] IRLR 728 and the **Presidential Guidance** on seeking a postponement (2013) considered. The Tribunal may also properly draw on other relevant evidence and information, including in relation to the course and conduct of the litigation hitherto, when forming a view on that question.

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In the present case, the Claimant, who was, at the time of her application, unrepresented, applied for a postponement of the full merits Hearing, on the grounds of medical unfitness. The Tribunal accepted that she was unfit but, in all the circumstances, refused the application. Having regard, in particular, to the content of the medical evidence, the history of the course and conduct of the litigation during a period when the Claimant had had representation, and the Tribunal's proper assessment of when, if the application were to be granted, the matter would be likely to come to an effective Hearing, its decision was not *Wednesbury*-unreasonable.

HIS HONOUR JUDGE AUERBACH

Introduction and Procedural History

1. The Claimant in the Employment Tribunal ("the Tribunal"), who is now the Appellant, presented a claim form in June 2017. She had worked for the First Respondent in the provision of consultancy services to Volvo Car Corporation for about a month ending on 30 January 2017. She complained of five alleged acts of direct sex discrimination and/or harassment on the part of the First Respondent, said to have occurred during the course of that assignment, and by way of termination of the relationship. In each case the Second Respondent was said to be the person who engaged in the conduct. Originally Volvo was also a Respondent, but the claims against it were later withdrawn and dismissed.

2. The matter was listed for a Full Merits Hearing to open on 8 January 2019. In the run-up to that Hearing the Claimant applied for a postponement. She did not attend the Hearing and was not represented. The Respondent's counsel applied for the claims to be dismissed under Rule 47 of the **Employment Tribunals Rules of Procedure 2013**, which provides:

> **"If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."**

3. The Tribunal (Employment Judge Gumbiti-Zimuto, Ms P A Breslin and Mr M J Selby) first considered whether to postpone the Hearing. It decided not to do so. It then went on to dismiss the claims. Its written Judgment and Reasons were sent to the parties on 14 January 2019. The Claimant applied for a reconsideration, but that was refused on paper.

4. The original Grounds of Appeal sought to challenge the Tribunal's decisions, both to refuse the postponement application, and then to dismiss the claims. However, at a Preliminary

Hearing ("PH") in the EAT, the challenge to the latter decision was found not to be arguable, and dismissed. The five grounds of appeal challenging the decision to refuse the postponement application were directed to proceed to a full appeal Hearing. Although the original Notice of Appeal was treated as raising an appeal in respect of both the Tribunal's decision to refuse to postpone the 8 January 2019 Hearing, and the Judge's later refusal of the reconsideration application, it was common ground before me that the latter adds nothing to the former.

5. I need to set out more fully the relevant procedural history in the Employment Tribunal. I take this from the Tribunal's Decision and copy documents in my bundle.

6. At the outset of the litigation both sides were represented by solicitors. The response contended that the claims were out of time, and that the Claimant and the First Respondent were not, in any event, in a legal relationship giving rise to jurisdiction to entertain the complaints (in particular because the contract for the Claimant's services was with a limited company controlled by her); and the individual complaints were disputed on their merits.

7. At a telephone case management PH on 31 August 2017 a further PH was listed for 8 December 2017 to consider matters including the Claimant's "employment status", clarification of the basis of the claims, and the Respondents' applications for strike-out or deposit orders. The Claimant's solicitors failed to provide a timely document setting out the basis of the claims. They informed the Tribunal that this was because she had been admitted to hospital. Following an Unless Order, such a document was then provided, although there was then a dispute as to whether it complied with the relevant Order. The PH that was due to take place on 8 December 2017 was subsequently converted to a telephone Hearing and then postponed to 15 March 2018.

A 8. At the PH on 15 March 2018 the matter was listed for a further PH on 27 September 2018, to consider whether the Claimant was a contract worker and whether her complaints were presented in time. A Full Merits Hearing was also listed to take place on 8 to 11 January 2019.

B 9. On 20 September 2018 the Claimant's solicitors applied for a postponement of the PH due to take place a week later, attaching a letter from her GP. The Respondents objected. A Judge refused the application on the basis that there was no indication that the Claimant was C unable to attend on the actual date of the PH. A Med 3 was then provided, indicating that the Claimant was not fit to work from 21 to 30 September. In the box describing the condition, the GP, Dr Turner, wrote: "anxiety, having IAPT counselling, not medically fit to attend court". The D Respondents did not oppose that renewed application, and it was granted. It was then agreed that, rather than attempt to have the Tribunal relist the PH, all issues should be considered at the Full Merits Hearing that was already listed to open on 8 January 2019.

E 10. The Respondents' solicitors subsequently complained that the Claimant had not complied with directions, and sought an Unless Order. The Claimant's solicitors resisted this and informed the Tribunal that further directions had now been agreed. They also wrote that the Claimant had F been unwell, and could provide further medical evidence if required.

11. On 27 November 2018 the Respondents' solicitors wrote to the Claimant's solicitors. G Among other things they expressed a concern that the Claimant would "once again seek to delay the hearing". They stated that their clients would not unreasonably oppose any postponement application, but that any such application should be made in good time and supported by cogent medical evidence. They also stated that it would be essential, in that case, to be provided with H further details of her medical condition and prognosis.

12. On 17 December 2018 the Claimant's solicitors wrote to say that they were no longer acting for her. On 18 December the Respondents' solicitors sought an Unless Order in respect of exchange of witness statements. On 19 December Ms Donna Cartwright wrote on the Claimant's behalf, requesting a postponement of the Full Merits Hearing that was due to open on 8 January 2019 "until at least mid-February 2019" and "until alternative representation can be secured". She attached a letter from Dr Turner dictated on 4 December 2018 and dated 6 December 2018, reading in material part:

> **"I would like to confirm that we are currently treating Ms Orla Phelan for severe anxiety. She is currently under the care of the Crises Team and having counselling.**
>
> **Unfortunately due to the severity of her symptoms I feel it will take her a long time to recover. We are currently reviewing her on a regular basis and as part of her treatment we are giving her fit notes on a 4 weekly basis if we do not feel she is fit for work or fit to attend court.**
>
> **We do not feel we can predict whether she will be fit in February, however, in view of the severity of her symptoms I feel it is unlikely that she will be fit to attend court for the foreseeable future. I will continue to review the situation and provide notes as appropriate."**

13. By a letter of 31 December 2018 the Respondents' solicitors objected to that application. An email from, or on behalf of, the Claimant, in reply, stated that she was "incapacitated and under the care of the Crises team and undergoing counselling" and would be unable to meet any deadlines whilst recovering and until fresh representation had been found.

14. A letter of 3 January 2019 conveyed that EJ Vowles had considered the Claimant's application for a postponement, the Respondents' objection, and their application for an Unless Order. It continued:

> **"In view of the proximity of the hearing date there is insufficient time to issue an order. The claim was presented on 9 June 2017 and relates to events in January 2017. It is in the interests of justice that the case is not further delayed.**
>
> **The application for a postponement is refused and the hearing remains listed on 8 – 11 January 2019. The Claimant and the Respondents may renew their applications at the start of the hearing."**

15. On 3 January 2019 a firm of solicitors emailed the Tribunal that the Claimant had contacted them that day enquiring about representation. They explained that they were not formally instructed, but were concerned, from a call, that she seemed to be "very distressed and unwell". They asked if the Tribunal could postpone the Hearing to enable her, at least, to obtain a copy of the bundle, and to draft a witness statement, if not to obtain representation.

16. The Tribunal referred in its Decision to further emails of 4 and 7 January 2019 indicating that the Claimant had approached a new firm of solicitors (not the one which wrote the 3 January email) but stating they needed more time to review her case; and to an email from the Free Representation Unit to her of 7 January stating that there was insufficient time to take on her case, and to an email from Dr Turner of 7 January stating that she "will not be fit to attend court tomorrow". That email continued: "I would like to confirm that due to her mental health I feel she needs a support/advocate to support her through the legal process."

17. The Claimant did not attend the Tribunal Hearing nor was she represented at it. The Respondent was represented by Mr Lockley of counsel.

The Employment Tribunal's Decision

18. In the first part of its decision, the Tribunal set out the procedural history. It then noted that the Claimant had not attended, and that the Respondent had applied for the claim to be dismissed pursuant to Rule 47, the text of which it set out. It set out the following paragraphs from the examples given in the **Guidance on Seeking a Postponement of a Hearing** issued by the President of Employment Tribunals (England & Wales) in December 2013:

"1 When a party or witness is unable for medical reasons to attend a hearing. All medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease.

4 If a representative has withdrawn from acting details should be given as to when this has happened and whether alternative representation has been or is being sought."

