Neutral Citation Number: [2024] EAT 16

Case No: EA-2022-000735-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 February 2024

Before:

BRUCE CARR KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

CHRISTIAN ABANDA BELLA

Appellant

- and -

(1) BARCLAYS EXECUTION SERVICES LIMITED
(2) GÖTZ RIENACKER
(3) JEONG KIM
(4) JEREMY HAWORTH
(5) OCTAVIA KNOX CARTWRIGHT
(6) CHRIS EASDON

Respondents

- -
- -

Mr William Young for the **Appellant**
Mr Gordon Bartlett for the **First to Sixth Respondent**

Hearing date: 11 January 2024

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – Recording of Tribunal proceedings

The Claimant/Appellant applied to the Employment Tribunal to be allowed to record a 3-day preliminary hearing. The Employment Judge declined to grant the application as he was not satisfied with the evidence in support or that there was any significant disadvantage to the Appellant.

In reaching his decision, the Judge did not refer to the guidance provided on this question in **Heal v University of Oxford [2020] ICR 1294**. Although the guidance in **Heal** is not mandatory, is in important in considering an application to record proceedings and by not referring to it, the Judge then failed to take into account factors material to the assessment of the Appellant's application.

The Judge should therefore have granted the application and it was right to make a declaration that the decision not to do so was unlawful.

The Appellant did not seek any additional remedy beyond the bare declaration

BRUCE CARR KC, DEPUTY JUDGE OF THE HIGH COURT

1. This is an appeal against the decisions of Employment Judge Crosfill not to allow the appellant to record proceedings at a preliminary hearing which was held on 19, 20, and 21 July 2022. That hearing took place in order to determine strikeout applications brought by the respondents relating to a number of claims which the appellant had brought against them. The appeal was allowed to proceed following a r.3.10 hearing before Judge Walker on 22 March 2023 at which the appellant made it clear that he was not asking for the substantive decision taken after the July 2022 preliminary hearing to be overturned.

2. Notwithstanding that indication, at the outset of this hearing I raised with Mr Young, counsel appearing on behalf of the appellant, what his client hoped to achieve from this appeal. Mr Young confirmed that the appellant was not seeking to overturn the decision reached at the preliminary hearing but having noted that that decision itself was subject to a separate appeal to this tribunal, indicated that the appellant saw a potential tactical advantage in that appeal of being able potentially to deploy a favourable judgment in this appeal as part of his case on the substantive appeal against the decision reached at the preliminary hearing.

3. On 9 July 2023 and following the r.3.10 hearing before Judge Walker which had taken place in March, the respondents had confirmed that they were not contesting this appeal. The tactical point having been raised by Mr Young apparently for the first time today, I was concerned that had they known of it, the respondents might have taken a different view on whether or not to contest today's appeal. I therefore adjourned the hearing in order that in house counsel for the respondents, who was present at the hearing as an observer, could take instructions. After a short adjournment, the respondents were able to confirm that they were now, in fact, contesting the appeal but were content to rely on the reason set out by Employment Judge Crosfill in his two relevant decisions and did not

wish to make any additional submissions. The appeal, therefore, continued as a contested one, albeit with the respondents playing no active part in it.

THE APPELLANT'S APPLICATIONS FOR PERMISSION TO RECORD THE PROCEEDINGS

4. The appellant's first application for permission to record the proceedings was set out in an email dated 17 July 2022. In that application, he said the following:

> **"3. Specifically, the upcoming Preliminary Hearing on 19, 20 & 21 July 2022 is a 3-day hearing and Mr Abanda Bella is a disabled litigant-in-person diagnosed with anxiety, depression, PTSD, paranoia and psychosis and furthermore, Mr Abanda Bella has been suffering from exacerbated sleep disturbance since May 2022 and has had to rely on medication as a result. In addition, Mr Abanda Bella is currently experiencing exacerbated psychosis symptoms for which Mr Abanda Bella is currently seeking additional psychiatric help.**
>
> **4. Therefore, Mr Abanda Bella is currently experiencing an exacerbated reduction in his cognitive bandwidth including issues with memory, focus and mood.**
>
> **5. Accordingly and due to his reduced cognitive bandwidth, Mr Abanda Bella cannot reasonably be expected to reliably take notes whilst effectively partaking in the upcoming Preliminary Hearing on 19, 20, 21 July 2022.**
>
> **6. Therefore, it is submitted that allowing Mr Abanda Bella to record the upcoming Preliminary Hearing on 19, 20, 21 July 2022 would significantly lessen the cognitive load on Mr Abanda Bella during the hearing thereby helping him to effectively take parts in the hearing and is thus fair.**
>
> **7. For the avoidance of any doubt, Mr Abanda Bella will not be in a position to wait for summary notes produced after the hearing by the Tribunal, as Mr Abanda Bella will need to be able to recall the important points being made by all parties over the course of the 3-day hearing, during the hearing itself."**

