Neutral Citation Number: [2024] EAT 118

Case No: EA-2022-000525-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 July 2024

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MS HEIDI BENNETT	**Appellant**
- and -	
LONDON BOROUGH OF ISLINGTON	**Respondent**

- -
- -

Elaine Banton (appeared pro bono) for the **Appellant**
Nigel Porter (instructed by Chief Legal Officer LB Islington) for the **Respondent**

Hearing date: 31 May 2024

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

Postponement

On day one of a ten-day hearing the employment tribunal refused an application made on behalf of the claimant to postpone the hearing. The application was renewed on day two. It was refused on the basis that there had been no material change of circumstances since the previous day.

The tribunal erred because, in particular, (a) the application had been renewed in part on the basis of the claimant's representative's deteriorating ill health. Although the tribunal had decided the previous day that the hearing would continue, with adjustments for the representative, the representative had confirmed that he would not be representing because of his ill health, and there was medical evidence to support that stance; (b) the tribunal had failed to consider the full potential implications for the claimant, of the loss at this stage of her representative, in terms of her ability to represent herself, taking account of the evidence of her mental health disability. That went beyond the issue of whether she could give evidence without a witness statement, which had been the focus of consideration the previous day; and (c) the tribunal failed to consider the option of a short postponement to allow the claimant to obtain further medical evidence about her own ability to represent herself. That would have been a viable option in this case in particular given the length of the listing.

HIS HONOUR JUDGE AUERBACH:

Introduction and Background

1. I will refer to the parties as they were in the employment tribunal, as claimant and respondent. This is the claimant's appeal against a decision declining to postpone the full merits hearing of her claims. I will start with an overview of the relevant litigation history.

2. The claimant was employed by the respondent from 2005. At the time of her dismissal she was a Senior Business Support Officer in the Digital Services Business Support Team. On 19 June 2019 she was dismissed on the given ground of capability. Her internal appeal was unsuccessful.

3. The claimant presented three claims to the employment tribunal (before and then after her dismissal and then the appeal outcome) raising complaints of unfair dismissal and disability discrimination. She was represented by Mr Daniel Ibekwe, a volunteer casework co-ordinator with Brighton & Hove Race Project, a charity. The respondent was represented by its legal department.

4. At a hearing on 15 March 2021 the matter was listed for a ten-day full merits hearing from Monday 14 March 2022 and directions were given. These included service of the final bundle on 29 November 2021 and exchange of witness statements on 17 January 2022. The claimant's claimed disabilities were identified as PTSD, which was, as such, admitted, and dyspraxia. The list of issues set out that there were multiple complaints of discrimination contrary to sections 13, 15, 21, 26 and 27 **Equality Act 2010**, detrimental treatment on the ground of having made protected disclosures, ordinary unfair dismissal and unfair dismissal by reason of the claimant having made protected disclosures or asserted statutory rights.

5. Revised orders were made by EJ Bedeau on 25 January 2022. These now required the

final bundle to be served by 31 January 2022 and witness statements to be exchanged by 28 February 2022.

6. On Friday 18 February 2022 Mr Ibekwe applied for the forthcoming full merits hearing to be postponed. In an email of 24 February 2022 the respondent's representative resisted that application. That application was refused by an order of EJ Quill sent on Monday 7 March 2022. The parties were now ordered to exchange witness statements, if not yet done, by 4pm on 9 March 2022.

7. Mr Ibekwe renewed the postponement application that same day, 7 March 2022. The respondent served its witness statements at the appointed time on 9 March. Mr Ibekwe indicated that the claimant was not in a position to do so. On 10 March the second postponement application was refused by EJ Hyams on the basis that there had been no material change in circumstances.

8. On Friday 11 March 2022 by an email sent at 14.37 Mr Ibekwe applied again for a postponement. The respondent emailed opposing that third application. EJ Quill directed that any application to postpone should be made at the start of the hearing and supported by evidence.

9. The hearing opened on 14 March 2022 before EJ Quill, Mr Sutton and Mr Wharton. A solicitor, Mr C Ezike, appeared for the claimant, specifically to argue the postponement application. The claimant and Mr Ibekwe were also present. Mr Porter of counsel appeared for the respondent. He opposed the application. Starting at about 12.50 pm the tribunal gave an oral decision refusing to postpone the hearing. It indicated that the hearing would resume the next day at 2pm. A written decision was sent at about 7.47 am on 15 March 2022. That was the third postponement decision.

10. A little earlier, at 6.54 am that same day, 15 March 2022, the application for a postponement was renewed by way of an email from Brighton & Hove Race Project which attached a letter from Brighton & Have Race Project and one from the claimant. That was the fourth application.

11. Neither the claimant nor any representative attended for her when the hearing got under way that afternoon. Mr Ibekwe was contacted and explained that the email that morning had been intended to convey that neither he nor the claimant would be attending. The tribunal decided that, subject to any comments from the respondent, it would not postpone, but nor would it dismiss the claim. It would proceed with the hearing. Mr Porter indicated that he had no comments on the correspondence and the tribunal then proceed to give oral reasons for its decision. The written decision was sent to the parties on 16 March 2022. That was the fourth postponement decision.