19. I should set out the next part of the Tribunal's Reasons in full.

"29. We have reminded ourselves that the overriding objective when making a decision in the circumstances such as those in this case is overall fairness to both parties and that is not necessarily predetermined by the situation of one party, such as a potentially absent claimant who was denied an adjournment. The Tribunal have to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other to have a trial within a reasonable time and the public interest in the prompt and efficient adjudication of cases. [Here, a footnote cited O'Cathail v Transport for London [2012] ICR 614.]

30. We first considered whether we should adjourn and postpone the hearing to another date. We have come to the conclusion that a postponement is not in the interests of justice in this case. The reason for postponing would be the claimant's unavailability because she is unwell. However, the claimant has not set out more than that she is suffering severe anxiety. The information from the claimant's GP is that the claimant's is currently not fit to attend the hearing. We have no specific explanation or understanding of the claimant's condition beyond this.

31. The medical certificates and supporting medical evidence provided do not explain the nature of the condition concerned beyond describing it as anxiety and severe anxiety. While the medical information provided includes the GP's opinion that the claimant is unfit to attend the hearing, it does not set out a prognosis of the condition or any clear indication of when that state of affairs may cease. It is stated that "due to the severity of her symptoms I feel that it will take her a long time to recover" and "I feel it is unlikely that she will be fit to attend court for the foreseeable future".

32. We have also considered the history of this case. The case was adjourned in August 2017 the case was listed for an open preliminary hearing on 8 December 2017: this was converted to a telephone preliminary hearing because there had been a failure to comply with the Tribunal's directions for reasons by the claimant. When the open preliminary hearing was re-listed for hearing on 27 September 2018 the claimant was unable to attend and there had been a failure to comply with the directions for that hearing.

33. We note that the respondents anticipated the problems the situation which arose when in the letter of 27 November 2018, they expressed "concern … that given [the claimant's] background and her admitted state of health and personal issues, she will once again seek to delay the hearing." The respondent asked that they be informed "urgently" of any postponement application and that any such application have "cogent medical or other evidence". The respondents stated that they "will not unreasonably oppose an application that is made in good time and supported by cogent evidence". The claimant was asked not to wait until shortly before the hearing when the preparation for the hearing will have been done.

34. The respondent having stated a reasonable position to adopt was then faced with exactly the situation that they had sought to avoid. The claimant's application for a postponement was made very late. Cogent medical evidence beyond the GP's statement that the claimant suffers anxiety or severe anxiety has not been provided.

35. The claimant has not complied with the Tribunals orders in respect of preparation for the hearing. There is some history of non-compliance from the claimant, the correspondence from the claimant's solicitors indicates that in September 2017 the claimant's admission into Cork University Hospital played some part. It is not a complete

explanation for the failure to comply with the requirement to provide a skeleton argument by the 28 September 2017 and there has been no explicit explanation for the failure to comply with the more recent directions.

36. If this case was re-listed for hearing with a time allocation of four days, the Judges' listing calendar would allow this case to be re-listed for hearing in Reading from 11 November 2019. Attempts to find an earlier date are not possible unless the availability of the parties is known. The claimant's availability for a hearing is not known.

37. The claimant's application asks for a reasonable time to find an alternative representative. The explanation of why the solicitors acting for the claimant come off the record is not clear. The solicitors come off the record on 17 December 2018 when the case is listed for hearing to commence on 8 January 2019. A new solicitor was approached but they have made no application to the Tribunal on the claimant's behalf asking for more time and no indication is given by the claimant that they need more time to decide whether they can act for her and if so what amount of time is required. We note that the claimant had approached Lawson West Solicitors Limited by 4 January 2019. The claimant has also approached the FRU and appears to have made an unrealistic request that they take on her case on 7 January 2019 for a hearing commencing at 10am on the 8 January 2019: they were unable to do so. FRU has not asked for more time to consider the claimant's case. The claimant's application makes reference to a postponement until Mid-February. While this may be a realistic period of time for the claimant to obtain new representation there is no indication that the claimant would be fit to proceed with her case then.

38. Taking into account the fact that the claimant's claim is in respect of a short period of engagement by the second respondent between 31 December 2016 and 30 January 2017 (or about 21 working days). The matters giving rise to this claim occurred in 2017, two years ago. There is no indication when the claimant is likely to be in a position to proceed with the hearing. In addition we note that the claimant's application for a postponement was considered and refused by EJ Vowles and that there has been no real change in circumstances since that application was made.

39. If this matter were postponed it would be approaching 34 months after the relevant events occurred before a final hearing can take place. The respondent is ready for hearing today. But for the claimant's failure to comply with directions and illness by now the parties could have been in position where at least the preliminary issues had been determined. Had that occurred it would allow the claimant and respondent to have a better understanding of the strength or weakness of their cases.

40. A postponement of the hearing is not in the interests of justice."

20. The Tribunal then went on to dismiss the complaints under Rule 47.

The Grounds of Appeal

21. At the PH in the EAT, the following Grounds of Appeal were permitted to proceed:

"In concluding that the hearing should not be postponed, notwithstanding reliable medical evidence showing the Claimant was reasonably incapable of proceeding, the Tribunal erred in law as it:

First Ground

(a) Failed to apply the strong presumption in the authorities that a litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal and to the other parties.

Second Ground

(b) Wrongly considered that the medical evidence provided by the Claimant (at a time when she was not legally represented) was not sufficiently specific to support the application for an adjournment.

Third Ground

(c) Entirely failed to recognise that the Claimant was likely to be a disabled person and that it was under an obligation to make reasonable adjustments to accommodate aspects of her disability to ensure that she may participate as fully as possible in the proceedings. In particular:-

(i) The Equal Treatment Bench Book should have been consulted; and
(ii) Consideration should have been given to whether, in light of the email from Dr Turner, the Claimant could have a fair hearing without representation;

Fourth Ground
(d) Reached a conclusion on the facts before it which was perverse.

Fifth Ground

In light of the Tribunal's observations that the Claimant might not be in proper health to proceed with her case for a considerable period of time, the Tribunal should have exercised its case management powers to stay the proceedings until such time as the Claimant could demonstrate that she was in a position to proceed. Failing to do so was a serious procedural irregularity."

Argument

22. At the Hearing of this Appeal, Mr Ohringer of counsel appeared for the Claimant, speaking to a joint skeleton with Ms Ramage-Hayes of the Free Representation Unit. As in the Tribunal, Mr Lockley of counsel appeared for the Respondent. I summarise what seem to me to have been the most significant points raised in oral and written submissions on both sides.

Claimant

23. Mr Ohringer submitted that the **Presidential Guidance** concerns the form of a postponement application, but not the basis on which it should be determined. It codifies dicta in **Andreou v Lord Chancellor's Department** [2002] IRLR 728.

24. As to the substantive approach where a postponement on medical grounds is sought, in **Teinaz v Wandsworth Borough Council** [2002] ICR 1471, Peter Gibson LJ said, at [21]:

> **"A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment."**

25. But this was moderated in **O'Cathail v Transport for London** [2013] ICR 614, in which the Court of Appeal said, at [47]:

> **"Finally, Article 6 of the Convention does not compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds, if it would mean that the hearing would take place in the party's absence. There are two sides to a trial, which should be as fair as possible to both sides. The ET has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within reasonable time and the public interest in prompt and efficient adjudication of cases in the ET."**

26. Where a litigant is disabled the Tribunal is under a duty to make adjustments to ensure effective access to justice. In this respect, it would be helpful to consult the Equal Treatment Bench Book: **Rackham v NHS Professionals Limited**, UKEAT/0110/15 at [31]-[36]. When a party is suffering from mental ill-health, this should be recognised from the outset, so that positive steps can be taken, including exploring representation: **Galo v Bombardier Aerospace UK** [2016] IRLR 703 at [56]-[65]; **Anderson v Turning Point Eespro** [2019] ICR 1632.

27. A decision on a postponement application involves the exercise of discretionary case management powers pursuant to Rule 29 of the **Employment Tribunals Rules of Procedure 2013**. In **Teinaz** at [20] Peter Gibson LJ said that "some adjournments must be granted if not to do so amounts to a denial of justice", a proposition that he reiterated in **Andreou** at [35].

