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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM A DECISION OF AN INDUSTRIAL TRIBUNAL

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CATHERINE EDGAR

Appellant;

v

MacNAUGHTON BLAIR LTD
AND
STEVEN WHYTE

_____ **Respondents.**

The Appellant appeared as a Litigant in Person
Mr Neil Phillips (instructed by Worthington's Solicitors) for the Respondents

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Before: McCloskey LJ, Horner LJ and Kinney J

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KINNEY J *(delivering the judgment of the court)*

Introduction

[1] This is an appeal from the decision of an Industrial Tribunal which dismissed the claim of Ms Edgar ("the appellant") for discrimination, constructive dismissal and breach of contract. Ms Edgar did not have representation at the Tribunal, nor did she have any legal representation before this court. There were case management hearings before this court and the appellant was reminded that there was no right of appeal by way of a full rehearing to this court from a decision of an Industrial Tribunal.

[2] The court must also consider whether the appeal has been brought in time and if not whether the court should exercise its discretion to accept the appeal.

[3] The court is grateful to the parties for the detailed and considered written submissions and arguments provided. A factual background to this matter can be briefly set out.

Background

[4] The appellant was employed by the first respondent from July 2017 until her resignation in October 2020. In November 2018 the appellant suffered a head injury unrelated to her work. She did not require time off. She suffered from post-concussion syndrome following the injury. The appellant's role in her employment involved public facing duties. In March 2020, in the face of the Covid pandemic, the country went into lockdown and the appellant was furloughed for approximately five weeks. On her return to work at the end of April 2020 she was asked to perform the role of store marshal and control the number of customers able to enter the indoor shop area. She reported difficulties wearing a number of different types of face coverings and was issued with a face visor as an alternative. The appellant performed this role for approximately seven weeks before returning to a customer sales role. The appellant raised no issue with the wearing of a visor at that time.

[5] On 31 July 2020 the appellant was informed that the company would be enforcing a policy making it mandatory for staff to wear face coverings. The appellant refused to wear a face covering and also refused to wear a face visor. She advised the first respondent that she suffered from various health issues. The first respondent confirmed that the appellant could wear a face visor, but the appellant would not do so. There was an informal discussion with the appellant, and she was placed on paid leave on 4 August 2020 and given some time to reflect on her decision not to wear a face covering. On the same day the appellant used the company whistleblowing procedure to make a report in which she said that she was distressed by the emotional impact of seeing her colleagues faces covered and that she felt uncomfortable that the respondent was removing her freedom of choice.

[6] The claimant was invited to an informal meeting the following day. She was told the meeting was not disciplinary. This meeting was surreptitiously recorded by the appellant. The first respondent's representatives at the meeting removed their masks and remained socially distanced to make the appellant feel more comfortable. At this meeting the appellant said that she became overheated and dizzy and could lose her balance when wearing a face visor. As the appellant's role involved manual handling of products that could be heavy, she was referred to an occupational health practitioner for an opinion. The appellant was told that she would remain off work on full pay until the occupational health report had been received and considered. She was assessed by occupational health on 17 August 2020. The report confirmed the appellant was fit for work with adjustments including not lifting objects that weighed more than 15 kg.

[7] On 25 August 2020 the appellant was told that she could return to work with the adjustments recommended by occupational health, and she was asked to wear a face visor on the basis that the company had addressed the reason why she could not wear such a visor. The appellant said that she was not required by law to wear a face visor and she was given a further day off work on full pay. She was told to wear a face visor if she was in the shop area with customers present. At a return to work meeting on 27 August 2020 the appellant was told she did not need to wear a face covering when behind the screens at the counter in the premises but would have to on the shop floor. However, on her return to work on 31 August 2020 the appellant raised further concerns about wearing the visor. As a result, the appellant was told she would return to amended shop duties, but she would no longer be required to wear a visor. She was, however, asked to wear an exemption badge lanyard, something she had previously confirmed she could do. The appellant was told that she would return to counter duties on the seventh or eighth of September 2020 on the understanding that she would wear the exemption badge lanyard.

[8] On 8 September 2020 the appellant informed the first respondent she was unable to wear the exemption badge lanyard as it reminded her of her brain injury. It was agreed that she could return home and take the remainder of the week as a holiday. On 14 September 2020 it was agreed with the appellant that she no longer needed to wear the exemption badge lanyard. The appellant then sent an email to the first respondent and amongst various complaints said that she was uneasy about returning to work and sought information about how other employees were being treated.

