Neutral Citation Number: [2022] EAT 111

Case Nos: EA-2021-000135-AS and EA-2022-000167-AS

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 2 August 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MR Z SOKOLIK **Appellant**

- and –

KOBRE & KIM (UK) LLP **Respondent**

- -
- -

Zdenek Sokolik, the **Appellant** in person
Georgina Hirsch (instructed by DWF Law LLP) for the **Respondent**

Hearing date: 16 June 2022

- -

JUDGMENT

This Judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.

The date and time for hand-down is deemed to be 10:30 am on 2 August 2022

Summary

Practice and procedure – application for postponement – decision to dismiss for non-attendance – rule 47 ET Rules

The claimant did not attend the first day of the full merits hearing of his claims but applied for a postponement on the grounds of ill-health. The ET refused that application and dismissed the claimant's claims upon his non-attendance. It subsequently confirmed that decision on the claimant's application for reconsideration. The claimant appealed against both the original decision and the refusal of his reconsideration application.

Held: *allowing the first appeal but dismissing the second*

Acknowledging that medical evidence had recommended the claimant not attending "his hearing", ET took the view this referred to the full merits hearing and that the evidence did not confirm the claimant was unable to attend a short hearing of his postponement application; it had also formed the view that the claimant's correspondence in the days preceding the hearing demonstrated that he was able to communicate coherently. The ET's reasoning thus revealed errors in its approach. The claimant could not have assumed that the hearing would only be concerned with his application for a postponement and, as the ET had apparently accepted, the medical evidence indicated that he had been advised to remain away from the trial of his case due to his ill-health. Moreover, whatever the ET's view of the claimant's correspondence, it provided no basis to contradict the medical evidence as to his mental health difficulties. These errors vitiated the ET's decision and were not rectified on reconsideration. The claimant's first appeal would therefore be allowed.

There was, however, nothing in the claimant's complaints of inadequacy of reasons, procedural impropriety, or bias in relation to the reconsideration hearing and the second appeal was dismissed.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. The issues raised by this appeal concern the exercise of the power to dismiss a claim upon a party's non-attendance at a hearing, pursuant to rule 47 Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237** ("ET Rules"). Specifically, the appeal challenges the dismissal of a claim in circumstances in which medical evidence had been provided in support of an application to postpone the hearing in question.

2. In giving this Judgment, I refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeals against two Judgments of the London Central Employment Tribunal (Employment Judge Nicolle sitting with lay members Mr Schofield and Ms James; "the ET"). In the first appeal, the claimant challenges the ET's Judgment promulgated on 15 April 2021 ("the April Judgment"), dismissing his claim under rule 47 **ET Rules**; that Judgment followed a hearing before the ET on 13 April 2021. The second appeal is brought in relation to the ET's reconsideration Judgment in the same case, promulgated on 8 October 2021, following a hearing on 4 October 2021 ("the October Judgment").

3. The claimant has acted in person both before the ET and in the proceedings before the EAT. The respondent has at all times been legally represented, although Ms Hirsch first appeared on its behalf at the reconsideration hearing in October 2021.

4. Given the claimant's stated impairments, various adjustments have been made at this hearing. It has taken place remotely by video platform, rest breaks have been accommodated, and the claimant has sometimes kept his eyes closed when addressing me.

Preliminary Application

5. At the outset of the hearing, the claimant asked that I make an order under rule 50 **ET Rules** that this hearing take place in private and/or restricting the reporting of his name. That request was made on two bases: (1) because the claimant believes allegations have been made by one of the respondent's witnesses in a statement in the underlying proceedings that are false and relate to matters of a sexual nature; and (2) because the present appeal addresses matters relating to the claimant's medical condition. Having heard the parties' submissions on this application, I gave an immediate indication that I did not consider there was a proper basis for the hearing to take place in private but otherwise said that I would reserve my decision on the application until after hearing the submissions on the appeals.

6. In considering the claimant's application, I have proceeded on the basis that my powers must be the same as those of the ET, the EAT having a broad discretion in how to regulate its own procedure (section 30(3) **Employment Tribunals Act 1996**). My starting point has to be the principle of open justice; that is, that justice is administered in public and is open to public scrutiny (**A v BBC (Scotland)** [2015] AC 588 SC; **Ameyaw v Pricewaterhousecoopers Services Ltd** [2019] ICR 976 EAT). A party who seeks a derogation from that principle bears the burden of demonstrating, by clear and cogent evidence, the harm relied on so as to establish that the measures sought are necessary.

7. Although the claimant has referred to allegations he believes to have been made in the underlying proceedings, it is unnecessary for me to address those matters on these appeals because they are irrelevant for present purposes. I acknowledge that a party's subjective concerns might be of relevance when considering the necessity of a derogation from the open justice principle in the interests of justice (where, for example, that party might otherwise be unable to give their evidence openly and freely) but the matters identified

cannot impact on the present hearing and provide no basis for any part of this hearing to be conducted in private or for any anonymity or restricted reporting order.