28. However, in **O'Cathail** the Court of Appeal held that the EAT had been wrong to interfere with a Tribunal's decision to refuse a postponement. As it described at [21]-[24], the EAT had in part relied on an authority from the civil jurisdiction: **Terluk v Berezovsky** [2010] EWCA Civ

1345, in which "the test laid down regarding an adjournment decision was whether the decision was unfair rather than whether it lay within the broad band of judicial discretion". However, further on, Mummery LJ (Etherton and McFarlane LJJ concurring) said:

> **"44. The crucial point of difference from *Terluk* is that decisions of the ET can only be appealed on questions of law, whereas under the CPR the appeal is normally by way of review and the decision of a lower court can be set aside, if it is wrong, or if it is unjust by reason of a serious procedural or other irregularity in the proceedings. In relation to case management the ET has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The ET's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the EAT should continue to adopt rather than the approach in *Terluk* as summarised in the headnote quoted above. It is to be hoped that this ruling will put an end to the "apparent confusion in authority" on the point pointed out by Wilkie J in *Riley v. The Crown Prosecution Service* (13 June 2012 – UKEAT/0043/12/SM) at [55]-[56],**
>
> **45. Overall fairness to *both* parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment."**

29. Mr Ohringer's principal submission, however, was that **O'Cathail** is no longer good law, in view of the decision of the Supreme Court in **R(Osborn) v Parole Board for England and Wales** [2014] AC 1115, which included the following at [65]:

> **"The first matter concerns the role of the court when considering whether a fair procedure was followed by a decision-making body such as the board. In the case of the appellant Osborn, Langstaff J refused the application for judicial review on the ground that "the reasons given for refusal [to hold an oral hearing] are not irrational, unlawful nor wholly unreasonable" (para 38). In the case of the appellant Reilly, the Court of Appeal in Northern Ireland stated at para 42:**
>
> **"Ultimately the question whether procedural fairness requires their deliberations to include an oral hearing must be a matter of judgment for the Parole Board."**
>
> **These dicta might be read as suggesting that the question whether procedural fairness requires an oral hearing is a matter of judgment for the board, reviewable by the court only on *Wednesbury* grounds. That is not correct. The court must determine for itself whether a fair procedure was followed (*Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; 2006 SC (HL) 71; [2006] 1 WLR 781, para 6 per Lord Hope of Craighead). Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required."**

30. This *dictum* was, said Mr Ohringer, of general application to any proceeding in which Article 6 rights were engaged. The "case management" description could apply to a wide variety

of decisions, from those dealing with minor aspects of the conduct of the litigation to those which had the potential effectively to determine the outcome of the case. Those which fundamentally affected the fairness of the proceedings should, in principle, be held to a higher standard. There was no principled reason why the approach in the Tribunal should be different to that taken in civil litigation. The analysis in **O'Cathail** was, therefore, implicitly overruled in **Osborn**. In any event, a decision to refuse a postponement which contravened common law principles of natural justice and/or Article 6 rights, *was* a decision taken in error of law.

31. Consistently with this, **Rackham**, **Galo**, **Islam v HSBC Bank plc**, UKEAT/0264/16 and **Shui v University of Manchester** [2018] ICR 77 all took the approach that an appellate Court must consider afresh whether the Employment Tribunal had followed a fair procedure. The only decision going against that tide was **Leeks v Norfolk and Norwich University Hospital NHS Foundation Trust** [2018] ICR 1257. But the appeal in **Leeks** was argued before **Islam** and **Shui** were handed down (although the *decision* in **Leeks** was handed down after). Further, **Leeks** did not concern a postponement decision; and did not advance any explanation of why the **Osborn** approach should not apply to Employment Tribunals.

32. In **Morton v Eastleigh Citizens Advice Bureau**, UKEAT/0208/18, the EAT had recognised that there were divergent approaches in the authorities. But in that case the claimant was seeking a postponement for more medical evidence to be obtained, not asserting that they were medically unfit to attend. The Court of Appeal's decision in **Morton** [2020] EWCA Civ 638 did not consider **Osborn**, or address the issue of fairness in cases of medical unfitness to participate. **Chowdhury v March Farm Futures**, UKEAT/0205/19/DA, was also not concerned with an application to postpone, and took this doctrinal debate no further.

33. Turning to the Grounds of Appeal, Mr Ohringer submitted, in summary, as follows.

34. As to Grounds 1 and 2, the Tribunal's citation of **O'Cathail**, but not **Teinaz**, showed that it had wrongly calibrated its approach to a disabled litigant. Where a party is medically unfit, although the interests of both parties, and the public interest in finality of litigation, should also be taken into account, this feature should almost always point to a postponement. The medical evidence produced by the Claimant addressed all the points identified in **Andreou**, and the **Presidential Guidance**: nature of condition, fitness to attend, and prognosis. The Tribunal was wrong to reject it as inadequate. The fact that the prognosis was uncertain should not have counted against the Claimant. The medical evidence did not indicate that she would inevitably be unfit for a very long time, or that this could not be reassessed after an interval.

35. As to Ground 3, there was no consideration by the Tribunal of the possibility that the Claimant might be a disabled person, nor of the adjustments that might be needed for her, including whether an opportunity to arrange fresh representation might assist her. The Tribunal failed to follow the approach indicated by **Rackham** and **Galo**. Ground 4 was, Mr Ohringer acknowledged, a "backstop" perversity argument, applicable if, contrary to his primary contention, the **O'Cathail** approach did still apply, but relying, essentially, on the same underlying points as Grounds 1 – 3.

36. Ground 5 advanced an alternative approach of staying the matter until such time as the Claimant was able to provide medical evidence that she was now able to proceed. The Tribunal could then, at such time, have ruled on whether the delay had become so great that a fair trial was no longer possible. In this case it was a serious procedural irregularity not to have considered or

adopted this more nuanced approach. Mr Ohringer cited **Riley v Crown Prosecution Service** [2013] IRLR 966.

Defendant

37. Mr Lockley's principal arguments were as follows.

38. The law remained that the EAT could only intervene where the Tribunal had exercised its discretion in error of law. The EAT remained bound by **O'Cathail**, and now also by **Morton**, a Court of Appeal decision post-**Osborn** in the Supreme Court, to the same effect. Further, there was no tension between **Teinaz** and **O'Cathail**. The exercise of any case management discretion could only be properly interfered with where, applying ordinary public-law principles, the decision was so unfair that it was perverse. **Osborn** was an application of that approach to the particular scenario of an adjudication concerning whether an oral hearing was an essential component of a fair decision relating to the liberty of the subject. It did not have any wider implications for the underlying principles. The decision of the Court of Appeal in **Osborn** (which took the same approach to the law as did the Supreme Court) had itself followed **Terluk**, which had been properly distinguished by the Court of Appeal in **O'Cathail**.

39. In so far as the wider existing body of authority at EAT level might be thought to reflect two conflicting lines of approach, this conflict could be resolved, suggested Mr Lockley, in one of two ways. He invited me to lay the matter to rest by adopting one or other of these.

40. What he called the narrow basis drew upon a distinction drawn in **Galo** and **Chowdhury** between a single case management decision and the wider question of the fairness of a Hearing or Tribunal procedure. Applying that distinction, **Galo** and **Shui** correctly followed the **Osborn**

approach, because they were both concerned with issues of overall fairness of process. **Rackham** was also concerned with what procedural steps were necessary to ensure fairness to a disabled litigant. Its flirtation with the possibility of taking a more interventionist approach to case management decisions generally, was *obiter*. By contrast, **Teinaz**, **Andreou** and **O'Cathail** all concerned individual case management decisions. When the speeches in each of them are read with care, all speak with one voice in adopting what might be called an orthodox public-law approach to an appeal in respect of the exercise of a discretion. **Leeks** was also concerned with such a decision, and was correctly decided (though, on this approach, the *discussion* in **Leeks** wrongly doubted the validity of this distinction).

41. Alternatively, what Mr Lockley called the broader basis would break the impasse by holding that **Leeks** was rightly decided in both reasoning and outcome, and by following it in preference to **Galo** and **Shui**, which were wrong. On this reading, the **Osborn** approach applies only to cases of serious procedural irregularity, such as bias, where there is only one correct answer in law; or, as held in **O'Cathail**, the **Osborn** approach simply does not apply to appeals from case management decisions by Employment Tribunals. But, finally, even under the orthodox approach, a Tribunal will still err if it takes into account an irrelevant consideration, or leaves out of account a relevant one, or relies upon a finding which is perverse in the sense that it is not properly supported by the evidence, as the Court of Appeal found happened in **Teinaz**.

42. Turning to the case in hand, Mr Lockley initially suggested that, a decision to refuse the postponement having been taken prior to the 8 January 2019 Hearing, by EJ Vowles, at that Hearing the Tribunal was then merely considering, in view of the non-attendance of the Claimant, whether to hear or dismiss the claims. However, in further discussion he accepted that, following the Tribunal's letter of 3 January, the Claimant had effectively renewed her postponement

application, postponement was in any event an option available to the Tribunal under Rule 47, and the Tribunal did, on 8 January, in fact consider (afresh) whether to postpone. Nor (he confirmed) did he seek to rely on **Serco v Wells** [2016] ICR 768 to argue that the Tribunal could not properly have revisited EJ Vowles' decision; though the fact that the question had been considered in the run up to the hearing *was*, he said, relevant context.