12. The tribunal proceeded to hear the matter in the absence of the claimant or any representative for her. It issued judgment dismissing the claims on 18 March 2022 and subsequently provided written reasons for that decision in August 2022.

13. A notice of appeal was presented by Mr Ezike's firm on the claimant's behalf appealing against both the third and fourth postponement decisions, being those taken by the full tribunal on 14 and 15 March and sent in writing respectively on 15 and 16 March 2022.

14. Both appeals were considered on paper not to be arguable. At a rule 3(10) hearing on 23 May 2023, at which the claimant was represented by Mr Ezike, HHJ James Tayler dismissed the appeal against the third postponement decision. He directed ground 2, paragraphs 15 to 22, and ground 4, only, of the appeal against the fourth postponement decision to proceed to a full appeal hearing.

15. There has also been a further appeal against the tribunal's substantive decision dismissing the claim. In July 2023 that appeal was stayed by me pending the outcome of the present appeal.

16. The appeal that I heard is accordingly solely against the fourth and final decision refusing to postpone the full merits hearing. Since the rule 3(10) hearing the claimant's then solicitors have ceased to act. Ms Banton of counsel appeared for the claimant before me by direct access and on a pro bono basis. Mr Porter of counsel appeared for the respondent, as he did in the tribunal.

The Tribunal's Decision

17. I need to say more about the third postponement application and decision, and then the fourth application, before considering the fourth decision itself in more detail.

18. In the third postponement application Mr Ibekwe sought an adjournment pursuant to rules 29 and 30A. He wrote that because of the respondent's failure to comply with directions relating to the bundle, the claimant had been unable to prepare her witness statement. He referred to her suffering from PTSD, Depression, Anxiety and Dyspraxia, and to a psychiatrist's report in that regard. He referred to his own diagnosis with kidney stones and wrote that he was awaiting an operation in April or May. He wrote that he was in constant pain and unable effectively to assist the claimant for the hearing, and he referred to a medical report. He submitted that the claimant "would be placed under increased pressure to consider all the evidence from the Respondent." She could not afford paid representation. He cited **Teinaz v Wandsworth LBC** [2002] EWCA Civ 1040; [2002] ICR 1471.

19. In its decision on that third application the tribunal referred to the report of Dr Ojo, Consultant Psychiatrist, relating to the claimant, of 22 March 2021. This referred to PTSD, in

respect of which the respondent admitted that the claimant was a disabled person. There was also what the tribunal said was a disputed issue in relation to dyspraxia. The report also referred to the claimant having had a dyslexia assessment. Her status in that respect was disputed by the respondent, but the tribunal said that for the purposes of its present decision it would assume that she also had dyslexia.

20. The tribunal accepted that it had been planned that Mr Ibekwe would represent the claimant at the hearing. Mr Ezike had appeared on day one only to argue the postponement application.

21. The tribunal traced the relevant litigation history. It noted that at the March 2021 hearing the judge had given timetabled directions leading to the requirement for an agreed bundle by 29 November 2021. As of 6 December the parties had exchanged lists, but not copy documents. The respondent's representative had tabled a draft bundle index. Mr Ibekwe had indicated that he was content with it provided that certain documents were added. In subsequent correspondence the respondent's representative declined to send a draft bundle until certain copy documents were supplied to it. Following further exchanges both parties had made applications to the tribunal leading to further orders made by EJ Bedeau on 25 January 2022. These required the claimant to send her documents in good time so that the respondent could then serve the bundle by 31 January 2022. Witness statements were then to be exchanged by 28 February 2022.

22. The tribunal commented on the first postponement application of 18 February 2022. The application said that the claimant's side had done their utmost to prepare for the hearing and to ensure that the bundle was ready, but did not feel the hearing could proceed. It referred to the claimant being "fragile". The tribunal interposed that while it was conceded that she had PTSD there had been no specific medical evidence that she could not attend the forthcoming

hearing or produce a witness statement for it. That first application had referred at one point to matters not having been helped by Mr Ibekwe's own health issue; but the tribunal considered that this had only been mentioned in passing, and that his own ill health was not *at that point* the basis for the 18 February application.

23. The tribunal noted that that first application had been refused by EJ Quill on 7 March 2022. It also noted that in fact the draft bundle had been sent by the respondent on 17 January, and, by the time of the decision on 7 March, the final bundle had also been sent electronically on 22 February and in hard copy on 23 February. The tribunal noted that EJ Quill's order was for exchange of witness statements on 9 March, with which the respondent, but not the claimant, had then complied. The second postponement application, made that week, had been refused by EJ Hyams on the basis that there had been no new information supplied.