8. That said, the issues raised by the claimant's appeals do require some consideration of medical evidence that would otherwise be private to the claimant and I accept that his article 8 rights under the **European Convention on Human Rights** are thus engaged. Article 8 is, however, a qualified right and I am bound to balance the claimant's right to a private life against the rights of others, in particular under article 6 (fair trial) and article 10 (freedom of expression, which includes the right to report on court proceedings). I bear in mind that this is not a hearing at which the claimant is required to give evidence and I cannot see that article 8 provides any justification for holding this hearing in private. More generally, I have no basis for considering that the claimant would be restricted in presenting his arguments or in continuing to litigate these proceedings if no anonymity or restricted reporting order were to be made; no such order was made by the ET and that has not impacted upon the claimant's ability to pursue this matter. On the other hand, there is a wider public interest in understanding the factors that have been taken into account in determining this appeal, without any restriction on the reporting of the evidence that was before the ET. Balancing the potentially conflicting rights in play, I do not consider the claimant has demonstrated the need for the measures sought at this stage. I therefore refuse the application.

The Relevant Background and the ET's Decisions Under Appeal

9. There have been no findings of fact in this matter and this background summary is taken from the ET1 and ET3 and from the various orders and decisions of the ET.

Background

10. The respondent is the UK entity of an international law firm. On 4 March 2019, the claimant started a fixed term contract of employment with the respondent as a litigation assistant. That employment was due to end on 30 April 2019 but was terminated on 8 March 2019, with one week's pay in lieu.

The Procedural History

11. On 30 June 2019, the claimant commenced proceedings against the respondent in the ET; pursuing claims of direct sex discrimination and victimisation. In completing his ET1 form, the claimant ticked the box at 12.1, to state that he had a disability, but said no assistance was required.

12. A case management preliminary hearing took place on 5 March 2020. The trial of the claimant's claims should then have commenced on 15 July 2020 but that was postponed due to the pandemic and the first day of the hearing used for a further case management hearing. At that stage, the trial of the claim was re-listed for four days, to commence on 13 April 2021.

13. By letter of 25 March 2021, those acting for the respondent put the claimant on notice of their intention to apply for costs should he continue to pursue his claims, explaining why they considered the proceedings to be unreasonable and vexatious. The claimant forwarded that letter to the ET, saying he considered this to be a threat aimed at causing him fear and distress. On 29 March 2021, the claimant relied on this letter, amongst other matters, in support of an application to strike out the respondent's response under rule 37 **ET Rules**. On 1 April 2021, the ET notified the parties that the claimant's rule 37 application could be considered on the first day of the hearing.

14. Late in the evening on 5 April 2021, the claimant filed evidence with the ET, including a letter from a consultant psychiatrist dated 12 April 2015 recording a diagnosis of adult attention deficit and hyperactivity disorder ("ADHD"), and a draft letter from The ADHD Clinic, dated 10 February 2021, which confirmed the claimant's ADHD diagnosis.

15. By email of 6 April 2021, the claimant wrote to the ET to seek adjustments at the forthcoming hearing of his claims, so as to address the difficulties he might otherwise suffer as a result of his disabilities, referring to the fact that he had suffered depression since the age of 17 and had a diagnosis of ADHD, and attaching a copy of a Social Entitlement Chamber decision from 2 October 2017, confirming his entitlement to a personal independence payment by reason of his mental health issues. Specifically, the claimant explained that he might be "*overwhelmed even through basic conversation*" and "*may lose concentration, … eye [contact] and [the ability to] follow what is being said*". Subsequently, by email of 7 April 2021, the claimant detailed the adjustments he wished the ET to make, as follows:

> "- I do not wish to be questioned by the aggressive Respondent (or their lawyers) - I believe their aggressive litigation approach is aimed to damage me and to trip me up (let alone for the threats of £35,000 which they expressed towards me); I'd be happy to be questioned by a Judge (and the panel members)
>
> With the application for the reporting restrictions, I am asking that the hearing takes place in private instead of public because I do firmly believe that the Respondent's only interest is to scandalizing me *[sic]* - all actions done by the Respondent thus far indicate to me that this is the case and I feel threatened and intimidated by them.
>
> I am asking the Tribunal to take such steps to protect me from them and to adjust the hearing in such a way so that I was able to concentrate well, without being under fear."

16. The "*application for reporting restrictions*" referred to another application the claimant had made on 7 April 2021, whereby he sought an anonymity order under rule 50 **ET Rules** on the basis of what he said were "*several sexually highly scandalous allegations*" made

about him by one of the respondent's witnesses (which he denied) and given the information he had provided to the ET regarding his long term mental health impairment.

17. On 8 April 2021, the claimant sent a number of emails to the ET, re-sending some of his earlier correspondence but also providing various fit notes, albeit these did not address his ability to participate in the ET proceedings or attend any hearing. Subsequently, by email sent at 2:53 pm on 8 April 2021, a letter from a Dr Noor, of the "Push Doctor" service (which I understand to be an on-line or telephone doctor service), was forwarded to the ET. Dr Noor had apparently assessed the claimant at 12:53 that day and advised that he suffered from ADHD and anxiety, that he had had several appointment reviews for his mental health, especially in the preceding three months, and that his anxiety was impacting on his ability to concentrate. The letter ended by saying that Dr Noor would be grateful if the ET could take the claimant's circumstances into consideration. For his part, the claimant explained that he was not in good health and was "*currently under distress from the threats received on 25/03/2021 and … am unable to proceed because of it*"; he said that he had seen a doctor privately that day and would be taking the doctor's advice.