43. Contrary to Ground 1, submitted Mr Lockley, the Tribunal had not erred by citing (only) **O'Cathail** and not also **Teinaz**. **O'Cathail** is still good law. The point which the Tribunal, at [29], correctly, drew from it, was an important one, that had been restated by the Court of Appeal in **Morton** at [23]. Both **O'Cathail** and **Teinaz** recognised that where one party is medically unfit to attend, a postponement will "usually" be the fair outcome – but not always. This Tribunal had properly identified that the medical evidence was that the Claimant was unfit to attend. Although it did not cite **Teinaz**, it clearly therefore considered, first, whether it ought, on that account, to postpone; but it properly then also had regard to other factors set out in the succeeding paragraphs. In particular, it properly took into account features of the history of the litigation, its concerns about other aspects of the medical advice, and the prejudice to the Respondents were the Hearing to be postponed. It had not made the error alleged by Ground 1.

44. As for Ground 2, the Tribunal considered the **Presidential Guidance**, and properly identified shortcomings and concerns about the medical evidence, in particular on the question of lack of detail of condition or any clear prognosis, taking into account what was said in **Andreou**. It properly considered all the medical evidence available, being that which had been produced in September 2018 (at [9] and [12]), the GP's December 2018 letter. at [19], and the GP's 7 January 2019 email, at [24]. The Tribunal properly accepted that this showed that the Claimant was currently unfit to attend, but also correctly found that it said no more about her

condition than that it was one of severe anxiety, and did not give "any clear indication of when that state of affairs may cease". It correctly referred to the GP's view that "it will take her a long time to recover" and that it was "unlikely" that she would be fit to attend "for the foreseeable future". This was all properly taken into account by the Tribunal.

45. Taking with this Ground 5, there was no specific request for a stay; but in any event, a postponement coupled with a stay would have the same implications for the Respondents in terms of wasted costs, and the potential prejudice of delay and future uncertainty. The Tribunal properly assessed that if the Hearing did not proceed, it would be unlikely to be relisted for many months, and properly took account of the past history of the litigation (including delays that had occurred when the Claimant was represented, and that the very scenario predicted by the Respondents had come to pass) in judging the prognosis for the future course of the litigation, and potential for unfairness to the Respondents, if the Hearing did not go ahead.

46. As for Ground 3, the evidence fell far short of establishing that the Claimant was a disabled person. In any event, framing the question in terms of disability discrimination law did not add anything, in substance, as questions relating to the Claimant's fitness to participate in a Hearing now, or in the future, fell in any event to be weighed in the balance when deciding whether or not to postpone, and duly were taken into account by the Tribunal. Nor had the Claimant identified any particular part of the Equal Treatment Bench Book, which was said to be relevant. Nor did the Tribunal need to consider whether the Claimant could have a fair hearing without representation, as she had made it clear that she did not intend to attend at all.

47. As for Ground 4, applying the orthodox approach, the Tribunal's exercise of its discretion was plainly not perverse. All of the matters relied upon by the Tribunal as weighing against a postponement were relevant, and its reasons for relying upon them were cogent.

The Law

48. A decision on an application to postpone a Hearing is a case management decision within Rule 29. The overriding objective (Rule 2) of course applies. Rule 7 requires to the Tribunal to have regard to the **Presidential Guidance** on such applications, though it is not bound by it. As to the approach to be taken on appeal, the EAT is bound by the decisions of the Court of Appeal and the Supreme Court; so I shall, at this point, focus on these.

49. In **Teinaz** the Tribunal, at the start of a Hearing, refused an application by Dr Teinaz's representative made on the ground that he was not medically fit to attend. The EAT allowed his appeal, and this was upheld by the Court of Appeal. Peter Gibson LJ said the following:

> **20. Before I consider these points in turn, I would make some general observations on adjournments. Every tribunal or court has a discretion to grant an adjournment, and the exercise of such a discretion, going as it does to the management of a case, is one with which an appellate body is slow to interfere and can only interfere on limited grounds, as has repeatedly been recognised. But one recognised ground for interference is where the tribunal or court exercising the discretion takes into account some matter which it ought not to have taken into account: see, for example, Bastick v James Lane Ltd [1979] ICR 778 at 782 in the judgment of Arnold J giving the judgment of the EAT (approved as it was in Carter v Credit Change Ltd 1980 1 All E.R 252 at page 257 per Lord Justice Stephenson, with whom Cumming-Bruce and Bridge LJJ agreed). The appellate body, in concluding whether the exercise of discretion is thus vitiated, inevitably has to make a judgment on whether that matter should have been taken into account. That is not to usurp the function of the lower tribunal or court: that is a necessary part of the function of the reviewing body. Were it otherwise, no appellate body could find that a discretion was wrongly exercised through the tribunal or court taking into account a consideration which it should not have taken into account or, by the like token, through failing to take into account a matter which it should have taken into account. Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. As was said by Atkin LJ in Maxwell v Keun [1928] 1 KB 645 at page 653 on adjournments in ordinary civil actions:**
>
> **"I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of**

> **Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."**
>
> **21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.**

50. He considered that, in the instant case, the Tribunal had erred by taking into account its view that Dr Teinaz had *chosen* not to attend. That was not supported by the medical evidence which, rather, was to the effect that he had been *advised* by his doctor not to attend. There was no proper basis to doubt the genuineness of that evidence.

51. Arden LJ said this:

> **"35. The starting point is that the appellate tribunal does not read the original application with a view to forming, and if necessary substituting, its own judgment as to the way the discretion should be exercised. Nor does the appellate tribunal consider whether the exercise of discretion by the inferior tribunal is one of which it approves. The discretion remains that of the inferior tribunal. The appellate tribunal only intervenes in a limited number of situations. It set aside the exercise of discretion by the inferior tribunal if the exercise of discretion is "outside the generous ambit within which reasonable disagreement is possible": see G v G [1985] 1 WLR 647, or, as this court put it in Carter v Credit Change Ltd [1981] All.E.R 252 at 258, the tribunal's decision is perverse or such that no reasonable tribunal could have come to. Other situations in which the appellate tribunal can intervene in the exercise of discretion by the inferior tribunal are where the tribunal has made a mistake in law, acted in disregard of principle, misunderstood the facts or failed to exercise the discretion. The other situation in which the appellate tribunal can intervene, and which is the relevant one in this case, is where the inferior tribunal took into account some irrelevant consideration or, alternatively, left out of account some relevant consideration.**
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> **36. Two points flow from this last point. First, it is for the appellate tribunal to determine what considerations are relevant to the question at issue. It does not defer to the inferior tribunal in the selection or identification of these considerations. Second, unless permission is given for fresh evidence to be adduced on appeal, the appellate tribunal makes this determination on the factual material before the inferior tribunal. If the appellate tribunal finds that an irrelevant consideration has been taken into account or that a relevant consideration has been left out of account, the appellate tribunal must conclude that the exercise of discretion by the inferior tribunal is invalidated, unless it can be satisfied that the consideration did not play any significant role in the exercise of the discretion and thus constituted a harmless error involving no prejudice to the appellant.**
>
> **37. It is to be noted that the standard of review as respects the exercise of discretion involves the grant of considerable deference to the inferior tribunal. In particular, where several factors going either way have to be balanced by the inferior tribunal, the appellate tribunal does not interfere with the balancing exercise performed by the inferior tribunal unless its conclusion was clearly wrong.**

52. In that case the Tribunal had taken into account an irrelevant consideration, being an unjustified conclusion that it had drawn from the evidence. At [40] she observed that Article 6 (then only recently incorporated into domestic law) did not add anything to the argument in this case "but it does underscore the need to approach applications to adjourn on the grounds of applicant's ill health with great care." Buckley J agreed with both the other judgments.

53. **Andreou** was another case of an application to postpone a Hearing on medical grounds. The Tribunal directed a short adjournment for the applicant to produce further evidence, but when produced this was still found wanting, and the application was then refused. The EAT allowed an appeal, but the Court of Appeal restored the Tribunal's decision. Peter Gibson LJ cited from the judgments of both himself and Arden LJ in **Teinaz**. The Tribunal had reached proper conclusions on the evidence. At [46] Peter Gibson LJ added the following:

> **"The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course, an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that complaints such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened employment tribunals are these days. Fairness to other litigants may require that indulgences given to those who have had the opportunity to justify an adjournment but have not taken that opportunity adequately are not extended. It was a matter of particular concern that no indication was given in the evidence of Mrs Andreou either as to when the medical evidence which she required from the consultant would be available, nor as to when it might be that this case could come on for trial. Viewing the case in the round and considering all the circumstances referred to by the Tribunal, I cannot see how it could be said that in refusing the application the Tribunal was perverse or otherwise plainly wrong in refusing a further adjournment."**

54. Arden LJ agreed with Peter Gibson LJ's remarks about **Teinaz**, and as to the outcome. She referred to the "high hurdle" that an appellant must overcome when seeking to have the exercise of a discretion set aside. This decision was not perverse. She also said this:

> **"65. Finally, I would add this. Stress and anxiety are generic terms. Mr John Cavanagh QC, who has appeared for the appellant, has not suggested that stress and anxiety**

> **cannot constitute an illness. However, as I see it those terms are likely to cover a range of symptoms differing widely in their severity. Where a party seeks an adjournment on the basis of stress or anxiety, he should expect to produce details of the symptoms, the causes, severity, and so on, or to explain why those details cannot be supplied to the Tribunal. When a party applies for an adjournment he must bear in mind the need for complaints to employment tribunals in these sorts of matters to be heard promptly, the need to consider the interest of other parties to the proceedings and the need to avoid unnecessary waste of tribunal time and scarce resources."**

55. Cresswell J agreed with Peter Gibson and Arden LJJ.

56. In **O'Cathail** the Tribunal refused an application for a postponement supported by medical evidence that the applicant was unfit to attend. That decision was overturned by the EAT, but restored by the Court of Appeal. Mummery LJ (with whose speech Etherton and Macfarlane LJJ agreed) said, at [11]: "In the case of an appeal from a statutory discretion entrusted to and exercised by the ET, the EAT can only set aside the ET's decision on the ground of an error of law, such as when the ET goes wrong in principle in its approach to the discretion, or when it makes a decision that is so wrong that no reasonable ET, properly directing itself could have made it on the material before it."