[9] The appellant remained in work until 17 September 2020 when she left early for a medical appointment and did not return to work thereafter. In a subsequent exchange of correspondence, the appellant said that she felt ignored, distrusted and belittled. She sought an apology for the treatment she had suffered relating to the lack of consideration, the ignorance of the first respondent on the implementation of protocols and a complete failure to risk assess the dangers of imposing those protocols, namely the use of face coverings. The first respondent confirmed that that

correspondence would be treated as a grievance. On 14 October 2020 the appellant was invited to a grievance meeting later that month. Also, on 14 October 2020 the appellant tendered her resignation with immediate effect.

[10] The appellant's claim before the Industrial Tribunal was case managed on several occasions. At a preliminary hearing on 25 August 2021 the parties were directed to agree a list of legal issues and lodge those with the Tribunal office. Ultimately, this was resolved by a preliminary judgment which was issued on 26 March 2022. In that judgment the Vice President set out the legal issues that were to be determined by the Tribunal. These were:

1. Whether the claimant had been, at the relevant time, disabled for the purposes of the Disability Discrimination Act 1995?

2. Whether the respondent had unlawfully discriminated against the claimant contrary to the 1995 Act either directly, for disability-related reasons, on the ground of harassment or as a result of a failure to make reasonable adjustments in relation to the policy, procedure and practice for mask wearing/badge wearing/lanyard wearing and health and safety precautions in relation to the Covid pandemic?

3. Whether the claimant had been constructively and unfairly dismissed, contrary to the Employment Rights (Northern Ireland) Order 1996, as a result of the actions/inactions of the respondents in relation to its policy, practice and procedure for mask wearing/badge wearing/lanyard wearing or health and safety precautions in relation to the covered pandemic? That claim included a breach of contract claim and a notice pay claim.

[11] The matter was then heard by the Tribunal from 10-14 October 2022 and a detailed judgment was recorded in the register and issued to the parties on 21 February 2023.

[12] The Tribunal determined after considering the evidence that the appellant was not a disabled person at the relevant time for the purposes of the Disability Discrimination Act. The Tribunal reached this determination after considering the evidence presented by the appellant in relation to her asserted Post-Concussion Syndrome which was sustained after an injury she suffered on 14 November 2018. The relevant time for the purposes of consideration of this issue was agreed to be between 31 July 2020 until the appellant's resignation from the respondent's employment on 14 October 2020. Despite having reached this conclusion the Tribunal nevertheless continued with a consideration of the various heads of disability discrimination on their merits and concluded that each of those claims should be dismissed.

[13] The Tribunal also considered the appellant's constructive unfair dismissal claim. The Tribunal said it could not identify any action by the respondents which

amounted to a repudiatory breach of contract and that its actions were entirely reasonable. As the Tribunal had found that the claimant had resigned and was not dismissed there was no entitlement to notice pay. All of the appellant's claims were dismissed.

[14] The appellant then sought a reconsideration of the decision by the Tribunal and a further hearing was convened. The outcome of that hearing was a judgment issued to the parties on 30 May 2023 in which the Tribunal acknowledged the appellant's profound disagreement with the Tribunal's first judgment and her disappointment and disagreement with the decision. However, the Tribunal affirmed its decision.

[15] The appellant then appealed to this court. The grounds of appeal are set out over 10 pages. However, we are satisfied they can fairly be summarised as follows:

(i) That the Tribunal proceedings were not conducted fairly or justly and were in breach of proper procedure and procedural fairness.

(ii) That the Tribunal failed to make reasonable adjustments for the appellant.

(iii) That the Tribunal did not properly consider the appellant's witness statement and was biased.

(iv) That the Tribunal had not properly read all of the evidence the appellant submitted to the Tribunal before a case management hearing on 9 March 2022 and at that hearing required the appellant's attendance at a medical assessment without having previously seen the appellant's medical evidence. The appellant alleges that this demonstrates bias.

(v) That the Tribunal failed to ensure there was a full disclosure of documentation.

(vi) That the Tribunal did not use the entirety of the five days allocated to the hearing creating time pressure on the appellant's cross-examination.

(vii) That the Tribunal failed to comply with previous rulings of the Court of Appeal and in particular the guidance given in the decision of *Galo v Bombardier Shorts* [2016] 25 (to be contrasted with the more recent *Galo v Bombardier Shorts* [2023] NICA 50).