18. The respondent resisted the claimant's applications, setting out its reasons in detail in an email of 8 April 2021.

19. On 9 April 2021, again attaching a fit note and the letter from Dr Noor, the claimant emailed the ET saying that he would "*not be able to attend the hearing on 13-16 April 2021 due to sickness*".

20. At some stage on 12 April 2021, the claimant's case was assigned to be heard by Employment Judge Nicolle and at 4:22pm he contacted the parties to inform them of this fact and, given the pressures on the ET's administrative staff at the time, provided the parties with his Skype email address.

21. At 7:27pm on 12 April 2021, the claimant emailed to the Employment Judge, without copying his message to the respondent, saying that the threat of costs made by the respondent had made him "*loopy*" and he had seen a doctor who "*assessed me last week and advised me to rest*"; the claimant requested a stay of proceedings on the ground of ill health. The Judge forwarded that message to the respondent's solicitors for comment, asking the claimant to "*please provide details as to when he says he'll be in a position to participate in a CVP hearing*" and making clear: "*Unless otherwise agreed in the interim the claimant's application for a stay will be considered at the commencement of the proceedings not before 11:30 AM tomorrow*". Those acting for the respondent replied that evening making clear that the application for a stay was opposed.

22. At 8:10pm, Employment Judge Nicolle emailed the parties stating:

> "For the avoidance of doubt the tribunal is proceeding on the basis that the case will go ahead and will use any available time prior to 1130 to commence reading the documents. Any application to stay the proceedings to be made by the claimant will be heard at 1130, or as soon thereafter as the tribunal is available."

23. At 8:40pm that evening, the claimant again emailed directly to the Employment Judge's address, not copied to the respondent, in which he advised:

> "I am unable to attend tomorrow. If I did, it would be without mental capacity, anything that I would have said would be irrelevant and absurd and I cannot afford to be proceeding on the basis of lack of capacity with ill health."

The claimant asked that the hearing be adjourned:

> "… until my mind is fit to attend and plead the case before you as I am currently intimidated and threatened by the other party. I do not know what evidence is needed, or how I need to express that I am not fit …".

It seems that the claimant then sent a further four emails to Employment Judge Nicolle's address, not copied to the respondent, during the course of that evening.

24. By email from Employment Judge Nicolle to the parties at 7:51am on 13 April 2021 he advised that he had received a total of five emails from the claimant the previous evening, making clear that it would be inappropriate for him to consider this correspondence given that it had not been sent to the respondent. The Employment Judge reiterated:

> "No decisions will be made on any element of your claim based on the papers prior to the commencement of the hearing at 11:30 today".

25. By a yet further email sent at 8:26 am on 13 April 2021, the claimant referred to having been assessed by a Dr Lutterodt that morning, saying that he had been treated for acute depression and distress, with sleeping tablets and antidepressants, since January 2021; he again asked that the hearing be adjourned. A letter from Dr Lutterodt, of the "Push Doctor" service, dated 13 April 2021, was then submitted to the ET by the claimant, which recorded that there had been a consultation with the claimant at 7:20am that day and advised that the claimant had:

> "a history of ADHD and anxiety for which he has had multiple consultations with our service this year. Following recent communication he has suffered from worsening mental health symptoms. He is currently on medication and engaging with counselling. We would recommend a period of 2 weeks off work and his hearing until his mental health has improved".

The Hearing on 13 April 2021

26. The ET hearing on 13 April 2021 commenced at 11:30 am by cloud video platform ("CVP") but the claimant did not join the hearing. An email was sent reminding the claimant that the hearing was underway and the ET clerk sought to make contact with him by telephone. It seems that the claimant responded to the clerk, saying that he was asking the ET to consider his medical evidence and rule appropriately. The ET concluded that the claimant "*had decided that he could not, or would not, participate*" (April Judgment, paragraph 15). For the respondent it was submitted that the claimant's application for a

postponement should be refused and an application was made for the case to be dismissed under rule 47 **ET Rules** or struck out under rule 37.

The April Judgment

27. Considering the claimant's application for a postponement, the ET had regard to the medical evidence, noting that while this confirmed that the claimant had ADHD and suffered from depression and stress, it did not provide "*any specific reliable time in which he would make a recovery*". Allowing that there was some evidence of a deterioration in the claimant's mental health since January 2021, the ET noted that it was not suggested that this involved "*a significant and sudden deterioration*", but related to his "*very long-standing mental health conditions*" (April Judgment, paragraph 17). Further, the ET did not consider that the evidence explained why the claimant was unable to attend the hearing to make his application for a postponement in person. The ET considered it was apparent from the claimant's "*voluminous email correspondence*" that he could communicate coherently, and observed that he had been advised that his application for a postponement would be considered at the commencement of the hearing (April Judgment, paragraph 18).