24. The tribunal then turned to the third application itself, of 11 March 2022, being the one that it was presently deciding on 14 March. The tribunal noted that, in relation to Mr Ibekwe's health, it had before it a discharge summary showing an emergency admission to hospital on 1 February and discharge on 3 February. There was also a GP's letter dated 3 March. This included:

> **"This is a letter to confirm that Daniel has been unwell for the last few months, and continues to be under investigation and medical support for this. For the foreseeable future, it would not be medically sensible for him to be put under any unnecessary stress or burden. I therefore support his decision to continue working as he is able, but to abstain from attending tribunals, which I believe would not be wise in his medical condition. I would be grateful for your understanding and compassion in this matter."**

25. The tribunal commented;

> **"So we note that it refers to "for the foreseeable future". It does not mention a procedure planned for next few months. It makes clear that Mr Ibekwe is not considered unfit to work in general terms, but states that the GP supports Mr Ibekwe's decision to continue working as he is able, while abstaining from attending tribunals."**

26. The tribunal noted that in oral argument Mr Ezike had indicated that the claimant would need at least until May to prepare a witness statement, and, when the tribunal asked, he did not request permission for her to give evidence instead orally, by means of relying on documents in the bundle, or otherwise. The tribunal noted that the various particulars of claim each contained a fair amount of detail, and there was a further document submitted by the claimant on 25 January 2021 which contained detailed further and better particulars in relation to her claim. The tribunal had ascertained that, were it to postpone, the earliest that a ten-day hearing could be relisted was June 2023.

27. The tribunal reviewed points emerging from a number of authorities: **Teinaz**, **Andreou v Lord Chancellor's Department** [2002] EWCA Civ 1192; [2002] IRLR 728; **Mukoro v Independent Workers' Union of Great Britain**, UKEAT/0128/19/BA; **Phelan v Richardson Rogers Limited** [2021] ICR 1164 (EAT); **Khan v BP plc** EA-2021-261, 12 February 2021.

28. The tribunal set out its analysis and conclusions, in summary, as follows.

29. First, the tribunal considered that the claimant had not needed to wait until 17 January 2022 (when the draft bundle had been served) to start to prepare her own witness statement. She already had enough information and documents to do a good deal of work on it before then. Had she done so, there would have been more than enough time to finalise the statement following receipt of the draft bundle. On 17 January Mr Ibekwe had actually suggested exchange of statements on 15 February. EJ Bedeau had apparently not seen that, and allowed longer. The witness statement had still not been done as of 14 March. In all the circumstances the tribunal was not persuaded that the claimant's own health or dyslexia or PTSD had denied her the opportunity to prepare for the hearing.

30. The tribunal was also not persuaded that she was not well enough to participate in the hearing. She had in fact attended that day. While the tribunal was told that there had not been enough time to get a GP's letter for her, any such letter, said the tribunal, would have commented on why it was said that preparing a witness statement was difficult for her to do, rather than saying that she was unwell.

31. As to Mr Ibekwe's health, the tribunal had taken account of the 3 March GP's letter, but also of what he himself had written on 18 February. He had attended that day (14 March), although he was not acting as a representative. The tribunal was not satisfied that he was unable to play any part in the hearing. Noting that he was not said to be unfit for work, but that he should avoid unnecessary stress or burden, the tribunal was satisfied that his ability to participate could be managed by making adjustments to the hearing times. It outlined a proposed timetable beginning with a 2pm start the next day and two 45-minute hearing sessions, with later starts and shorter sessions than usual for the remainder of the week. The tribunal was also open to applications for participation by video.

32. I turn, then, to the fourth application and the decision upon it.

33. On 15 March 2022 at 6.54 an email was sent to the tribunal by another volunteer at Brighton & Hove Race Project on behalf of Mr Ibekwe and attaching two letters.

34. The first letter, from Brighton & Hove Race Project, included the following:

> **"Please note that Mr Ibekwe whom is unwell with a potentially serious sickness will not take any part in the proceedings if it were to proceed, and will comply with medical advice. Mr Ibekwe had taken the bold but potentially irresponsible decision to flout the medical advice imposed upon him, so much as to ensure that he afforded the Employment Tribunal due respect. The same goes for the Claimant whom despite her serious condition and disability, extended and afforded to the Employment the same courtesy and respect, and her personal correspondence to the Tribunal is attached."**

35. The second letter, from the claimant, dated 14 March, referred first to the history regarding the bundle, stating that the electronic copy was unsuitable because of her dyslexia. With Mr Ibekwe falling ill she was not able to obtain the necessary assistance to help her complete her statement, which would involve reacquainting herself with the documents. She added:

> **"I will also have to respond to the points which are raised by the documents and challenge any part of it which I consider needed challenging. Most importantly, I will require to set out my case in order to answer the issues which the Tribunal will be considering, as well as to address the legal points.**
>
> **All of these tasks require assistance from my representative whom was unfortunately unwell and was therefore unable to help or assist me. There is no other person at the Race Project whom deals with or is experienced in employment law and employment matters other than Mr Ibekwe. I could not up and go to find another representative at that very stage of the case. I could not afford to pay legal fees, because I cannot simply afford it full stop. To also up and go about finding a different representative at that very late stage of proceedings is also an extremely daunting task. I am a lay person whom also has anxiety issues and depression. I would not know how to go about it in my lay capacity, and I was already too stressed by the time that I cannot be expected to coordinate such a complex exercise. It would simply have been too much for me."**