(viii) That the Tribunal failed to consider and apply relevant laws and evidence and that the Tribunal misapplied the law by not giving consideration to multiple pieces of evidence which were omitted from the Tribunal's decision and have resulted in unreasonable findings of fact.

From these grounds of appeal, it is clear that the appellant's case is essentially one of procedural unfairness.

The time point

[16] In this case the court has also had to consider whether the appellant's appeal has been brought in time and properly lodged in accordance with the relevant court rules. The respondent has contended that the appeal was lodged out of time and should not be admitted. The court has a broad discretion to extend time for the lodging of an appeal. In *Davis v Northern Ireland Carriers* [1979] NI 19 the Court of Appeal said:

> "Where a time limit is imposed by rules of court which embody a dispensing power the court must exercise its discretion in each case and the relevant principles are:
>
> 1. Whether the time is already sped: a court will look more favourably on an application made before the time is up;
>
> 2. When the time limit has expired, the extent to which the party applying is in default;
>
> 3. The effect on the opposite party of granting the application and in particular whether he can be compensated by costs;
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> 4. Whether a hearing on the merits has taken place or would be denied by refusing an extension;
>
> 5. Whether there is a point of substance to be made which could not otherwise be put forward;
>
> 6. Whether the point is of general, and not merely particular significance; and
>
> 7. That the rules of court are there to be observed."

These principles are not exhaustive but assist in the task of deciding how the discretion should be exercised. The Tribunal decision in this case was sent to the parties on 21 February 2023. Six weeks from that date was 4 April 2023. An appellant who wishes to make a direct appeal against the judgment of the Tribunal to the Court of Appeal is required to serve a notice of appeal on all parties to the case and the Tribunal within six weeks of receiving a copy of the Tribunal's judgment. The appellant sent an un-stamped Notice of Appeal to the respondent and the

Industrial Tribunal on 22 May 2023. The Notice of Appeal was eventually stamped on 1 June 2023 and the respondent received a stamped copy on 12 June 2023.

[17] On 21 March 2023 the appellant sent an email to the Court of Appeal office indicating her intention to lodge an appeal against the decision of the Tribunal and asking what address it should be sent to. Later that same day she sent a further email asking about applying for remission of fees. The appellant's application was returned with a handwritten note dated 23 March 2023 saying, amongst other things, that she needed to contact the Office of the Industrial Tribunal regarding exemption from fees. This advice was erroneous. There was further correspondence between the applicant and the court offices resulting in confirmation that the appellant's application for remission of the fees required in lodging a notice of appeal had been granted on 1 June 2023.

[18] In the context of the broad discretion of this court to extend time it was relevant that the unrepresented appellant in this case had clearly made a considerable effort to comply with the Rules. During the relevant time period and, indeed, beyond it the parties were still actively engaged in Tribunal proceedings relating to the reconsideration request made by the appellant. There was no significant prejudice suffered by the respondent as a result of the confusion faced by the appellant in lodging her appeal and the subsequent delay in providing a Notice of the Appeal. In all of the circumstances and against that factual background this court exercises its discretion to extend time for appealing.

The legal framework

[19] The role of the Court of Appeal in relation to appeals from Industrial Tribunals has been set out in *Nesbitt v The Pallet Centre Ltd* [2019] NICA 67 where the court said:

> "[60] A valuable formulation of the governing principles is contained in the judgment of Carswell LCJ in *Chief Constable of the Royal Ulster Constabulary v Sergeant A* [2000] NI 261 at 273:
>
> > 'Before we turn to the evidence, we wish to make a number of observations about the way in which Tribunals should approach their task of evaluating evidence in the present type of case and how an appellate court treat their conclusions.
> >
> > 4. The Court of Appeal, which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.

> 5. A Tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless—
>
> (a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the Tribunal (*Fire Brigades Union v Fraser* [1998] IRLR 697 at 699, per Lord Sutherland); or
>
> (b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36."

This approach is of long standing, being traceable to decisions of this court such as *McConnell v Police Authority for Northern Ireland* [1997] NI 253.