28. The ET expressed its concern that if the case were to be postponed and relisted for a further four days - probably later in 2021, or possibly early 2022 - the situation could be repeated, which would be unsatisfactory. Recognising there would inevitably be a prejudice to the claimant in dismissing his claim, that had to be balanced against the prejudice to the respondent in these circumstances (April Judgment paragraph 19). The ET did not consider it would be "*an effective use of its time, or indeed that of the Respondent and its witnesses, to have a hearing in absentia particularly given the Tribunal's preliminary view of the substantive merits of the claim*". In this regard the ET explained that, on the basis of its reading of the pleadings and witness statements, its "*provisional view is that any hearing in absentia was unlikely to provide any basis to infer that the dismissal of the*

Claimant was related to his sex" (April Judgment paragraph 20). The ET also expressed its view that it did not consider that there was any basis for the claimant's contention that he had been subject to bullying or harassing behaviour by the respondent in the conduct of the litigation (April Judgment paragraph 21). In the circumstances, the ET concluded that the most appropriate course would be to dismiss the entirety of the claim due to the claimant's non-attendance.

29. In giving its oral Judgment on 13 April 2021, the ET further expressed the view that the claimant's claims should be struck out under rule 37 **ET Rules**. Before its written Judgment was promulgated, however, the ET reconsidered this aspect of its decision of its own motion, noting that no prior written notice had been provided to the claimant of the respondent's application in this regard and he had not been provided with a reasonable opportunity to make representations.

The Application for Reconsideration

30. On the evening of 13 April 2021, the claimant again emailed Employment Judge Nicolle, making various representations, including that he was "*available for an online deposition … and … to be questioned online by a Judge and his panel members*". On 14 April 2021, the claimant applied for a reconsideration of the hearing (this was before the promulgation of the April Judgment but followed the ET's email to the claimant on 13 April 2021 notifying him his claim had been dismissed because of his non-attendance).

31. On 15 April 2021, the ET wrote to the parties, acknowledging the claimant's application for reconsideration and providing directions for its determination. In that letter, Employment Judge Nicolle indicated his provisional view, as follows:

> "… based on the application for reconsideration, but also the totality of the email communications and attachments sent by the Claimant prior to and after the hearing on 13 April 2021 that he has provided sufficient evidence to explain

> his non-attendance based on reasonably evidenced medical issues and that in these circumstances it would be appropriate to reconsider the decision to dismiss the claim under Rule 47".

The Reconsideration Hearing and the October Judgment

32. The hearing of the claimant's reconsideration application took place before the ET on 4 October 2021. At that hearing, which took place by CVP, the claimant was in attendance, acting in person, and the respondent was represented by Ms Hirsch. In re-visiting the material that had been before it on 13 April 2021, the ET observed that the claimant's position was put at its highest in the letter from Dr Lutterodt, although it took the view that, in recommending that the claimant take time off from work and "*his hearing*", Dr Lutterodt would have been referring to the intended four-day full merits hearing, rather than the short hearing to consider the claimant's application for a postponement which he had been required to attend (October Judgment, paragraph 11).

33. In support of his application for reconsideration, the claimant had pointed out that he had been ill for a period of six weeks following the hearing on 13 April 2021, but the ET could not see that directly impacted upon the decision it had made, which had been based on the material available to it at the time (October Judgment, paragraph 22). The ET noted that "*the requirement*" had been for the claimant to join the hearing:

> "23. … It may have only been for a matter of minutes. His ability or otherwise to make submissions would have been a factor to take into account. It may well have been we would have granted the postponement request. The Claimant took the risk of not joining and thereby disobeying a clear Order from the Tribunal as to the appropriate sequence of events."

34. The ET noted that the claimant had "*demonstrated an ability to communicate cogently and with significant frequency*" on the evening before, and on the morning of, the hearing as well as in the preceding days and weeks, sending multiple emails to the ET and making

various applications. He had also been able to make an application for reconsideration within hours of the hearing. These were factors the ET considered indicated that:

> "24. … the Claimant's failure to participate [in the hearing] was not one which was as a result of overwhelming prohibitive medical circumstances but rather a choice he had made. That may well have been from his subjective perception understandable. Nevertheless, it was contrary to the clear instruction of the Tribunal …"

35. Taking the view that its decision to dismiss the claim under rule 47 **ET Rules** had been correct, the ET rejected the application for reconsideration.

36. Following the hearing, at 10:35pm, the claimant emailed the Employment Judge (copied to the respondent) asking for clarification as to the position regarding his earlier applications to strike out the respondent's response, for reasonable adjustments, and for an anonymity order. The ET referred to these matters in its written Judgment, explaining that these had not been considered in the claimant's absence but would have been matters that he might have chosen to pursue had he attended the hearing on 13 April 2021, but he had not (October Judgment paragraph 28).