57. Commenting on the EAT's reasoning, Mummery LJ said:

> **"22. That reasoning was based in the main on the EAT's reading of recent Court of Appeal cases that were not concerned with employment tribunal proceedings, but which, the EAT commented at [26], did not suggest that they were of limited application. The main case cited was *Terluk v. Berezovsky* [2010] EWCA Civ 1345 in which Sedley LJ gave the judgment of the court in which I sat with him. The appeal was against the refusal of the trial judge in a defamation case to grant an adjournment to give a party the opportunity to obtain legal representation. The test laid down regarding an adjournment decision was whether the decision was unfair rather than whether it lay within the broad band of judicial discretion. The approach in *Terluk* was followed by this court in *Osborn v. Parole Board* [2010] EWCA Civ 1409 in the context of the refusal by the Parole Board of oral hearings to serving prisoners and by the EAT in *D'Silva v. Manchester Metropolitan University* (11 February 2011- UKEAT/0336/09/LA).**
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> **23. *Terluk* was considered in *Dhillon v. Asiedu* [2012] EWCA Civ 1020 in the context of the refusal of an adjournment at the commencement of the trial of a civil action in the County Court. In *Dhillon* the court referred to the determination of fairness by considering the position of both sides, by taking all relevant matters into account and by conducting a balancing exercise and to the fact that the Appeal Court will only interfere with the first instance decision, if it is plainly wrong.**
>
> **24. The EAT also cited the guidance in earlier Court of Appeal cases on adjournments of ET hearings: *Teinaz v. London Borough of Wandsworth* [2002] ICR 1471 at [20]-[22]**

and *Andreou v. Lord Chancellor's Department* [2002] IRLR 728. The EAT commented that, although those cases used language "suggestive of a broad discretionary test," that was "implicitly subject to the fundamental principle" whether the effect of the decision to refuse an adjournment has been to deny a fair hearing to that party: see [35] and [36].”

58. Further on, Mummery LJ (in a passage part of which I have already cited) said:

“39. I have reached the conclusion that this appeal should be allowed on the short ground that there was no error of law in the judgment of the ET refusing to exercise its broad discretion to grant the adjournments requested.

40. First, I have never seen such a scrupulously detailed and careful decision by an ET or, indeed, by any court or tribunal, on the question whether or not to grant an adjournment. It is clear that the most anxious consideration was given to taking the exceptional step of refusing an adjournment applied for on unchallenged medical grounds.

41. Secondly, the judgment cited the guidance in the relevant decisions of this court on the established approach to adjournment applications to the ET. It is not contended that the ET took into account irrelevant factors or that it left relevant factors out of account in balancing the various factors for and against an adjournment. The decision was reached solely on the basis of relevant considerations.

42. Thirdly, the ET correctly took the overarching fairness factor into account in assessing the effect of its decision on *both* sides. The position of the potentially absent claimant is highly relevant in all cases of adjournment refusal, but it is not determinative of every case. The ET expressly stated that this was "a very rare case", in which it was more unfair in general for the matter not to proceed than it would be to adjourn.

43. Fourthly, there was no error of law in failing to take the approach laid down in *Terluk*. That case is distinguishable on the ground that it was not a decision on the wide management powers of the ET or on the more limited appellate jurisdiction of the EAT, as compared with appeals under the CPR. I should add that, in any event, the difference in the approach taken in *Terluk* can be overstated. In many cases, I would expect in the vast majority of cases, the outcome will in practice be the same, even though the relevant statutory provisions and procedural rules are different and the emphasis in the formulation of approach differs: see the comments of Langstaff J in *Pye v. Queen Mary University of London* (23 February 2012 – UKEAT/0374/11/ZT) at [20]-[21]. Rule 4 of the 2004 Regulations provides that "the overriding objective of these Regulations and the rules …is to enable tribunals and Employment Judges to deal with cases justly." That is the CPR objective transposed to the ET. "Justly" means that overall fairness is paramount in the exercise of the discretion. The claimant did not have a monopoly of the fairness factors in this case. It would not be fair for TfL to be repeatedly denied a hearing on the ground of the claimant's recurrent health problems.

44. The crucial point of difference from *Terluk* is that decisions of the ET can only be appealed on questions of law, whereas under the CPR the appeal is normally by way of review and the decision of a lower court can be set aside, if it is wrong, or if it is unjust by reason of a serious procedural or other irregularity in the proceedings. In relation to case management the ET has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The ET's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the EAT should continue to adopt rather than the approach in *Terluk* as summarised in the headnote quoted above. It is to be hoped that this ruling will put an end to the "apparent confusion in authority" on the point pointed out by Wilkie J in *Riley v. The Crown Prosecution Service* (13 June 2012 – UKEAT/0043/12/SM) at [55]-[56],

45. Overall fairness to *both* parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation

> **of one of the parties, such as the potentially absent claimant who is denied an adjournment.**
>
> **46. Fifthly, the EAT's application of the *Terluk* approach led it into substituting its own decision on the exercise of the discretion for that of the ET. That was an error of law on its part. The ET did not err in law by reaching a decision that the EAT would not have made, had it been considering the application to adjourn. What is fair in the interests of the parties is, in the first instance, a matter for assessment by the ET. The EAT ought only to intervene if the ET has erred in principle or produced a perverse outcome in the sense that no reasonable tribunal could have concluded that it was fair in all the circumstances to refuse the adjournment.**
>
> **47. Finally, Article 6 of the Convention does not compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds, if it would mean that the hearing would take place in the party's absence. There are two sides to a trial, which should be as fair as possible to both sides. The ET has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within reasonable time and the public interest in prompt and efficient adjudication of cases in the ET."**

59. In **Riley** the Employment Judge concluded, in light of the medical evidence, that the employee would, at best, probably not be fit to participate in a trial for at least a further two years. Having regard to the impact of a delay on that scale, he concluded that a fair trial was not possible. Longmore LJ (Rimer and Mummery LJ concurring), observed, at [1] - [3], that, in the EAT, Wilkie J had identified a "potential disconnect" among the various authorities between whether the "*Wednesbury* test" or the "fairness test" applied. However, by the time the matter reached the Court of Appeal, **O'Cathail** had been handed down in the Court of Appeal, which resolved "this interesting question" in favour of the *Wednesbury* test.

60. Longmore LJ went on, at [27], to emphasise the right of both parties to a fair trial within a reasonable time, and cited what Peter Gibson LJ had to say about that in **Andreou** at [46]. He concluded, at [28]:

> **"It would, in my judgment, be wrong to expect Tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a Tribunal. Like Wilkie J I can see no error of law and would dismiss this appeal."**

61. **Osborn** concerned whether, or in what circumstances, the Parole Board ought to have an oral hearing. The Court of Appeal ([2010] EWCA Civ 1409) held that whether the rules of natural justice have been transgressed is not to be determined by a *Wednesbury* test. The appeal Court must decide whether the Judge took a procedurally fair approach or not, to whether to have an oral hearing, in the circumstances of the case as the Judge found them to be. The Supreme Court ([2014] 1 AC 1115) came to essentially the same view as to the law, albeit, upon applying it, with a different outcome in the cases in hand. The judgment of Lord Reed (the other Justices concurring) included the passage, at [65], which I have set out at [29] above.