[61] Thus in appeals to this court in which the *Edwards v Bairstow* principles apply, the threshold to be overcome is an elevated one. It reflects the distinctive roles of first instance Tribunal and appellate court. It is also harmonious with another, discrete stream of jurisprudence involving the well-established principle noted in the recent judgment of this court in *Kerr v Jamison* [2019] NICA 48 at [35]:

> "Where invited to review findings of primary fact or inferences, the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility … the appellate court will not overturn the judge's findings and conclusions

> merely because it might have decided differently …"

Next the judgment refers to *Heaney v McAvoy* [2018] NICA 4 at [17]-[19], as applied in another recent decision of this court, *Herron v Bank of Scotland* [2018] NICA 11 at [24], concluding at [37]:

> "To paraphrase, reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses."

Procedural unfairness

[20] As can be seen from the distillation of the appeal points made by the applicant, this case is essentially a challenge to the procedural fairness of the Tribunal proceedings.

[21] Procedural fairness is central to appropriate decision-making. The Tribunal must receive all relevant information and properly test that information. It is important that litigants are fairly treated and have no reason for any sense of injustice as a result of the process engaged by the Tribunal. However, what fairness requires of the Tribunal depends on the circumstances of the individual case. What does not change is that the Tribunal must be independent and impartial. In *TF v NI Public Services Ombudsman* [2022] NICA 17 the Court of Appeal said:

> "[88] It is also appropriate to reiterate unequivocally that in any case where procedural unfairness at first instance is canvassed as a ground of appeal, it is the function and duty of the appellate court to decide this issue for itself. This court must identify all material facts and considerations bearing on the issue of procedural unfairness and having done so, ask itself whether this ground of appeal has been established. There are no limiting mechanisms such as a margin of appreciation or a discretionary area of judgment with regard to the first instance court or Tribunal. In this discrete respect the role of an appellate court equates fully with that of a judicial review court determining a complaint of procedural unfairness on the part of the decision maker.
>
> [89] The immediately foregoing analysis also serves to highlight the improper intrusion of the principle of *Wednesbury* irrationality in cases where an appellate court

> is required to determine a ground of appeal complaining that the first instance decision is vitiated by reason of an adjournment refusal determination. That is not to say that irrationality or kindred touchstones such as taking into account immaterial facts or factors or failing to have regard to material facts or factors have no role to play in appeals to this court. Quite the contrary: the *Edwards v Bairstow* principles are as relevant today as they were when first enunciated almost 70 years ago, as the decision of this court in *Nesbitt v The Pallet Centre*, wherefrom substantial excerpts are reproduced at [43] - [44] above, demonstrates. However, the important consideration is that these principles belong to the exercise of determining whether a first instance decision is vitiated by an error of law of a kind other than procedural unfairness.
>
> [90] It is also timely to re-emphasise paragraphs [47] and [48] of *Nesbitt* in this context. Within these passages there is a recognition that where the denial of a fair hearing, in particular denying a litigant or the subject of an administrative decision an adequate opportunity to put his case, is established, the enquiry for the appellate court or court of review will not invariably terminate at this point. That is because the central issue to be determined is whether the process as a whole deprives the person concerned of their right to a fair hearing. This conclusion will not necessarily follow in every case. However, as emphasised memorably by Bingham LJ, cases of this *genre* are likely to be "of great rarity" for the reasons articulated by the Lord Justice. Furthermore, as stressed by this court in Nesbitt at [48], the test at this judicial level is '… whether the avoidance of the vitiating factor/s concerned **could have** resulted in a different outcome.'"

The case management process

[22] The appellant asserts that the Tribunal failed to follow proper procedure to ensure that she was on an equal footing with the respondent. The appellant contends that during the case management process the Tribunal failed to properly communicate witness statements to her, did not consider her brain injury symptoms and the impact of those in her ability to participate and that there was a preconceived bias towards her. The appellant further contends that she was disadvantaged because the Tribunal failed to advise her before a case management hearing on 9 March 2022, that the Tribunal had not been able to access or read all of the information the appellant had submitted to the Tribunal the week before. The Tribunal then instructed the appellant's attendance at a medical assessment without

having seen the earlier medical evidence provided by the appellant. The appellant contends that this was a failure to conduct a proper investigation of her evidence and was a significant disadvantage to her. The issue of the appellant's disability was central to much of this case management process.