5. The appellant put in a further application on 11 July 2022 sent shortly after 11.00 p.m. which he described as a follow-up to his earlier application. The email of 11 July 2022 had attached to it a

report from a psychotherapist who had been engaged in weekly cognitive behavioural psychotherapy sessions with the appellant which had begun over three years earlier in July 2019. The report covered three adjustments which were suggested as being appropriate so as to enable the appellant effectively to participate in the forthcoming hearing. The third of these was that he should be allowed to record the proceedings. The first adjustment that had been sought was that the appellant should be able to attend the hearing remotely from his home using the CVP system.

6. A section of the report dated 11 July 2022, from the psychotherapist Ms Collette Sharbel-Merven, had described the appellant as suffering from chronic generalised anxiety and had said as follows:

> **"Mr Abanda Bella presents with fluctuating, chronic, excessive, and persistent anxiety resulting in an exacerbation of uncomfortable worrying thoughts which further impacts on his existing concentration deficits and increases his physical and mental fatigue. His anxiety further increases his sense of detachment from himself and results in intense and distressing physical symptoms of dizziness, heart palpitations, hyperventilation, and panic attacks."**

7. Later, in the same report, under the heading "Concentration deficits", Ms Sharbel-Merven said as follows:

> **"Due to Mr Abana Bella's depression and generalised anxiety, he presents with diminished ability to think and process information effectively and exhibits concentration difficulties. Thus, he experiences difficulties being present moment focused."**

8. Under the heading "Reasonable adjustments", Ms Sharbel-Merven said as follows:

> **"Mr Abanda Bella seeks to attend the 3-day 19 July 2022 hearing remotely, from his home and by video conference. Mr Abanda Bella also seeks to be able to record the hearing and to have pre-arranged regular short breaks during the 3-day 19 July 2022. His home is the only place where Mr Abanda Bella feels truly safe and further provides him with a stable, familiar, fully predictable, and controlled environment**

in which he is used to implementing learned symptom-mitigating strategies during his psychotherapy.

In addition, it is my observation that staying home, recording the hearing and communicating by video conference enables Mr Abanda Bella to considerably decrease the cognitive, sensory, and psychological loads on himself in comparison with face-to-face interactions outside of his home, and furthermore in comparison with having to take notes and take part in the hearing at the same time, which multi-tasking would quickly overwhelm Mr Abanda Bella's cognitive bandwidth.

Finally, Mr Abanda Bella's home is, presently, the only place where he has been able to reliably implement and utilise learned symptom-mitigating strategies. I, therefore, fully support that allowing Mr Abanda Bella to attend the 3-day 19 July 2022 hearing remotely, from his house and by video conference is a suitable reasonable adjustment for him. It should however be noted that implementing all symptom mitigating strategies, for long durations of time, is exhausting for Mr Abanda Bella. This is further complicated by the fact that his mental impairments distort Mr Abanda Bella's awareness and judgement of how fatigued he is. Being able to record the hearing and pre-arranged regular short breaks are thus needed for Mr Abanda Bella to be able to replenish his stamina, compose himself, regulate his emotions and thoughts, reflect on the proceedings, and make informed decisions. I thus fully support and endorse allowing Mr Abanda Bella to have pre-arranged regular short breaks and to be allowed to record the hearing as suitable reasonable adjustments."

9. In her conclusion, Ms Sharbel-Merven then said this:

"It is also my professional opinion that allowing Mr Abanda Bella to record and attend a three-day hearing starting on 19 July remotely and by video conference with pre-arranged regular short breaks would constitute suitable reasonable adjustments for him."