62. **Solanki v Intercity Telecom Limited** [2018] EWCA Civ 101 was a civil appeal concerning the refusal of an adjournment on medical grounds. While the Court (Gloster LJ, Singh LJ concurring) accepted, citing **Terluk**, that it had to be satisfied the Judge's decision was not unfair, it also observed at [35] that: "Obviously overall fairness to both parties must be considered." It went on to conclude, however, at [40], that the Judge had not had adequate reasons for rejecting the medical evidence, at [42] that, while the Judge was right to consider the prejudice to the other party of adjourning, his analysis of the state of play, and the impact of this was, in so many words, faulty, and at [44] that this case was therefore "one of the rare circumstances, as considered by Peter Gibson LJ in **Teinaz**, where an adjournment had to be granted, because not to do so amounted to a denial of justice." So the Court concluded, at [45], that, "on a proper evaluation of the relevant considerations", this was a case whether the prejudice occasioned to the appellant "clearly outweighed the costs and unavoidable inconvenience to the respondents that would have been occasioned by a short adjournment."

63. In **Morton** the claimant wanted, but was refused, an adjournment to enable her to have more time to prepare and with a view to obtaining a joint medical report to support her claim that she was, in law, disabled. She had not actually applied for an adjournment on the basis that she was not medically fit to participate in the hearing. Her appeals to the EAT and the Court of Appeal were unsuccessful. Lewison LJ (Underhill LJ delivering a concurring judgment) said:

> **"23. A decision by a tribunal to refuse an adjournment is a case management decision. A decision of that kind often involves an attempt to find the least worst solution where parties have diametrically opposed interests. In the case of an adjournment application the grant of an adjournment will cause delay in resolving the dispute, will gave rise to abortive and irrecoverable costs, will lose hearing time in the ET to the inconvenience of other users. All these are factors which the ET routinely has in mind when considering such applications. On the other hand, it must take into consideration the need for a fair process (fair to both sides, that is); and consider any prejudice that the applicant will suffer if the application is refused.**
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> **24. As Mummery LJ explained in *O'Cathail v Transport for London* [2013] EWCA Civ 21, [2013] ICR 614 at [44]:**
>
> **'In relation to case management the employment tribunal has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The tribunal's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the Employment Appeal Tribunal should continue to adopt…' "**

64. Pausing there, in my view there is, on examination, no conflict or tension in the guidance emerging from these authorities, in relation to challenges to decisions on applications to postpone on ill health grounds. In **Teinaz** Gibson LJ articulates what may be called classic *Wednesbury* principles applicable to the exercise of a judicial discretion, as does Arden LJ, citing the notorious "general ambit within which reasonable disagreement is possible" *dictum* from **G v G**. The basis for intervention in that case was the Tribunal's mistaken (and hence irrelevant) conclusion that Mr Teinaz had chosen not to attend, and failure to recognise the relevant consideration that he was following medical advice.

65. In **Andreou** again the approach of Peter Gibson LJ, with the other members of the Court agreeing, is to apply a perversity test, and he identifies the need to weigh into the balance fairness

to *both* sides. **O'Cathail**, again, adopts a *Wednesbury* approach, and highlights the need to weigh fairness to *both* sides. In **Riley** Longmore LJ refers to the suggestion of a "potential disconnect" mooted by Wilkie J having been resolved by **O'Cathail**.

66. The practical significance of a more interventionist approach being available in the civil jurisdiction, may, I respectfully venture, be overstated. In **O'Cathail**, Mummery LJ himself made this point at [43]. He also referred to another Court of Appeal authority from the civil jurisdiction, **Dhillon v Asiedu** [2012] EWCA Civ 1020. In that case, the Court (Baron J, Arden and Davis LJJ concurring) compared an earlier Court of Appeal decision which set out what I have called the *Wednesbury* test, with what was said in **Terluk**, and commented, at [66]:

> **"Although the language in these two cases is entirely different, the foundation of the decisions is both consistent and analogous. The conclusions which I derive from the authorities are that:**
>
> **a. the overriding objective requires cases to be dealt with justly. CPR 1.1(2)(d) demands that the Court deals with cases 'expeditiously and fairly'. Fairness requires the position of both sides to be considered and this is in accordance with Article 6 ECHR.**
> **b. fairness can only be determined by taking all relevant matters into account (and excluding irrelevant matters).**
> **c. it may be, in any one scenario, that a number of fair outcomes are possible. Therefore a balancing exercise has to be conducted in each case. It is only when the decision of the first instance judge is plainly wrong that the Court of Appeal will interfere with that decision.**
> **d. unless the Appeal Court can identify that the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible (Aldi Stores Limited v WSP Group Plc [2007] EWCA Civ 1260. [2008] 1 WLR 748, paragraph 16) the decision at First Instance must prevail."**

67. Similarly, in **Solanki**, though **Terluk** was cited for the proposition that the appellate Court should decide for itself whether a postponement-application decision was fair, the Court also regarded it as obvious that fairness to both sides must be considered; and the substantive decision is, in its language and reasoning, one in which the Court intervened because the Judge had taken an approach to the question of whether, on the evidence, the applicant was medically unfit, which was wrong; and because, if the facts as they stood at the time were correctly appraised, the balance of prejudice weighed so heavily on his side, that the decision could only properly have been taken

A one way. The striking observation that this was a "rare" case where an adjournment *had* to be granted, is also redolent of the Court intervening only because it considered the exercise of the discretion on these facts to have been manifestly wrong.

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68. The Court of Appeal's decision in **Morton** is, to my mind, in keeping with the foregoing analysis. Decisions on whether to grant an adjournment are often particularly difficult precisely where *both* sides' rights to a fair hearing are engaged, and point in opposite directions. As C Lewison LJ put it, such a decision "often involves an attempt to find the least worst solution where parties have diametrically opposed interests." That is why it cannot be said, in such cases, that there must only necessarily be one fair outcome; and why, as it was said in **Terluk**, the test D on appeal is not whether the Tribunal reached a decision which was "the" fair one, but whether it was "a" fair one. In substance the same point was made in **Dhillon**.

E 69. Nor do I see a conflict between the foregoing line of authorities, and cases such as **Rackham**, **Galo** and **Osborn**. They are concerned with decisions about the *arrangements* for the conduct of litigation, or a Hearing, which may, potentially, in some fundamental way, impinge on one party's right to a fair trial, without impacting on the rights of the other party. Most F decisions, for example, about adjustments which may need to be made to enable a disabled party, or one with a particular medical condition, properly and meaningfully to participate in a Hearing, will be of that sort. In **Rackham**, at [43] Langstaff P put it this way:

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> **"…there are some cases in which it is plain that a Tribunal has nothing that might sensibly be called a case management discretion to exercise in order to secure fairness. An example might be that of Claimants, witnesses or Respondents who have no English language. If they have a foreign tongue, an interpreter is needed. If they are dumb, they need sign language to convey what they mean. If they are deaf, they need someone to assist them with understanding. Without this they simply cannot get access to the justice that is required. If such a case were to proceed without the necessary steps being taken, there would be a material procedural irregularity that, just as in a case of bias, would fall for assessment on appeal in which the appellate body, initially the Appeal Tribunal, acts as fact-finder."**

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70. In **Galo**, the immediate issue was a refusal to postpone a Hearing; but the wider issue, with which the decision is in substance concerned, was whether the Tribunal had sufficiently recognised the impact of the claimant's mental health disability, by way of adjustments to the litigation process from the outset, as well arrangements for the conduct of the Hearing, an issue described by the NICA as one of "procedural fairness". The Court concluded, at [65], that it did not need to deal with authorities such as **O'Cathail** and **Teinaz** in detail "because the issue of procedural fairness goes much wider than the narrow issue of failing to adjourn."

71. Such issues of procedural fairness may arise: by reference to the general principles concerning what is required of any fair judicial adjudication, such as those relating to apparent bias, as in **Gillies** [2002] UK HL 2 (cited by the Supreme Court in **Osborn**); from features of the issue being adjudicated or the nature of the dispute, such as, in **Osborn**, among other things, that the liberty of the subject was at stake; or from matters affecting a particular party, such as the impact of a mental or physical impairment, as in the examples given in **Rackham**. In all such cases, whether the process adopted was fair or not, is a question of law, and an appellate Court must decide whether the Court or Tribunal below acted fairly or not.

72. Even in a case concerned with this sort of problem, it may be noted, a *Wednesbury* approach may still be appropriate when considering how the Tribunal approaches the evidence-gathering exercise in relation to the substantive issue. See **Rackham** at [45]. Though, ultimately, the question of whether the arrangements made were sufficient to address the difficulty and secure fairness, is one for determination by the appellate Court, there are no hard and fast rules about how the Tribunal below should manage the process of coming to its decision about such

arrangements, as such. As **Anderson** discusses, there is, for example, no *automatic* obligation for the Tribunal to hold a "ground rules" hearing in every such case.

73. I conclude that there is, ultimately, in principle, no tension between the authorities which tell us that the proper approach, in respect of an appeal concerned with a decision on an adjournment application on grounds of medical unfitness, is the *Wednesbury* test, and those which tell us that the proper approach, in respect of a decision about adjustments to the litigation or Hearing process, to accommodate a party with a mental or physical impairment, is a "fairness" approach. These lines of authority can co-exist because they, in principle, address distinct problems. I therefore do not agree that the effect of **Osborn** is that **O'Cathail** should be regarded as no longer good law. **O'Cathail** remains good law and binding on the EAT.