36. Further on she wrote:

> "**Now that the Tribunal has again rejected my postponement application, I cannot do anything else. I have not prepared or completed my witness statement. I will not want to prepare a statement in my lay mind and thinking that is supposed to address and also deal with the issues and especially legal points which the Employment Tribunal are supposed to be dealing with or determining. The case is complex and is beyond what an ordinary person or individual can handle, without requiring legal help and assistance. This is what I need or needed my representative Mr Ibekwe for. Unfortunately he himself is or was not well to be able to assist. Look at the Respondent whom themselves are paying for a very experienced Barrister. And this is with all the fact that they already have in-house legal department."**

37. She continued that without a witness statement she would be unable to participate in the hearing. Further on she said that she could not take part in the hearing. "It will effectively be an unfair hearing. I will be expected to sit there and take everything that is thrown at me, but I am not able to respond."

38. In its decision the tribunal, after tracing the events since its decision the day before, said this:

> "**3.9 The tribunal considered both items and neither of them provide a reason for the tribunal to change its decision from yesterday, which was that the postponement application was refused and that the hearing would continue.**
>
> **3.9.1 The claimant's letter makes comments about being unable to prepare her statement because of the lateness with which she received the hard copy (as opposed to the electronic copy) of the documents making up bundle. She said it was collected on 28 February 2022 and we take that into account. What she says in the letter does not address the substance of what we said yesterday, which, amongst other things, was that the drafting of the claimant's statement could have commenced a long time in advance of the draft bundle on 17 January 2022, because she could do so based on the documents that were already in her possession. She has not addressed that in her letter; she has not made any comments in her letter about which relevant documents she did not possess (and why) or why she could not use the hard copies of those documents already in her possession (from during and after her employment) to start work on her statement. As we said yesterday, had that been done it would have been potentially straightforward (or, at least, comparatively easier) to just complete the statement and add page references once the bundle was received. That is so even if she needed to wait until 28 February to do that. She had until 9 March to do that, based on EJ Quill's orders of 7 March 2022. As we said yesterday, the Claimant had not even done a statement by yesterday 14 March (2 weeks after the hard copy, and 8 weeks after the electronic draft version) in support of an application for admission of a late statement. In fact, we were expressly told that there was no such application being made.**
>
> **3.9.2 Furthermore, and in any event, the Claimant and her solicitor (Mr Ezike) were reminded that she could make an application to give witness evidence without reliance on a written statement (by reference to items in the bundle or otherwise) and she expressly declined to make such an application.**
>
> **3.9.3 In relation to Mr Ibekwe's health, one slight difference between today and yesterday is that he was here yesterday and he is not here today. We commented on his GP's letter of 3 March 2022 yesterday. His GP's letter refers to avoiding unnecessary stress or burden and to the fact that the GP supports Mr Ibekwe's decision to work and to abstain from conducting employment tribunal cases. The letter does not say that he is unfit to work or that he was not fit to assist in the preparation of the witness statement. It does not say that he would have been unable to participate with the adjustments to the timetable which we would accommodate. Furthermore, Mr Ibekwe's own comments about the reasons for not attending are based on pain, rather than the matters mentioned by the GP. The medical evidence does not say that, due to pain, he could not participate."**

The Grounds of Appeal

39. As I have explained, there was a single notice of appeal challenging both the third and

fourth postponement decisions. There was a single grounds of appeal document. The grounds that are live before me, in relation to the fourth decision, are part of ground 2, at paragraphs 15 – 22, and the whole of ground 4, which was paragraphs 34 – 40 of the document. The text of these is as follows:

> "**15. The Employment Tribunal erred in failing to take into account relevant considerations when arriving at its decision.**
>
> **16. The Tribunal failed to consider the impossibility of obtaining alternative representation at such short notice for the hearing. At [Para 3.45] the EJ noted that the Claimant instructed a solicitor to attend the hearing on 14th March 2022 but also noted at [Para 3.4] that the solicitor was only instructed for the postponement application.**
>
> **17. The Tribunal erred in failing to take into account the fact that it would be impossible to find alternative representation to prepare for a 10-day hearing with a bundle of over 200 pages.**
>
> **18. There is a need to ensure a level playing field and the failure to take this into account meant that the claimant was severely at a disadvantage with the refusal to postpone the hearing.**
>
> **19. The prejudice of a refusal of postponement would cause the claimant meant that it would be impossible for a fair trial to be conducted. The Claimant had been unable to produce a witness statement with reasons for the same provided.**
>
> **20. Whilst the Tribunal noted that the claimant had been involved in the preparation of the particulars of claim [Para 3.40], this was done with the help of her chosen representative who had taken ill. [Para 3.4 & 3.24].**
>
> **21. The claimant would not have been able to prepare her witness statement without assistance as a result of her disability. The assistance would have been in the form of help from her chosen representative who was unwell. In addition, the preparation of the witness statement would have required reference to the bundle which the claimant had not received. The Respondent had only provided a list of documents intended to be in the bundle without the documents themselves. The Respondent subsequently provided an electronic copy of the bundle but failed to provide the hard copy bundle. The Claimant required the hard copy so as to enable her be in a position to prepare her statement.**
>
> **22. The Tribunal failed to take the above matters into account which is submitted are all relevant.**
>
> **… …**
>
> **34. The Tribunal erred in its application of the relevant authority relating to application for postponement of hearings.**
>
> **35. The Tribunal rightly referred to Teinaz v LB, but erred in its application. [para 3.30] For instance the Tribunal did not consider the possibility of a short**