10. The first decision of Employment Judge Crosfill in response to the appellant's request for a recording of forthcoming preliminary hearing was set out in a letter from the Employment Tribunal dated 12 July 2022. In that letter, the Judge said as follows:

> **"I am not prepared to allow a recording to be made of the proceedings. I note that Mr Abanda Bella is able to produce long and complex documents. I have noted in previous hearings that Mr Abanda Bella closely follows any arguments and has had no obvious difficulties putting across his position orally. Whilst I have to have regard to the evidence submitted by Mr Abanda Bella, I am not satisfied that together with my own observations in respect of Mr Abanda Bella's skills and abilities establishes that is a reasonable adjustment to depart from the ordinary practice of the Tribunal."**

11. The first point to make in relation to this letter is that in it, the Judge refers only to having seen the appellant's email of 5 July 2022. I have not been able to identify an email of that date. The first email in which the appellant made his application is the one dated 7 July 2022 to which I have already referred. I therefore infer that the reference to 5 July 2022 is an error and what the Judge had in mind, in fact, was the email of 7 July 2022.

12. The other point note is that the Judge's letter of 12 July 2022 makes no reference to the appellant's email of 11 July or any evidence from Ms Sharbel-Merven which had only been sent late the previous day. The absence of any reference either to 11 July 2022 email or to the psychotherapist's report which accompanies it, leads me to the conclusion that on 12 July 2022, the decision was likely to have been based only on the contents of the appellant's email dated 7 July 2022.

13. On 13 July 2022, the appellant wrote again to the Employment Tribunal asking the Judge to reconsider the request to the court. This email referred expressly to Ms Sharbel-Merven's report and set out extracts from it. It also made the point that Ms Sharbel-Merven had been the appellant's psychotherapist since July 2019 and would therefore have had an in-depth and exhaustive understanding of his medical impairments, conditions, and symptoms. A lengthy argument was set out as to why the adjustments sought should, in fact, be granted. This application led to a second decision which is also the subject of this appeal, which decision was set out in a letter from the

Employment Tribunal dated 16 July 2022. The Employment Judge declined to vary his earlier decision and gave the following reasons:

> **"Mr Abanda Bella has provided letters from Collette Sharbel-Merven who is a cognitive behaviour therapist. She holds a number of qualifications as a CBT therapist but has no clinical qualifications (in the sense that she is HCPC registered). She does suggest that permitting Mr Abanda Bella to record the proceedings would assist him. I have given her opinion all appropriate weight, but I am not bound to follow her recommendations.**
>
> **I have had regard to the nature of the forthcoming hearing. No evidence will be given at the hearing. All of the outstanding matters will be dealt with having heard the submissions of the parties. Any decision I make will be recorded by me and written orders will be sent to the parties. As such, in order to fully participate in the hearing Mr Abanda Bella will only need to make a brief note of any oral submissions he wishes to reply to. He will need to do so during the hearing and having a recording device would be of no assistance.**
>
> **Mr Abanda Bella suggested in his original application that having a recording would allow him to correct any errors in my case management summary and avoid unnecessary appeals. I would not expect any party to feel the need to 'correct' my case management summary. What is important is the orders that I make. Errors in recording orders are rare. If a party contends that there has been an error of law in making any order then they can appeal. On any appeal it is the written reasons included in the case management summary which are important not what was said at the hearing.**
>
> **I have allowed Mr Abanda Bella to record one hearing when he made an application at the outset. This was very much an ad-hoc decision made for pragmatic reasons to progress the hearing. I have not granted permission at subsequent hearings and Mr Abanda Bella has reported no difficulties.**
>
> **I have given Mr Abanda Bella permission to attend remotely via CVP. He had previously said that it was impossible for him to attend via CVP suggesting that he did not have an adequate internet connection. When this was first raised, I expressed my surprise and informed Mr Abanda Bella that I had conducted**

numerous CVP hearings where people with very few resources have managed to maintain a good connection. I urged him to attempt to use CVP. He told me that all forms of video conferencing were impossible. I was, and remain, sceptical of the assertion that Mr Abanda Bella was unable to engage in a video hearing due to a poor quality internet connection. He now accepts that this is possible, and I note from Ms Sharbel-Merven's latest letter that she holds weekly on-line sessions with him. I consider that there is some evidence that Mr Abanda Bella has exaggerated the difficulties he has experienced with video hearings. Whilst this most certainly does not lead me to dismiss what Mr Abanda Bella asserts, I do not take his assertions at face value.