74. In cases where a medical postponement is sought, the appeal Court may, and should, still intervene, on proper *Wednesbury* grounds, including if the Tribunal below has overlooked a relevant consideration, taken into account an irrelevant one, or struck the balance in a way that no reasonable Tribunal properly conducting the exercise could have done. On this, the authorities establish a number of further important guiding principles.

75. First, where the application is to postpone a trial or other Hearing, the outcome of which may dispose of the claim, or some other material substantive issue in the case, the applicant's Article 6 and common law rights to a fair trial will be engaged. Because of the serious consequences of refusing a postponement, it should, in such cases "usually" be granted. If what sits on the other side of the scales is simply the inconvenience and cost to the other party of the matter going off, then any Tribunal properly carrying out the balancing exercise would be bound to grant the application, and a decision not to do so is liable to be overturned, applying

Wednesbury principles. That is the point of Peter Gibson LJ's dictum in **Teinaz**. Because of what is stake for the applicant in such cases, a failure properly and fairly to appraise the medical evidence with due care will also vitiate the exercise of the discretion, as was found to have occurred in both **Teinaz** and **Solanki**.

76. However, as the foregoing authorities also plainly establish, the potential impact on the other party's fair trial rights, and the wider public interest, do also fall to be placed in the scales on the other side, and, if sufficiently weighty in the given case, may be properly found to tip the balance against the grant of the application. That is the point of Mummery LJ's observations in **O'Cathail**, especially at [47], and Longmore LJ's closing observation in **Riley**.

77. In most cases, such as those involving a sudden accident or short-term illness, the balance will clearly and obviously point in favour of granting the application, and it may, indeed, not be opposed. With many illnesses or injuries, the likely timescale for recovery can also be stated, and assessed, with some confidence; and the decision for the Tribunal is, again, unlikely to be a difficult or controversial one. But cases concerning mental ill health, by way of prolonged or recurring stress, anxiety, and/or depression (often associated with the litigation or its subject matter, itself), perhaps tend to dominate the authorities, because they often involve (or are said to involve) features that potentially have weightier implications for the other party's rights to a fair trial within a reasonable time scale, and/or wider public interest considerations.

78. There is one other aspect worth noting. In principle, the question of whether to postpone a trial on grounds of medical unfitness, and that of what adjustments may be necessary to enable fair participation in litigation or a trial, arise from different scenarios. But in practice there may

sometimes be features of both present, or the situation may otherwise require some careful scrutiny, to enable the Tribunal to see clearly what is truly at issue.

79. Before moving on from this survey of the law, I should take in, though I can do so, more briefly, the more recent authorities of the EAT that were cited to me.

80. **Islam** concerned two issues: whether the Tribunal should have extended time in respect of a reconsideration application, and the issue which that application itself raised, being whether, in view of the impact of the applicant's disabilities, the Tribunal had made sufficient adjustments to Hearing arrangements. The EAT approached the former as an exercise of discretion, but, in relation to the latter, took its steer from **Rackham**, **Osborn** and **Galo**. **Shui** concerned a litigant whose mental health issues were said to have an impact on their ability to participate in the Hearing, in respect of which the EAT looked to **Rackham**, **Galo** and **Osborn** for guidance; but it also raised an issue as to whether the Hearing should have been adjourned on ill health grounds, in respect of which guidance was drawn from both **Teinaz** and **O'Cathail**. I respectfully agree with the analysis of the law in both of these decisions.

81. In **Leeks** HHJ Hand QC came to the view that the *Wednesbury* approach should be generally applied, and that what the NICA said at [54] of **Galo** was wrong and should not be followed by the EAT. But, in respectful disagreement, I do not think **Galo** at [54] is wrong, but, rather, as I have suggested, that it is concerned, in principle, with a different type of scenario, though the immediate decision in that case was on an adjournment application.

82. Finally, in **Chowdhury** the Tribunal had expressed concerns about whether the claimant was fit enough to proceed with the Hearing, but deferred to his wish to do so. The EAT rejected a challenge to that decision. In the course of the discussion, it said:

> **"19. Ms Gordon Walker in her submissions suggested that O'Cathail should be regarded as having been overturned by the Supreme Court's decision of R (Osborn) v Parole Board) [2014] UKSC 61 which stressed that whether a fair hearing took place was not a question to which the test of Wednesbury unreasonableness should apply. Rather, the appellate court must decide for itself whether the procedure is fair, as subsequently held in Shui.**
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> **20. In our judgment the cases deal with different points and O'Cathail remains good law in relation to individual case management decisions. The principles in Shui relate to the wider question of the fairness of the hearing taken as a whole. In any event, the Claimant at no point sought an adjournment, quite the reverse. In an email sent on 13 February at about 11pm the Claimant stated that he wished to continue the hearing the following day, "as long as my health allows me." It is clear from the rest of that email that the Claimant was fully aware that it was open to him to seek an adjournment.**

83. As I have indicated, I agree that **O'Cathail** remains good law, and is not in conflict with **Osborn** or **Shui**. Nor do I think that **Chowdhury** should be read as introducing a further principled distinction based on whether a decision is a "one-off". The reference to "individual" case management decisions was just, I apprehend, a way of referring to the **O'Cathail** type of decision, as opposed to the **Osborn** type of decision.

Discussion and Conclusions

84. It follows from the foregoing analysis that I do not think that the Tribunal was wrong to cite **O'Cathail**, on the footing that it should have regarded it as no longer good law; nor was it wrong, as such, to cite **O'Cathail**, but not **Teinaz**. It also, rightly, did not treat the question of whether there should be a postponement on medical grounds as having been disposed of by EJ Vowles' decision. That decision plainly, as the Tribunal recognised, left upon the possibility of the application being renewed, and it *was* renewed, in particular with further medical evidence, being Dr Turner's 7 January email, that was tendered following EJ Vowles' decision.

85. The Tribunal clearly took all of that on board, in setting out the chronology in the way that it did; and it rightly treated the question of whether to postpone on medical grounds as its first order of business. It plainly also accepted, on the basis of the latest medical evidence, that the Claimant was, in fact, not fit to attend the Hearing. Given that this was the full merits Hearing, the Respondent's application, under Rule 47, to dismiss the claim, and, indeed, the fact that the Tribunal went on, having declined to postpone, to grant that application, I do not think it can sensibly be said that the Tribunal failed to appreciate the potential significance for the Claimant of a decision to decline to postpone the Hearing on this particular occasion.

86. In so far as Ground 1, in effect, argues that the Tribunal erred, on the footing that it was wrong to be guided by **O'Cathail**, and/or did not apply **Teinaz**, it therefore fails. Whether the Tribunal erred by not treating the fact that the Claimant was not medically fit to participate as decisive in her favour in this case, depends on whether there are *Wednesbury* grounds for the EAT to intervene, which I will explore further in the following discussion.

87. Ground 2 raises the question of whether, leaving aside the fact that the Tribunal accepted that the Claimant was medically unfit to attend the Hearing, it erred in the approach it otherwise took to the medical evidence, in particular with regard to the extent of the information that it contained about the nature of the Claimant's illness, and what it had to say on the question of prognosis. As to that, the **Presidential Guidance** does not refer to these aspects in order to set applicants, and their clinicians, an arid box-ticking exercise. It raises them, because the *substantive* information which the Tribunal is or is not given on these questions is liable to be highly relevant to its overall consideration of whether to grant such an application, and, if it does, on what terms and/or as to what further directions to give.

88. In a case where, as here, the Tribunal accepts that the applicant is unfit to participate in a Hearing at present, the focus is then likely to move to the overall picture as to the *substantive* prognosis: when the applicant is likely to be fit enough to participate, and with what degree of confidence that can be predicted. These aspects are liable to be particularly relevant to the assessment of the adverse impact on the other party, and the wider public interest implications, of a postponement being granted, as explained by Arden LJ in **Teinaz**, Mummery LJ in **O'Cathail**, and in other authorities. That is also why the **Presidential Direction** indicates that the medical evidence should address these questions. The Tribunal is therefore likely to be most interested in what the clinician is able to say about the substantive prognosis; but what they are able to say about the cause of the ill health, and other aspects, such as treatment or support, are likely also to help the Tribunal to assess realistically what the future may hold.

89. I therefore do not agree that in this case it should have been regarded as sufficient that Dr Turner had addressed the subject of prognosis, in the sense that she was not entirely silent on it. What the Tribunal properly took into account was the *substance* of what she felt able to say on that subject, as part of the overall picture that it had in relation to that substantive question.