> **adjournment for obtaining medical opinion of some kind despite being aware of the Claimants ongoing long-term medical issues.**
>
> **36. "Whilst 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 for the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment." Peter Gibson LJ (at para 20) Teinaz v London Borough of Wandsworth [2002]] EWCA Civ 1040.**
>
> **37. In this instance, the refusal to postpone the hearing meant that the Claimant was unable to participate in the hearing and as such she has been unable to present her case. The claimant was unable to attend and participate and the claim proceeded in her absence and subsequently dismissed.**
>
> **38. In addition, the Tribunal rightly referred to Khan v BP Plc [para 3.35] but erred in its application.**
>
> **39. The claimant had properly instructed a representative in good time for the hearing but through no fault of her own and due to an unfortunate occurrence, found that he representative was unavailable.**
>
> **40. Due to the nature of the complexities of the issues, it would have been impossible to instruct an alternative representative to get the case up and ready."**

The Law and the Arguments

40. A decision on an application to postpone a hearing involves the exercise of case-management powers under rule 29 **Employment Tribunals Rules of Procedure 2013**. Rule 30A relates specifically to applications to postpone a hearing. It provides, at 30A(2), that such an application made less than seven days before the start of the hearing may only be granted where all parties consent (further subject as provided), the application was necessitated by the act or omission or another party or the tribunal, or "there are exceptional circumstances." Rule 30A(4) provides that exceptional circumstances "may include ill health relating to an existing long term health condition or disability."

41. Presidential Guidance on postponement applications was issued in 2013. Pursuant to rule 7, tribunals must have regard to it, but are not bound by it. It includes provision that, where a postponement is sought on medical grounds, supporting medical evidence should include a

statement from a medical practitioner that in their opinion the applicant is unfit to attend the hearing. Where a representative has withdrawn, information should be given as to why, and whether alternative representation has been, or is being, sought.

42. Pursuant to rule 47, where a party fails to attend or be represented at a hearing the tribunal may dismiss the claim or proceed with the hearing in their absence; but, before doing so, it should consider any information about the reasons for their absence.

43. It is well-established that an appellate court can only interfere with a case management decision if it involved a misdirection of law, failed to take into account relevant factors, took into account irrelevant factors or was plainly wrong in the sense of being outside the generous ambit where reasonable decision-makers may disagree.

44. There is an established body of authority concerning applications for postponement, including in particular on grounds of ill health. Some of the main principles emerging from these authorities have been recently summarised by Eady P in **Hall v Transport for London** [2024] ICR 788 at [31]:

> **"Whether thus considering an application for a postponement due to ill health as an exceptional circumstance under rule 30A, or under the ET's general case management powers under rule 29, the following principles may be discerned from the case-law:**
>
> **(1) The exercise of a discretion to grant an adjournment is one with which an appellate body should be slow to interfere, and can only interfere with on limited, or "Wednesbury" (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223 CA) grounds (Teinaz v London Borough of Wandsworth [2002] ICR 1471 CA, paragraph 20; O'Cathail v. Transport for London [2012] ICR 614 CA, paragraph 11; Phelan v Richardson Rogers Ltd [2021] ICR 1164 EAT, paragraphs 73-74).**
>
> **(2) Where the application is to postpone a trial or other hearing, the outcome of which may dispose of the claim, or some other substantive issue in the case, the applicant's article 6 rights under the European Convention of Human Rights ("ECHR") and common rights to a fair trial will be engaged; thus, while an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice, and an applicant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of their own, will usually have to be granted an adjournment;**

> **(Teinaz, paragraphs 20-21; Phelan paragraph 75).**
>
> **(3) Article 6 ECHR and common law rights to a fair trial do not, however, 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 the hearing would take place in the applicant's absence; the ET has to balance the adverse consequences for the applicant with the rights of the other party to have a trial within a reasonable time, and the public interest in prompt and efficient adjudication of cases in the ET (O'Cathail, paragraph 47; Phelan paragraph 76).**
>
> **(4) In any event, the ET is entitled to be satisfied that the inability of the applicant to be present is genuine, and the onus is on the applicant to prove the need for such an adjournment; if there are doubts about medical evidence, the ET has a discretion whether or not to give a direction allowing such doubts to be resolved, which may include directing that further evidence be provided promptly, although it is not necessarily an error of law to fail to take such steps (Teinaz, paragraphs 21-22).**
>
> **(5) Fairness to other litigants may require that if an applicant has not adequately taken the opportunity to justify a postponement that indulgence is not extended (Andreou v Lord Chancellor's Department** [2002] IRLR 728 **CA, paragraph 46).”**

45. I was also referred to **Bilta (UK) Limited v Tradition Financial Services Ltd** [2021] EWCA Civ 221, but I do not think the discussion there adds any materially different or additional points.