I consider that I was entitled to have regard to the fact that in previous hearings Mr Abanda Bella has participated fully by responding to submissions made by Counsel for the Respondents and in response to any questions I might have put to him. I accept that he may have adopted coping strategies. Nevertheless, the fact that he was able to cope is a material factor in deciding whether to allow him to record the hearing.

Whilst there are moves to introduce recording in tribunal proceedings where that has been done the recordings are made and retained by HMCTS. Any party may apply for a transcript which may then be made at their expense. Such a system safeguards against any misuse of a recording. Allowing a party to make a recording of their own has no such safeguards.

As Mr Abanda Bella is attending the hearing via CVP there is a recording facility that can be used. If Mr Abanda Bella asks for the hearing to be recorded by HMCTS then that is an application that in my view strikes the right balance and I will be able to facilitate that."

14. The appellant wrote again on 18 July 2022 making a further request for the proceedings to be recorded. That request appears to have been addressed by the Employment Judge on the first morning of the hearing on 19 July and at para. 8 of the Judge's reasons, where it was stated that the application was being refused but that the proceedings were to be recorded by HMCTS.

LEGAL FRAMEWORK

15. The Employment Tribunal clearly was under a duty to make reasonable adjustments in appropriate circumstances. Whilst the language of reasonable adjustments appears in s. 20 of the Equality Act 2010, that section does not provide the source of the relevant duty as was made clear by Underhill LJ in **J v K [2019]** ICR 815 at [33], albeit in the context of an application for an extension of time for the presentation of a complaint to the employment tribunal:

> **"...judicial decisions are excluded from the scope of the Act: see paragraph 3 of Schedule 3 to the Act. But as a matter of general law the exercise of a judicial discretion must take into account all relevant considerations, and in such a case the party's mental condition or other disability would plainly be a relevant consideration."**

16. In the particular context of a duty to make reasonable adjustments, Langstaff J in **Rackham v NHS Professionals Ltd** UKEAT/0110/15/LA said as follows:

> **"32. We do not think it could sensibly be disputed that a Tribunal has a duty as an organ of the state, as a public body, to make reasonable adjustments to accommodate the disabilities of Claimants. Miss Joffe accepts, and indeed submits, that the particular route by which the obligation rests upon the Tribunal is unimportant, though it might be one of a number, because there can be no dispute there is such an obligation."**

17. Then at [36], the Judge said as follows:

> **"36. We therefore take the purpose of making an adjustment as being to overcome such barriers so far as access to court is concerned, in particular to enable a party to give the full and proper account that they would wish to give to the Tribunal, as best they can be helped to give it. We accept that practical guidance as to the way in which the court upon whom the duty to make adjustments for those purposes is placed should achieve this is given by the Equal Treatment Bench Book."**

18. The decision also contains a discussion dealing with the level of review to which and Employment Tribunal's decision on reasonable adjustments could be subject to scrutiny at the EAT level. That discussion ultimately led the Employment Appeal Tribunal to say this at [46]:

> **"46. In this case, though we are attracted to the proportionality analysis that Miss Joffe proposed and that Mr Horan in reply adopted, we do not think that the decision actually depends upon the approach we take, though we would observe that we would be very hesitant before suggesting that a pure *Wednesbury* approach was appropriate in any case in which it appeared to the reviewing court that it would have been reasonable to have to make an adjustment if that adjustment appeared necessary to obtain proper equality of arms for someone with a relevant disability."**

19. In addition, the court observed as follows at [50]:

> **"50. In many cases, if not most, a person suffering from a disability will be the person best able to describe to a court or to others the effects of that disability on them and what might be done in a particular situation to alleviate it."**

20. As to the exercise of the duty to make reasonable adjustments in the context of a request to record proceedings in the Employment Tribunal, the starting point is s.9 of the Contempt of Court Act 1981 which provides as follows:

> **"9 Use of tape recorders.**
>
> **(1)Subject to subsection (4) below, it is a contempt of court-**
>
> **(a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court..."**