Correspondence Subsequent to the Reconsideration Hearing

37. The claimant subsequently wrote to the ET on 21 October 2021, making various further requests and raising concerns as to the Employment Judge's conduct of the hearing, as follows:

> "2. Impropriety of the hearing of 04-10-21
>
> **-** EJ's disconnection during C's submission –
>
> **-** EJ's phone pointed to the ceiling during C's submissions –
>
> **-** EJ's failure to direct C to give evidence on oath –
>
> **-** EJ's disregard for Judge B Clarke's presidential guidance –

- EJ's inappropriate conversation with R's counsel after judgment was passed –

2.2 The Claimant regrets to have noticed Employment Judge Nicolle not being seen for parts of the hearing, having arrived 30 minutes late reporting IT issues by his own admission, and at times not even appearing on his cell phone used by him in absence of a PC to receive submissions from parties. The judge's cell phone was pointed to the ceiling at certain times during the hearing, including during C's submissions.

2.3 A full judge's disconnection happened during the hearing by which it was not clear as to whether material submission from C was received in full.

2.4 At any point in time during the hearing the said Judge did not direct the Claimant to put forward evidence on oath.

2.5 Save for retiring to pass a judgment, there were no specific adjustments agreed in advance to the hearing itself in defiance of the existing presidential guidance for vulnerable claimants, Rule 7 and C's applications in that regard.

2.6 The judge found himself party to an inappropriate conversation with R's counsel on the topic of "sift" "striking out" "to include" "reasons" after the reconsideration judgment was passed.

…"

38. By letter of 26 October 2021, the ET responded to the claimant, addressing the issues raised regarding the conduct of the hearing on 4 October 2021 as follows:

"The hearing on 4 October 2021

8. As the Claimant is aware as a result of his laptop malfunctioning it was not initially possible for Employment Judge Nicolle to join the hearing. The commencement of the hearing was delayed whilst he sought remote assistance from the judicial IT helpdesk. They were unable to resolve the issue. His laptop was defunct and had to be replaced. To avoid the loss of the hearing date, and the waste of time and costs for the parties, he and the nonlegal members proposed that the hearing should continue but with him joining via his phone. Given that he was considering written and electronic documents during the hearing as well as listening to the parties and taking notes it was inevitable that his face would not always be visible on his mobile phone which was on his desk and therefore the parties may well have been seeing the ceiling rather than his face. Whilst unfortunate it was preferable that the hearing took place, and no discourtesy was intended to the parties, and no adverse impact had on the hearing of the application. The position was explained to the parties and no objection was raised by the Claimant during the hearing.

> Evidence on oath
>
> 9. As the hearing involved an application for reconsideration both parties were given the opportunity to make submissions. No witness evidence with cross examination took place. As such there was no requirement for the Claimant, or any other party, to take the oath or affirm.
>
> Alleged inappropriate conversation between the judge and the Respondent's counsel
>
> 10.At the end of Employment Judge Nicolle's oral judgment at the reconsideration hearing Ms G Hirsch, Counsel for the Respondent, requested whilst all parties were in attendance that in the event of written reasons being requested the judgment should reflect that the claim was dismissed solely under Rule 47 and not Rule 37. That was already the case but for the avoidance of doubt was reflected in paragraph 14 of the judgment dated 7 October 2021. There was nothing inappropriate about the request made by Ms Hirsch."

The Claimant's Appeals and the Parties' Submissions

39. In his first appeal, the claimant identified three grounds of challenge, as follows:

(1) The ET failed to acknowledge, consider and/or respond to the claimant's 7 April 2021 application for reasonable adjustments, failing to conduct a ground rules hearing or to consider how to assist the claimant, to consider a methodology for questioning the claimant or whether part or all of the final hearing could be held in private and/or an anonymity order made, or otherwise to consider what steps could be taken to minimise any adverse effects of correspondence and communications from the respondent. Had the ET not so erred, the claimant contends that he would have been able to attend and participate in a final hearing listed within a month thereafter.

(2) The ET erred in dismissing the claim for non-attendance under rule 47 **ET Rules** by failing to consider the claimant's reasons for non-attendance and his application to postpone by applying the relevant legal principles, in particular as set down in **Teinaz v London Borough Wandsworth** [2002] EWCA Civ 1040; [2002] ICR 1471. The medical evidence supported the claimant's contention that he was unable to participate

through no fault of his own and that the deterioration in his health was not long-term (as the claimant had communicated to the ET, on medical advice, he believed he would be able to participate in one month); the ET had wrongly concluded that there was no reliable time for recovery. The ET had further failed to consider the effect on the claimant's health and/or ability to participate resulting from its failure to consider his applications for reasonable adjustments and/or an anonymity order, and had failed to take into account the effect of the costs warning directed at the claimant by the respondent on 25 March 2021. It is the claimant's case that those matters had resulted in a significant deterioration of his mental health.

(3) The ET had wrongly equated the claimant's ability to communicate in writing with his ability to participate in a hearing; that was an irrelevant factor and the ET had reached its conclusion without considering the claimant's conditions, which included anxiety, depression and a severe form of ADHD.

40. More generally, it is the claimant's case that the ET thus failed to ensure that the parties were on an equal footing in accordance with the overriding objective and that there was a fair trial in accordance with article 6 **European Convention of Human Rights**.