46. In summary, the main points made on each side were as follows.

47. Ms Banton submitted that the tribunal had failed to give proper or sufficient consideration to the fact that the issue was not, or not any longer, simply about the claimant’s witness statement. It was about whether she could fairly represent herself in circumstances where, through no fault of hers, Mr Ibekwe, because of his ill health, would not now be representing her. This was not a small case. It was a claim by someone who had been dismissed after 14 years’ service, listed for ten days. The complaints and issues in the case were complex and the body of evidence was substantial. The tribunal had failed properly to consider the impact of the claimant’s undisputed disability on her ability to represent herself. Ms Banton referred to the guidance in the *Equal Treatment Bench Book* regarding the position of litigants

in person with disabilities, including dyslexia and dyspraxia.

48. In relation to ground 4 Ms Banton submitted, relying particularly on **Teinaz**, that this was a case where, if it was not persuaded immediately to postpone the hearing outright, the tribunal had at the very least erred by not allowing a short postponement to enable the claimant to obtain further medical evidence relating to her ability to represent herself. Dr Ojo's report, combined with the claimant's letter, clearly showed that there was a genuine and serious issue to be considered. This was a case where, as in **Iqbal v Metropolitan Police Service**, UKEAT/0186/12, 7 September 2012, the tribunal erred by not, at least, taking that step. No reasonable tribunal would have failed to do so.

49. Mr Porter made the preliminary point that the grounds of appeal were originally presented as one set of grounds in relation to both the third and fourth decisions, and he submitted that passages in them seemed to be more directed at the third than the fourth decision. However, they had only been permitted to proceed in relation to the fourth decision.

50. However, he also submitted that the third decision provided relevant context for the fourth decision in two ways. First, it contained a full and correct self-direction as to the key pertinent points emerging from the authorities, which the tribunal could be assumed to have had in mind when making the fourth decision only the next day. Secondly, the findings made in the third decision (in respect of which the appeal had been dismissed at the rule 3(10) hearing) formed the starting point when the tribunal came to consider the fourth application. The tribunal, he submitted, had properly concluded that neither of the two letters emailed that morning gave any good reason to revisit the third decision. In particular, there had been no suggestion of a material change in Mr Ibekwe's health, and the points made by the claimant about her witness statement had all been made, and considered, the day before.

51. Mr Porter also submitted that the tribunal had not erred by failing to consider, or direct, a short adjournment to allow the claimant to obtain further medical evidence. He made two particular points. Firstly, the tribunal did not err by taking the approach that the issue that she had raised in her letter was specifically about her witness statement, not about her ability to represent herself at the hearing generally. That was certainly an entirely permissible reading of her letter. In its third decision the tribunal had also noted that any GP letter would only have addressed the witness-statement issue.

52. Secondly, the tribunal had already found that it was not persuaded that, because of his ill health, Mr Ibekwe could not represent the claimant. It had decided that, with adjustments, he could do so. This was a case where the tribunal was therefore entitled to proceed on the basis that, following its third decision, both Mr Ibekwe and indeed the claimant had then simply chosen not to attend. This was a material point of distinction from a case like **Khan v BP Plc**. It could not be right that any litigant whose representative withdrew at a late stage for any reason at all could then obtain a postponement. Such a litigant also had the option of recourse against the representative.

53. Mr Porter stressed the limited basis on which the EAT could intervene, and that this was a case where, pursuant to rule 30A, there had to have been an exceptional reason for postponing. The tribunal had not erred by failing to conclude that there was.

54. Ms Banton, in reply, stressed that this was a case which involved *both* the loss of a representative through no fault of the claimant, when it was too late to get another, *and* the claimant having evidenced serious mental disability. The evidence was also that Mr Ibekwe's absence was genuinely health-related, because of the serious pain caused by the kidney stones problem getting worse; and he was now following his doctor's advice, which he had not previously done. These circumstances *were* exceptional, and in any event the decision was

Wednesbury unreasonable. In any event this combination of factors made the case for at least a short adjournment unanswerable.

Discussion and Conclusions

55. First, I agree with Mr Porter that, in light of the summary of the law given in the third decision, I can be confident that the tribunal had a good appreciation of the relevant principles when it took the fourth decision. The issue, however, is whether it erred in the way that it applied, or failed to apply them, in the circumstances as they now stood when it took that decision, on day two of the hearing.

56. Secondly, I agree with Mr Porter that the decision on the fourth application must be considered on the basis that the tribunal properly took as its starting point the decision which it had reached the day before – and which has not been successfully challenged on appeal – and therefore that the focus must be on whether there had been a material change in circumstances. This focus was indeed captured by HHJ James Tayler when he explained why, although he had not permitted the challenge to the third decision to proceed, he did permit this challenge to proceed, on limited grounds.