21. The particular issue of whether a reasonable adjustment might be granted in the form of permission to record proceedings was considered by Choudhury J in the Employment Appeal Tribunal in **Heal v The Chancellor, Master and Scholars of the University of Oxford & Ors** [2020] ICR 1294. The appeal was against a case management order to the effect that if the claimant wished to record proceedings he should make an application to do so to the Judge at the preliminary

hearing itself where he wished to make the recording. The claimant appealed against that ruling on the basis that to make the application at the hearing would lead to uncertainty and that this would serve only to increase his anxiety. In the course of his judgment, Choudhury J, whilst dismissing the particular appeal, gave guidance on matters to be taken into consideration where the adjustment sought is for permission to record proceedings because of a disability related difficulty.

22. At [18], the Judge confirmed the position that the reasonable adjustments duty did not arise by virtue of s.20 of the Equality Act but as a matter of general law. Guidance was then given at [27] as to the factors which ought to be taken into account when dealing with an application for permission to record proceedings:

> **"27. The effect of these provisions in the present context, read with the authorities above and the terms of s.9 of the 1981 Act, may be summarised as follows:**
>
> **a. Tribunals are under a duty to make reasonable adjustments to alleviate any substantial disadvantage related to disability in a party's ability to participate in proceedings.**
>
> **b. Where a disability is declared and adjustments to the Tribunal's procedures are requested in the ET1 form, there is no automatic entitlement for those adjustments to be made. Whether or not the adjustments are made will be a matter of case management for the Tribunal to determine having regard to all relevant factors (including, where applicable, any information provided by or requested from a party) and giving effect to the overriding objective.**
>
> **c. The Tribunal may consider whether to make a case management order setting out reasonable adjustments either on its own initiative or in response to an application made by a party.**
>
> **d. If an application is made for reasonable adjustments, the Tribunal may deal with such an application in writing, or order that it be dealt with at a preliminary or final hearing: see Rule 30 of the ET Rules.**
>
> **e. Where the adjustment sought is for permission for a party to record proceedings or parts thereof because of a disability-related inability to take**

contemporaneous notes or follow proceedings, the Tribunal may take account of the following matters, which are not exhaustive, in determining whether to grant permission:

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

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

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

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

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

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

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

f. Where an adjustment is made to permit the recording of proceedings, parties ought to be reminded of the express prohibition under s.9(1)(b) of the 1981 Act on publishing such recording or playing it in the hearing of the public or any section of the public. This prohibition is likely to extend to any upload of the recording (or part thereof) on to any publicly accessible website or social media or any other information sharing platform."

THE APPELLANT'S SUBMISSIONS

23. The appellant criticises the Employment Tribunal Judge for failing to make reference to the EAT decision in **Heal** and/or otherwise for failing to apply the relevant principles derived from it. It is said that the Judge did not engage with the appellant's medical evidence and was, in effect, far too dismissive of the evidence of the appellant's psychotherapist Ms Sharbel-Merven. Mr Young also

says that it was an error of law for the Judge effectively to substitute his own judgment on the impact of the proceedings on the appellant's health without giving a proper explanation as to why the psychotherapy evidence was being rejected.

DISCUSSION

24. Turning to the first decision of the Employment Judge (contained in the letter of 12 July 2022), as already stated it appears that this decision was reached solely on the basis of the appellant's email of 7 July 2022. That email contained limited information to support the application to record proceedings and whilst it made a number of assertions with regard to the appellant's medical condition, it was unsupported by any medical or other evidence over and above of the appellant's own assessment of his ability to conduct the forthcoming hearing. Whilst the Judge in the first decision did not conduct a detailed exercise by reference to the case law or the sort of factors set out by Choudhury J in **Heal**, it seems to me that he was entitled, on the material before him, to reach the conclusion that he was not satisfied, based on the evidence submitted and based on his own assessment of the appellant's skills and abilities, that a departure from the ordinary practice of the tribunal was required in the form of a reasonable adjustment by way of recording of those proceedings.