41. The respondent resists the first appeal, arguing:

(1) The adjustments that had been sought by the claimant had not been reasonable. In any event, the request had not been refused and it would have been reasonable to expect that the ET would deal with such matters at the outset of the hearing (and an ET was not required to undertake a ground rules hearing in every case involving a disabled person, **Anderson v Turning Point Eespro** [2019] EWCA Civ 815, paragraph 30).

(2) **Tienaz** was not authority for the proposition that a refusal to postpone a hearing in circumstances such as the instant case was unlawful (and see **Mvula v The**

Cooperative Group Ltd UKEAT/0076/18 at paragraph 27). The claimant had known of the hearing date since July 2020 and had had ample time to provide any medical evidence on which he wished to rely. The fact that the claimant provided medical evidence that did not say he was incapable of attending the hearing provided a fair and reasonable basis for the ET to conclude that he was able to attend, at least for the short time it would be necessary to make his application to postpone. The ET had made clear that it would consider the claimant's application at the outset of the hearing and there was nothing in the medical evidence that clearly stated that the claimant would be unable to attend to make that application. Specially, the ET had regard to the letter from Dr Lutterdodt but permissibly did not consider that clearly addressed the form of hearing in question (that is, to consider the application for postponement). There was no evidence submitted to the ET that clearly stated that the claimant would be fit within a month (indeed, there were various dates provided in different medical documents) and the ET was entitled to consider there was no clear prognosis. As for the suggestion that the various matters relied on by the claimant (the ET's failure to determine his applications and/or the costs warning letter written by the respondent) had impacted upon his health, that would require the ET to speculate as to the cause of any mental health issues in the absence of independent medical evidence.

(3) The ET had been entitled to have regard to the claimant's ability to communicate in writing, albeit this was by no means a primary consideration in its determination.

42. By his second appeal, the claimant also identified three grounds of challenge, namely:

(1) That the ET failed to provide adequate reasons, failing to explain how it had addressed (a) the harm caused to the claimant by the respondent's witness having made speculative sexual allegations about him; (b) the respondent's intimidating pre-trial correspondence; (c) the effects on the claimant's health of (a) and (b); (d) why the ET

had not given any directions to deal with the claimant's various applications; (e) why the ET had, instead, given directions in favour of the respondent.

(2) That the hearing of 4 October 2021 was tainted by impropriety and technical errors, as follows: (a) the Employment Judge conducted the hearing on his hand-held cell 'phone instead of a computer, claiming to have studied evidence on his 'phone although that was not shown to the panel; (b) the Employment Judge disconnected himself during the claimant's submission due to technical issues and it was unclear whether the claimant's submission was received; (c) the Employment Judge admitted to having his cell 'phone pointed to the ceiling at times during the claimant's submission and was not seen for parts of the hearing; (e) the ET failed to direct the claimant to make submissions on oath; (f) the ET failed to apply recommendations from the ET President's Guidance.

(3) The claimant further contends that it follows from the preceding grounds that Employment Judge Nicolle had pre-judged the reasons for the claimant's non-attendance on 13 April 2021 and had proceeded with the case in the respondent's interest.

43. Resisting the second appeal, the respondent contends:

(1) The ET provided adequate reasons for its decision, in particular given the earlier reasons provided for the April Judgment.

(2) As for the allegations of procedural impropriety, the Employment Judge's use of his mobile 'phone (in circumstances in which he was having difficulties with his computer) did not give rise to any impropriety or disadvantage to the claimant. As for whether the Employment Judge viewed evidence on his mobile 'phone screen, that could only have been evidence submitted by the claimant and there could, therefore,

be no disadvantage to the claimant in not being shown what the Employment Judge was viewing on his screen (as would equally be the case if the Employment Judge was using a desk top computer for the hearing). There could, moreover, be no impropriety in not requiring the claimant to make submissions on oath.

(3) In respect of the allegation of bias, this appeared to be directed at the original, 13 April 2021, decision and was, accordingly out of time.

44. For completeness, I note that when the second appeal was permitted to proceed, it was directed that the claimant should lodge a witness statement detailing the improper conduct he alleged and that the Employment Judge and the ET lay members should then be afforded the opportunity to respond. The claimant duly lodged a three-page statement essentially setting out the points he had already made in his grounds of appeal. Unfortunately it did not prove possible to obtain a response from Employment Judge Nicolle (through not fault of the Judge) but the ET lay members responded as follows:

> Mr Scholfield: : "For my part, I can say that the Claimant's allegations - eg, in para 2, that EJ Nicolle showed "impropriety/bias" and in para 8, that EJ Nicolle showed a "clear preference to [R's] case and did not give a "fair hearing", are false and without foundation. Please let me know if anything further is needed."
>
> Ms James: "I am not sure I have any specific comments save to say I do not think there was anything biased or untoward about EJ Nicolle's conduct."

The Legal Framework

45. Rule 47 **ET Rules** addresses the issue of a party's non-attendance at a hearing, providing:

> "Non-attendance
>
> 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."