90. Nor do I agree that the Tribunal set the bar too high in terms of the quality of the medical evidence that it expected the Claimant to produce. Sometimes, where illness or injury has struck, or worsened, just before a Hearing, the applicant may need to be given more time to obtain such evidence. But this was not such a case. The Claimant's health problems were not new, and she knew, in particular from the Respondents' solicitors' November letter (which fairly reflected what was said in **Andreou** and the **Presidential Guidance**, and was written at a time when she was represented), what would be needed. Further, the Claimant did in fact obtain a letter from her GP in December, and a further email from her GP in January.

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91. Ground two therefore also does not succeed.

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92. Continuing my review of its reasoning, the Tribunal correctly identified that the reason for the application was that the Claimant was unfit, and, in light of the medical evidence, all of which the Tribunal had earlier fully and accurately set out, it made fair observations about how much information it did or did not provide about the nature of the illness. Its statement that the

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GP's opinion "does not set out a prognosis of the condition or any clear indication of when that state of affairs may cease" was clearly a comment about what the GP had or had not been able to say, in substance, about when the Claimant was likely to be fit; and, in the next sentence, it

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accurately cited pertinent passages from Dr Turner's letter which fully justified that comment.

93. The Tribunal then considered the history of the litigation. It was, in principle, entitled to

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draw on all the relevant evidence and information that it had before it, including what the history of the conduct and course of the litigation up to that point, might contribute to its assessment of the likely future course of the litigation, were it to grant a postponement. Its summary of those matters in the opening section of its decision was full, fair and accurate.

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94. The fact that this was not the first such application, the fact of the Respondent's November letter, and the timing of the current application, were all properly regarded as relevant

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considerations, contributing to the assessment of the prospects of the case coming to an effective trial in the future and when. The Tribunal was entitled in this regard to take into account the November letter, that the Claimant saw the GP on 4 December, and that the application was made

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two weeks later on 19 December; and fairly described it as "very late".

95. The Tribunal also properly considered the Claimant's previous non-compliance and/or late compliance with orders, including during a period when she was represented, as relevantly contributing to the overall picture of how matters might unfold in the future, were the application to be granted; and it gave due consideration to the evidence and information it had about the explanations for these, and the extent to which they might be related to her ill health.

96. The Tribunal also properly considered, and took into account, how far off the likely dates for any relisted hearing would be, on the information available.

97. The second limb of Ground 3 contends that the Tribunal erred by not considering whether this was a case where the Claimant could not have a fair Hearing without representation. Mr Ohringer highlighted Dr Turner's comment in her 7 January email. The emails in the run up to the Hearing also showed, he said, that the Claimant had been actively trying to get fresh representation, and was seeking a postponement, at least in part, specifically to have more time to get that in place.

98. As to that, in setting out the history, the Tribunal referred to the Claimant's former solicitors having come off the record on 17 December, fairly summarised the various communications following EJ Vowles' decision, regarding her contacts with potential fresh representatives, and cited what Dr Turner had said in her 7 January email. This aspect of matters was then specifically considered at [37], including a reference there to Ms Cartwright's request, in her 19 December email, "until alternative representation can be secured", for an adjournment to mid-February, which, the Tribunal observed, may be a realistic period for the Claimant to obtain such representation.

99. I have particularly reflected on whether the Tribunal ought to have attached more weight, to the Claimant's case that she could not properly represent herself, and needed the assistance of solicitors or other professional representation; and whether, taking account also of the fact that her solicitors had come off the record in mid-December, it should have postponed to allow her more time to arrange for that. However, I have ultimately concluded that this aspect does not support a proper basis for me to intervene in the Tribunal's decision.

100. Firstly, while the Claimant's friend, her GP and, indeed, one of the firms who she spoke to, all made representations about this, this was not a case, like **Galo** or **Rackham**, which was said to involve someone with a particular learning or other disability, which meant that they needed the help of a representative to be able to engage with aspects of the litigation or Hearing process, but were otherwise fit to proceed with a Hearing. Rather, the tenor of the medical evidence, in substance, was that the Claimant was suffering from anxiety, which was so serious in its effects, and so entrenched, that it was making her unfit to participate in a Hearing at all.

101. Secondly, the Tribunal also properly considered, whether, if it did postpone, and the Claimant did then obtain fresh representation in the next few weeks, that was, realistically, likely to lead to the litigation progressing within a reasonable time scale to a trial in which she would also be fit to participate. In particular, it was entitled, again, to have regard to the history of the litigation, during the period when the Claimant *was* represented, including in relation to issues of compliance with Orders, health issues having previously arisen, and applications for extensions of time or postponement having previously been made.

102. Having regard to the totality of the information that it had, I cannot say that it was perverse of the Tribunal not to conclude that allowing the Claimant a postponement to obtain fresh

representation would be likely to lead to her then, with the benefit of representation, being fit to progress the litigation to an effective trial within a reasonable timescale. So, even had this been a case where the Tribunal ought to have concluded that having representation was a *necessary* condition of the Claimant being fit to participate, it was still entitled to conclude that there was no realistic prospect of it being a *sufficient* condition, or one that was likely to make a significant difference to the probable timescale of the matter coming to an effective trial. So I have concluded, therefore, that the second sub-limb of Ground 3 does not succeed.

103. Nor does the first limb. That is for the following reasons. First, as authorities such as **Rackham** and **J v K** [2019] ICR 815 discuss, a Tribunal has a general duty of fairness, deriving from a number of overlapping juridical sources, to make appropriate adjustments to its procedures, and/or hearing arrangements, where it appears that, for some particular reason, the party concerned may otherwise be unable fairly to participate in the process. This does not actually turn on whether they are disabled within the **Equality Act 2010** definition.

104. Secondly, this was not a case where it was being said that the Claimant would be fit to proceed if particular adjustments were made to the Hearing arrangements. Rather, it was being said, and the Tribunal accepted, that she was not fit to participate in the Hearing at all. While the authorities rightly indicate that, in a case of the former sort, the Equal Treatment Bench Book is an invaluable source of guidance, which Tribunals would do well to consult, neither the Grounds of Appeal, nor Mr Ohringer's submissions, pointed to any particular provision of it which was said to be pertinent in this case. As I have said, the Tribunal was also entitled to take the view that allowing the Claimant a short postponement to arrange fresh representation would be unlikely by itself to make a meaningful difference to future progress in this case.

105. The Tribunal was also entitled to regard as relevant that it was already two years since the events to which the complaint related, that there was no indication of when the Claimant was likely to be in a position to proceed to a Hearing, that if a postponement were granted it would be approaching 34 months after the events before a final Hearing could take place, that the Respondent was ready for a Hearing, and that the fact that there had been no Preliminary Hearing, meant that no issues in the case had yet been resolved.

106. Having regard to all the foregoing I do not think I can say that the Tribunal had regard to any irrelevant, or ignored any relevant, considerations. It plainly appreciated the serious significance for the Claimant if a postponement of this particular Hearing was refused. But it properly assessed and weighed the significance for the Respondent and the wider public interest of the postponement being granted. In particular it reached a proper conclusion on all of the evidence before it, about the likely realistic timescale before the matter might come to an effective trial in which the Claimant would be fit to participate, including on the assumption that a postponement would enable her to organise fresh representation.

107. Mr Ohringer urged upon me that this was the first occasion on which the Claimant had sought a postponement of the *full* Hearing, and that, even on the Tribunal's reckoning, the matter could still come to trial within less than three years of the events in question. However, that is not an insignificant period, bearing in mind that, while the allegations, being of discrimination, were serious for the Claimant, they were also serious for the Respondents, including a named individual Respondent. I do not think I can say that this is a case where the Tribunal's approach to how it struck the balance between the parties' competing Article 6 rights was perverse, or that this Decision was otherwise *Wednesbury* unreasonable. Ground 4 therefore also fails.

108. Ground 5 argues, in effect, accepting for these purposes, that the Tribunal was entitled to find that the Claimant would not be fit enough to proceed for a considerable time, that it should have simply stayed the matter, leaving the review of whether the matter was still capable of a fair trial, until that time arrived. I do not think it was, as this Ground asserts, a "serious procedural irregularity" for the Tribunal not to have taken that course in this case.

109. First, the Claimant had not actually applied for a stay on that basis. Secondly, putting that to one side, there are cases where such a course may be appropriate, or the one adopted by the Tribunal, and where it would not be wrong to do so. But, as with postponement, relevant considerations here were: the amount of time that had already passed, the lack of progress that had so far been made in the litigation, and the poor prospects for the matter coming to an effective trial within a reasonable further time. Had such an application been made, the Tribunal would certainly have been entitled to take into account all of those features, and the implications for the Respondents of the litigation remaining unresolved for such an extended period. Having regard to all of that, I cannot say that this is a case where the Tribunal ought to have considered taking that step on its own initiative, still less that the only correct course would have been to do so. This Ground therefore also fails.

Outcome

110. For all of the foregoing reasons, the appeals against both the original and reconsideration decisions are dismissed.