25. As far as the second decision is concerned, the Employment Judge had a substantial amount of additional material and argument before him. In his email of 13 July 2022, the appellant quoted extensively from Ms Sharbel-Merven's report and had given detailed reasons as to why he felt the adjustment, in the form of a recording, was necessary. The point was also made that the appellant had been unable to find anybody to assist him acting on his behalf to take a note at the hearing. The second decision (which was contained in the letter from the Employment Tribunal dated 16 July 2022) gives, in summary, the following reasons for the Employment Judge declining to reverse his earlier decision:

(1) Ms Sharbel-Merven did not have "clinical qualifications" and he was not bound to follow her recommendations;

(2) There would be no evidence given at the preliminary hearing and the appellant need only make a brief note or oral submissions that he wished to make in reply to those made by the respondents;

(3) A recording would not be necessary to correct any errors in the case management summary or to avoid any appeal;

(4) Whilst the appellant had been given permission to record one previous hearing, that had been a pragmatic decision and the appellant had not had any apparent difficulties in subsequent hearings;

(5) He was sceptical about the previous concerns raised by the appellant about his problems in being able to participate in video hearings. This meant that he did not accept the appellant's assertions at face value;

(6) The appellant had coped in the past at earlier hearings; and

(7) The proceedings could be recorded by HMCTS which would mean that there was no risk of the recording being misused.

26. A number of valid criticisms can be made of the Judge's reasoning:

(1) It appears to me that he was rather too dismissive of the evidence of Ms Sharbel-Merven. Whilst she may not have had clinical qualifications, she was a trained and experienced psychotherapist who had worked with the appellant for many years and was therefore well placed to make an assessment of his needs;

(2) Whilst, of course, the Employment Judge was not "bound" to accept her recommendations, he appears to me to have been too ready to put those recommendations to one side;

(3) Although no evidence was to be given at the preliminary hearing, that did not mean that the appellant could "simply make a brief note" of the submissions that he wished to make. It is equally very difficult to see how a recording could be of "no assistance" to the appellant. Both the appellant and Ms Sharbel-Merven had made clear to the Employment Judge that the utility of the recording to him was to relieve him of the difficulty of trying to make a proper note during the course of a hearing in what would

have been his first multiday CVP hearing, thus assisting him in effectively participating in the proceedings. He would have the opportunity to listen to the recordings during breaks during the course of each day (although this would not have been entirely straightforward) and on the two overnight adjournments during the course of the three-day hearing;

(4) The fact that the hearing was based on submissions only and without evidence does not, in my view, make any material difference to the nature and context of the appellant's request save that it could well be thought that the risk of misuse was much relieved when compared to a hearing at which witnesses might give evidence which might then be used outside the Employment Tribunal hearing itself;

(5) Whilst the Employment Judge was right to conclude that a recording was not necessary to correct errors or avoid appeals, he was, it seems to me, much too ready to conclude that as the appellant had not had difficulties in some earlier hearings, he could manage without a recording on this particular occasion. As already stated, this was the first time that the appellant had faced to three-day hearing and the first time that he had attended via CVP. In addition, the Employment Judge had no evidence of what the appellant's mental state had been on the particular occasions on which he had been able to attend without the need for a recording. In addition, the fact that he had made a recording on an earlier occasion and had done so without any subsequent cause for concern should have been a matter which the Judge had regard to as addressing, in part at least, any misgiving which he might otherwise have had about possible misuse of a recording on this occasion;

(6) Whilst the Judge may have been entitled to refer to his own experience with the appellant as part of his assessment of his application, the "assertions" made by the appellant came primarily from Ms Sharbel-Merven about which the Employment Judge could plainly not have had any reason not to take what she said at face value;

(7) Recording of the proceedings by HMCTS was of no use at all to the appellant who asked to utilise the recording during the hearing itself in order to assist him in effectively participating in the three-day hearing.

27. Those criticisms having been made, the question for me is whether they are sufficient to enable me to say that the appeal should be allowed rather than this simply being an occasion on which I

might have come to a different conclusion had I been the Employment Judge dealing with these particular applications from the appellant.

28. Having considered that issue, it seems to me that they are. First, I have regard to the suggestion at para.49 of the EAT judgment in **Rackham** in which it was indicated that it would be very hesitant in applying a pure **Wednesbury** approach if it appeared to the court that it would have been reasonable to have made the particular adjustment. I also note the passage in [50] of the same judgment in which the Tribunal indicated that in many if not most cases it is the disabled person who will be in the best position to describe the effects of the disability on them and what might be done to alleviate those effects.