46. In the present case, the information before the ET regarding the claimant's reasons for non-attendance on 13 April 2021 included the medical evidence he had submitted and the various applications the claimant had made in the days preceding the hearing, in particular his application for a postponement.

47. Whether or not to grant an application for a postponement falls within the ET's general case management powers. **Presidential Guidance on Seeking a Postponement of a Hearing** explains the procedure that is to be followed and makes clear that any application on the ground of ill-health will require medical evidence to show that the party concerned is unable to attend. The ET has a broad discretion as to whether to grant a postponement but, when considering an application made on medical grounds, the approach it should adopt has been the subject of guidance laid down by the Court of Appeal in **Teinaz v London Borough of Wandsworth** [2002] EWCA Civ 1040, [2002] ICR 1471 and **Andreou v The Lord Chancellor's Department** [2002] EWCA Civ 1192, [2002] IRLR 728.

48. In **Teinaz**, the ET had refused the claimant's application for postponement on ill health grounds notwithstanding medical evidence advising that he should not attend the ET hearing. That decision was overturned by both the EAT and Court of Appeal, Peter Gibson LJ observing as follows:

> "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 the court and to the other parties. The litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the Applicant for an adjournment to prove the need for such an adjournment.
>
> 22 If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another

> is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."

49. In **Andreou**, the EAT decision overruling a postponement refusal by the ET was reversed by the Court of Appeal, that case being distinguished from **Teinaz** as there was insufficient medical evidence to show the claimant was unfit to attend the ET hearing, notwithstanding attempts by the ET to obtain answers from the reporting doctor to specific questions relevant to its decision.

50. By way of example of the approach that has been adopted in other cases, in **Mvula v The Co-Operative Group Limited** UKEAT/0076/18, [2018] 9 WLUK 442, the EAT considered the application of rule 47 in a case where medical evidence had been provided in support of the application to postpone, but was not sufficient to persuade the ET to grant the postponement. The EAT upheld the ET's decision, agreeing that the medical evidence had been vague and was insufficient to demonstrate that the claimant was unfit to attend the hearing. On the other hand, in **Chang Tave v Haydon** UKEAT/0153/10, the EAT considered the ET had erred in refusing an adjournment: (1) when the medical evidence demonstrated that the claimant, who was suffering from a major depressive disorder, had been advised not to attend the hearing and his presence was necessary for the trial; (2) by taking into account the claimant's cogent letters and lucid witness statement, when these could not bear on the uncontradicted medical evidence; and (3) because the ET did not find that the claimant had acted unreasonably in failing to attend, accepting that he may genuinely have felt he was not up to attending the hearing (see **Chang Tave** at paragraphs 30-32).

51. More generally, when considering the question of fairness, the ET must carry out its assessment in the round, see **O'Cathail v Transport for London** [2013] EWCA Civ 21, [2013] ICR 614, CA, paragraphs 45 and 47.

Discussion and Conclusions

52. Addressing the appeal against the April Judgment, I am satisfied that the ET did not err in how it dealt with the claimant's various applications in the days preceding the hearing on 13 April 2021. On 1 April 2021, the ET had made clear that the claimant's application to strike out the respondent's response would only be considered at the outset of the full merits hearing. That was a reasonable case management decision given the difficulty in arranging for a further preliminary hearing before the trial was due to start. Having received that response, however, the claimant continued to email the ET with various applications and objections, his messages being sent with increasing frequency as the trial date approached. The claimant says that the ET ought to have determined his applications – to strike out the respondent's response; for adjustments to the hearing procedure; for a hearing in private and/or an anonymity or restricted reporting order; for a postponement – at an earlier stage, but that was not a reasonable expectation, particularly given the pressures on the ET during April 2021. Moreover, these were applications being made in the fortnight immediately preceding the trial, in proceedings that had been on-going since 30 June 2019, and in which there had been two earlier case management preliminary hearings. Acknowledging that the claimant no doubt found it very stressful not to have immediate responses to each of his applications, there was no error of law in leaving these matters to be addressed at the outset of the full merits hearing.

53. More detailed consideration of the various applications made by the claimant only serves to reinforce that conclusion. Although the claimant may have suffered anxiety after receiving the respondent's letter of 25 March 2021, the ET rejected his contention that this

(or the respondent's conduct of the litigation more generally) amounted to bullying or harassment. That was a permissible view. While it is no doubt stressful for a litigant in person to receive a letter warning them of a possible application for costs, objectively viewed this could not provide any basis for an application for the response to be struck out. As for the claimant's applications for the hearing to be conducted (wholly or in part) in private and/or for an anonymity or restricted reporting order, these were matters that could not be addressed before the ET had started to read into the case, so as to understand the actual nature of the allegations being made and how these might be said to necessitate derogations from the open justice principle.

54. While the applications for adjustments to the hearing procedure would not have required the same familiarity with the case, it is necessary to bear in mind the nature of the requests being made. The claimant had said that he did not wish to be "*questioned by the aggressive Respondent (or their lawyers)*", although indicating that he would "*be happy to be questioned by a Judge (and the panel members)*"; otherwise, he was asking that the hearing take place in private. In adversarial proceedings that were to be conducted in accordance with the open justice principle, these were not adjustments that could readily be described as reasonable. It would be entirely unsurprising that these would be matters that the ET would seek to discuss with the parties at the outset of the hearing and would not wish to summarily determine on the papers.