57. In his written decision, at [21], HHJ James Tayler wrote:

> "**I consider there are limited arguable grounds in respect of that second decision in that, by the time the second decision was taken, Mr Ibekwe had made it clear that he would not attend the hearing. Accordingly, in those circumstances, if the matter was to proceed, the claimant would have to represent herself. I consider it is sufficiently arguable to proceed to a Full Hearing that there was a failure to take into account the difficulties that would face the claimant in representing herself were the appeal to proceed, at paragraphs 15 through to 22 of ground 2. In respect of ground 4 there is an arguable issue in respect of the approach adopted to the authorities in circumstances in which the claimant would have to represent herself and whether sufficient consideration was given to her ability to do so including the possibility that there be a brief adjournment to obtain more medical evidence dealing specifically with the question of her ability to represent herself in the absence of a representative.**"

58. When the tribunal came to take its fourth decision there was no difference in terms of the medical evidence relating to Mr Ibekwe. But there *was* a difference relating to his involvement. The day before, as the tribunal put it in its third decision: "Like the Claimant, he attended today, albeit he was not acting as representative." When it gave its third decision, it considered that he ought to be able to participate with the adjustments to hearing arrangements that it had proposed that day. Now it had been told in the letter received that morning that he would *not* take any part in the proceedings if they were to proceed, and this had been confirmed in a phone call.

59. In its decision the previous day the tribunal had not considered whether the claimant could fairly be expected to represent herself, because it had come to the conclusion at that point that she could continue to be represented by Mr Ibekwe, with the adjustments it had outlined. Now, the confirmation that Mr Ibekwe would certainly not be representing her required the tribunal to consider the question of whether the claimant could fairly represent herself.

60. I do not agree with Mr Porter that the tribunal did not need to consider this question, on the footing that the claimant had not herself raised it in her letter, but had only raised (again) the issue of whether she could be expected to produce (or have produced) a witness statement. I do not consider that to have been a realistic reading of her position, or of the situation as it presented itself to the tribunal at that point. That is for the following reasons.

61. Firstly, it was, to repeat, a fact that, if the hearing went ahead, the claimant would not just have to give evidence, but would now have to represent herself, in all respects, including cross-examination of the respondent's witnesses, written and oral submissions, addressing issues of law, and so forth. This was also a substantial final hearing in respect of which the list of complaints and issues under the various legal heads, including of disability discrimination, ran to ten pages.

62. Secondly, the tribunal had before it a consultant psychiatrist's report from Dr Ojo, written with the benefit of sight of medical records, and having assessed the claimant. This gave a formal diagnosis of PTSD in addition to depression, anxiety and dyspraxia, supported by a case history. This raised, at least, on any view, sufficient cause for concern that this claimant would face significant difficulties in representing herself over and above those that would be faced by a non-disabled litigant-in-person, particularly having lost her representative at the very start of the hearing.

63. Thirdly, I do not think it a fair or realistic reading of the communications that the tribunal had received, that the claimant herself was only raising a concern about the issue of her witness statement. Although significant parts of her letter went over the issues about the bundle and the production of her witness statement, the letter as a whole, including the passages I have cited, conveyed that she was saying that she was not able to carry out the range of tasks that would have been carried out by Mr Ibekwe, or another professional representative, had it been possible to get one, and that would now fall on her; and that, for that reason, she could not take part in the hearing if it went ahead.

64. I also observe that some of the claimant's references in that letter to her witness statement also contain at least hints that she maybe did not fully appreciate the distinction between matters of evidence to be covered in a witness statement, and matters of submission and argument, to be covered in a skeleton or oral presentation, and was in substance referring to both. Be that as it may, I do not think it was an adequate reading of the letter, or the situation, to treat the only issue as being – or being still – about her witness statement or what might stand in its place as her evidence in chief.

65. Nor do I agree that it is a sufficient answer to say that, because the tribunal had

concluded the previous day that Mr Ibekwe was not too ill to represent at all, and, with the adjustments proposed, could have done so, *therefore* the tribunal did not need on day two to further investigate the position in relation to the claimant's ability to represent herself, because it took the view that Mr Ibekwe had effectively now chosen not to come to the hearing. That is for two reasons.

66. Firstly, there are no automatic rules about the circumstances in which a party whose representative withdraws at a stage when it is too late for them to get other professional representation at a full merits hearing should or should not be granted a postponement. These matters turn on all the relevant circumstances of the given case. In the present case, on any view the claimant found herself without representation at a stage when, realistically, because of the cost, the work and the time commitment involved, she was not going to be able to arrange other professional representation, certainly without a postponement of the hearing dates. The tribunal therefore needed to consider the reason why this had happened, the implications of this for her, and all the other relevant circumstances. The fact that the tribunal was not persuaded that Mr Ibekwe was not well enough to represent, did not absolve it from considering the implications of his departure for the claimant.

67. Secondly, on any view the tribunal had medical evidence that Mr Ibekwe had a serious, ongoing medical problem of kidney stones, which he said was causing him debilitating pain, and an overall picture which would at least be consistent with that condition having got steadily worse in the weeks since mid-January, when it was first alluded to in the first postponement application. In my view that made it incumbent on the tribunal to pause for careful reflection as to the significance of what had been written that morning by Brighton & Hove Race Project, and of the fact that he did not come, notwithstanding the tribunal's proposal of adjustments that it had thought would be sufficient.