29. In addition, whilst I do not to treat the guidance in **Heal** as being a mandatory framework within which such applications need to be assessed, nevertheless, they do suggest some important matters which do not appear to have been taken into account by the Employment Judge. In particular, and using the numbering taken from [27(e)] of **Heal** itself, at (ii), whether the disadvantage could be alleviated by other means, two suggestions were referred to by the Judge, namely the appellant taking a note of the submissions that he wished to make and HMCTS itself taking a recording. Neither of those two suggestions addressed the appellant's particular difficulty. He needed the recording in order to have something to refer to during the course of the hearing itself and in order to have something that he could look at in order to prepare his response to the respondent's submissions. It was clear that he himself would have difficulty in keeping a full note of the proceedings in order to decide on the reply to submissions made by the respondents and he had been unable to find a notetaker to take a note on his behalf.

30. At (iii), whether the recording would alleviate the disadvantage - it appears that the recording would, indeed, alleviate the disadvantage as it was specifically addressed to the problem which the appellant otherwise faced of trying to follow and respond to submissions made by the respondents.

31. At (iv), the risk that the recordings would be used for a prohibited purpose - there was no evidence of any risk in relation to this application. Any risk was minimal given, firstly, the fact that the hearing was limited to submissions by the parties, and, secondly, that the appellant had recorded proceedings in the past without incident.

32. At (v), the views of the other parties - the respondents apparently raised no objections or concerns in relation to the appellant's applications. In contrast to a contested medical issue arising as part of the proceedings, the recording of a hearing by the appellant does not create any obvious disadvantage to the respondents and is not treated as a finding against them. Rather, it is a measure intended to restore some equality of arms between the parties.

33. At (vi), whether there should be any specific directions or limitations on the use of the recording - clearly, the Judge did not consider this point at all. Had he done so, he could have made it clear to the appellant that he was prevented from using the recordings in any context other than the particular hearing himself and could not refer to the recordings after that hearing for any purpose.

34. At (vii), the means of the recording and whether this would cause any disruption - again, the Judge did not address this point. Had he done so, he would no doubt have concluded that it would not be difficult for the appellant to record the hearing as it was taking place on CVP and this, in turn, would not have caused any or any substantial disruption to the proceedings. It is right that there may have been some delay by way of additional breaks each day for the appellant to check the recording if he needed to do so but that could have been addressed by sensible case management.

35. In considering the context of an application for permission to record proceedings, it is worth reflecting on the fact that in the vast majority of such cases, it is unlikely to be an adversarial process and is highly unlikely to produce an outcome which is adverse or negative to a respondent. This, it seems to me, goes to the reasonableness of the adjustment sought. A disabled appellant, particularly one acting in person, is already likely to be at a substantial disadvantage in facing experienced lawyers

on the other side. If that disadvantage is compounded by his particular disability related difficulties in following the proceedings or responding to what has been said by a respondent, it seems to me that the threshold of reasonableness in terms of an adjustment to help alleviate that effect should not be set too high. The adjustment sought in this case was very unlikely to impact on the proceedings (save for the possibility of needing slightly longer breaks) but was likely to assist the appellant in resisting the respondents' strikeout application.

36. In those circumstances, it seems to me that the appellant must succeed on Grounds 2 and 3 as a set out in the notice of appeal. By failing to follow the guidance set out in **Heal**, the Employment Judge has failed to take account of factors material to the assessment of the appellant's applications. In addition, I also conclude, based on the observation in **Rackham**, that this was plainly an adjustment which should have been made and the Employment Judge's assessment is sufficiently erroneous that I am entitled to make the declaration sought, namely that the decision contained in the letter of 16 July 2022 was unlawful.

37. In those circumstances, it is not necessary for me to consider the third occasion on which the Employment Judge addressed the question of recording the proceedings which he did within the substantive reasons provided following the completion of the preliminary hearing. In those circumstances, I allow the appeal. I am prepared to make an order declaring that the decision of 16 July 2022 not to allow the appellant a reasonable adjustment of recording the proceedings was unlawful and I make no further order beyond that.