55. The claimant's second and third grounds of challenge in relation to the April Judgment focus, however, on the ET's decision not to allow the application for a postponement but, instead, to dismiss the claims. As I have already observed, an ET has a broad case management discretion in determining whether or not to postpone proceedings and the EAT should not interfere with the exercise of that discretion unless satisfied that it reveals an error of approach, or that it was founded upon irrelevant considerations or failed to take

into account that which was relevant, or unless it is properly to be described as perverse. I further accept that the ET was entitled to consider that the medical evidence submitted in support of the application to postpone in this case was not entirely satisfactory, in that it did not provide a clear prognosis and did not address the possibility of adjustments that might be made to support the claimant's participation in the hearing. That said, the evidence did confirm that the claimant was someone who had been diagnosed with adult ADHD and suffered from anxiety and depression. It further confirmed that he had had a number of reviews relating to his mental health in the three months prior to the hearing, that his symptoms had worsened, and that his anxiety was impacting on his ability to concentrate. As on the morning of the first day of the hearing before the ET, it was further confirmed that the claimant had been recommended to take a period of two weeks away from work and away from "*his hearing*".

56. Although the ET refused to grant the claimant's application, it seems that it did accept that the evidence showed he would be unable to participate in a full merits hearing of his claims, hence its clarification in the October Judgment (paragraph 11) that it had read the reference to "*hearing*" in Dr Lutterodt's letter to be to the four day full merits hearing. It was on that basis that the ET appears to have been focused on the claimant's failure to attend a short hearing of the postponement application. Thus treating the hearing on 13 April solely as a short hearing of the claimant's application to postpone, the ET was entitled to form the view that there was no clear medical evidence addressing the claimant's ability to attend. The difficulty with that approach is that it presupposed that the full merits hearing would not go ahead, but that was not an assumption that the claimant could make (the ET had, after all, made clear that it would not deal with his application for a postponement in advance of the hearing) and the medical advice he had received was that he should not attend the trial.

57. The other difficulty with the ET's approach is that it also made certain assumptions about the claimant's ability to deal with the hearing based on the fact that he had been able to "*communicate coherently*" in the "*voluminous email correspondence*" in which he had engaged in the days preceding 13 April 2021. Whatever view was to be formed of the claimant's correspondence, as in **Chang Tave**, there was no basis for the ET to find that it contradicted the medical evidence before it.

58. As was made clear in **Teinaz**, it would have been open to the ET to seek further medical evidence to clarify the matters which it considered to be inadequately addressed (in particular, as to the claimant's future ability to participate in the trial of his claims); indeed, that was a course that the ET might have adopted within the four day period listed for the full merits hearing. Given, however, that it understood that there was medical evidence to support the claimant's non-attendance at the full merits hearing, it was not open to the ET to simply proceed to the dismissal of the case; contrary to the requirement under rule 47, that failed to take into account the information available to the ET about the reasons for the claimant's absence.

59. In my judgement, these errors of approach vitiate both the ET's refusal to allow the claimant's application for a postponement and its decision that the claim should be dismissed. Unhappily the errors were not addressed at the reconsideration stage, notwithstanding the provisional view expressed by the Employment Judge on 15 April 2021 (see paragraph 31 above). Indeed, the October Judgment suggests that the ET considered that the claimant's failure to attend the hearing on 13 April 2021 meant that he had disobeyed "*a clear Order from the Tribunal*", which was not the case.

60. I therefore allow the claimant's first appeal, on grounds two and three.

61. Given the view I have formed on the first appeal, it is unnecessary for me to address the appeal against the October Judgment in much detail. For completeness, however, I make clear that I consider the grounds of appeal pursued in this regard are without merit.

62. First, the ET's reasoning adequately explained the conclusions it had reached; it was not required to address each of the various applications that had been made by the claimant prior to 13 April 2021. Second, the hearing of 4 October 2021 was not tainted by any impropriety resulting from the IT difficulties experienced by the Employment Judge when seeking to conduct the hearing remotely. Although unfortunate that the Employment Judge had to conduct the hearing using his mobile 'phone, there is nothing to suggest that this led to any unfairness. Third, none of the matters raised by the claimant provide any basis for considering that there was pre-judgment on the part of the Employment Judge. Although I have found the ET erred in its approach to the evidence before it and in how it addressed the application to postpone, there is nothing that would cause the reasonable and informed observer to consider that there was a real possibility of bias (see **Porter v Magill** [2001] UKHL 67 HL).

Disposal

63. For the reasons I have provided, I allow the claimant's appeal in EA-2021-000135-AS, on grounds two and three, but dismiss ground one. I also dismiss the entirety of the appeal in EA-2022-000167-AS.

64. This matter will need to return to the ET for onward case management. It will be for the Regional Employment Judge to determine the composition of the ET that will now deal with these proceedings.