68. In particular, I do not think it was sufficient to say that his GP's letter had not indicated that he could not participate with the adjustments suggested by the tribunal, nor to rely on the fact that he had attended the tribunal hearing the previous day, and that what it called the "slight" difference was that he had not come on day two. I say that having regard to the fact that Mr Ibekwe had not represented the previous day, and another lawyer had specifically attended to do that, and that the adjustments had only been put forward by the tribunal the previous day, and that the GP's advice to Mr Ibekwe, which it was stated he was now belatedly following, had been not to attend the tribunal.

69. I have borne fully in mind that, as I myself concluded in **Phelan**, after an exhaustive review of the authorities, the EAT can only intervene on *Wednesbury* grounds (or if the tribunal has made a principled error of law, or taken into account irrelevant, or not considered relevant, factors). However, in the context of a decision of this type, two further particular considerations are significant.

70. First, true it is that, even where a party is plainly unfit to participate in a trial, that is not *bound* to lead to a postponement. The implications of granting a postponement for the other party's rights must also be weighed, and the likely delay before the hearing could be relisted is also a relevant consideration. However, as discussed in **Andreou**, where the refusal of a postponement made by an applicant who is (or may be) unfit to participate in a hearing may effectively determine their complaints, their right to a fair trial will be engaged, and proper weight must be given to the serious implications for them of refusing the application in such a case.

71. Secondly, and importantly, the option did present itself in this case, of allowing a short adjournment to enable the claimant to get further medical evidence – the scenario discussed in

Iqbal. In the present case the tribunal did not have to take an immediate all-or-nothing decision. The matter was listed for ten days. Mr Porter acknowledged in oral argument before me that a short adjournment would not have been a practical impossibility. I do not agree that it was sufficient that the tribunal had, the day before, considered the fact that the claimant had not had enough time to get a letter from her GP, but had concluded that any such report would only have addressed the witness-statement issue. The wider issue now, a day later, was one of her ability to represent herself at the hearing.

72. Nor is it an answer that the Dr Ojo report did not address that issue. Although it had been obtained by Mr Ibekwe for the purposes of this litigation, it had been obtained a year before, at a time when he was representing her, and it was expected that he would do so at trial, and for the purpose of addressing other issues. Further, the existence and contents of that report itself gave reason to suppose that the claimant's PTSD could affect her ability to represent herself, and that it was possible that, in a short adjournment, further clinical advice directed specifically to *that* issue could be obtained.

73. The tribunal did not consider and reject this option because it regarded it as impracticable in this case. It did not mention this option in its decision at all. Given what it did say in this decision, it would appear that it either did not consider this option, or did not pursue it, because it considered that the only issue that was live was about the claimant's witness statement and evidence (in relation to which, as such, the position had not materially changed since the day before) and/or because it considered that there had been no material change in relation to the position relating to Mr Ibekwe.

74. For all of these reasons I consider that the tribunal erred by failing to take into account (a) that, notwithstanding that it had proposed to proceed with some adjustments to hearing arrangements, Mr Ibekwe had confirmed that he would not be representing the claimant; (b)

that there was medical evidence that supported his stance that this was genuinely because of a worsening medical condition; (c) the fact that the issue now facing the claimant related not merely to her ability to produce a witness statement, but to her ability to represent herself, in circumstances where she had an undisputed mental health disability; and (d) the length of hearing allowed for the possibility of a short adjournment to allow her to obtain further medical evidence in those changed circumstances.

75. All of that being so, I do not consider that rule 30A(2) would have precluded the tribunal granting this application on the basis of exceptional circumstances, and I consider that the tribunal erred by not, at least, granting a short postponement to enable further medical evidence to be obtained. Bearing in mind the practical implications for the claimant of proceeding in her absence, and the impact on her Article 6 rights, and notwithstanding the potential delay before a postponed hearing might take place, no tribunal acting reasonably would have taken the view that there had been no material change in circumstances, and refused the postponement application outright.

76. The appeal therefore succeeds.

Next Steps

77. The claimant did in fact obtain a further medical report dated 15 March 2022, which was in my bundle. Ms Banton explained, on instructions, that this was produced when she obtained and attended an emergency appointment that evening. The author, Dr Garwood, identified that he is a Mental Health Act approved doctor, gave some background relating to the claimant's mental ill health, and stated that she was unfit to attend the tribunal from 14 – 25 March 2022.

78. That report was not before the tribunal when it took the fourth decision, and so has not

been relevant to the merits of this appeal. But in any event, in discussion Mr Porter acknowledged that, in practice, if I allowed this appeal, on whatever basis, the practical consequence would be that the matter would now have to return to the tribunal for a fresh trial. As the same tribunal which refused this postponement application went on to determine the claims on their merits, both counsel agreed that, in that event, that fresh trial should be before a differently constituted tribunal. I will so order.