[23] The court has had the advantage of seeing not just the record of the case management hearings but also transcripts of the exchanges between the parties at case management hearings. The Tribunal urged the appellant to obtain legal assistance and pointed out several sources of such assistance. This encouragement occurred in more than one hearing. The Tribunal also provided appropriate guidance during the case management process. For example, the appellant had provided a very lengthy witness statement, running to approximately 121 pages. The Tribunal gave some assistance in identifying what should be contained in a witness statement and set a word limit of 20,000 words which, it was noted, was twice the length that the Vice President, who was chairing the case management hearing, had ever stipulated in a case of this nature. The Tribunal went further in providing assistance by identifying the appropriate way in which witness statements, when received by the appellant, should be treated. The appellant was encouraged to study the witness statements and set out in advance questions and challenges that she wished to raise. She was warned of the difficulties of dealing with evidence for the first time at the hearing. The Tribunal acknowledged that this was a stressful situation even for individuals without memory problems. The appellant was told that the statements would be provided at least a month before the hearing so that she would have plenty of time to study them and prepare for the hearing. The appellant was also told that she could use her original 121page document as an aide memoire during the proceedings.

[24] The appellant also criticised the conduct of the case management hearing at which the Tribunal directed a consultant neurologist assessment of her. The record of proceedings of the relevant hearing noted that a considerable volume of correspondence had been sent by the parties to the Tribunal and the Tribunal had not been able to open attachments to certain emails. At this hearing the first respondent had requested an order requiring the appellant to attend a consultant neurologist in relation to her claim of disability at the relevant times. In the discussion that followed the appellant made it clear that she believed her disability had been established by the documentation she had provided. However, the appellant indicated that she was willing to attend a consultant neurologist appointment. The record of the hearing further clarifies that the Tribunal directed that the appellant would attend for the medical assessment on the basis that the consultant would assess the appellant's condition at the relevant time and not at the time of the hearing and that the consultant would have been provided with all of the medical evidence provided by the appellant. The appellant was also at liberty to discuss the details of that medical evidence with the consultant. It is not clear what disadvantage the appellant suffered by the Tribunal's inability to open some attachments to emails. The record discloses a full discussion and the appellant's agreement to the medical assessment.

[25] Given the review of the Tribunal proceedings in paras [22]–[24] above, we conclude that the appellant's complaint of procedural unfairness is unfounded. In essence it resolves to bare, unsubstantiated assertions which are confounded by other evidence.

[26] Finally, with regard to the case management process the appellant has made assertions of bias. There is no evidence before this court of either actual bias or perceived bias as asserted by the appellant.

The alleged failure to make reasonable adjustments for the appellant

[27] The appellant contends that the Tribunal did not properly consider her brain injury symptoms and the impact of those symptoms on her ability to participate in the Tribunal proceedings.

[28] A discussion on reasonable adjustments for the purpose of the proceedings took place at the case management discussion of 27 July 2022. The record noted that the question of disability was disputed by the parties. However, the Tribunal assumed for the purposes of the proceedings that the appellant suffered from the medical conditions and symptoms that she had identified. On that basis the Tribunal directed a range of adjustments to be put in place for the hearing. These included provisions to deal with visual disturbances, the use of her original 121 page statement as an aide memoire, keeping unnecessary noise and disturbance to a minimum and allowing the appellant regular breaks during the proceedings. The case was allocated five days for hearing and the Tribunal reminded the parties that it was imperative that the claim be heard and concluded within the time set aside for the hearing. The appellant confirmed at that hearing that she was content with the adjustments provided. It is clear from the final decision of the Tribunal that not only was the appellant able to avail of the adjustments provided but also that they were altered by the Tribunal during the course of the hearing at the appellant's request. The appellant took no issue regarding the adjustments or the conduct of the substantive hearing at the time. This discrete ground of appeal is manifestly devoid of merit given the preceding summary.

The procedure at the final hearing

[29] The appellant has asserted that the final Tribunal hearing was conducted unfairly. She points to several matters. The first is that although she had been allowed to use her original statement as an aide memoire, the Tribunal failed to question her on its contents. She claimed that because she had not been questioned by the Tribunal on that document, she was unable to remember that she needed to use her original statement to be fully able to present her case. However, the issue of witness statements had been extensively explored with the appellant in the case management process. She received appropriate guidance and directions from the Vice President. She was allowed to file a 20,000 word statement and was also

allowed to use her original 121 page document as an aide memoire. This lengthy document was not part of the evidence before the Tribunal. Its use, as explained. was designed by the Tribunal to provide the appellant with some additional assistance during the substantive hearing. Furthermore, the appellant could have requested further facilities during the hearing but failed to do so.

[30] Given the preceding summary, the appellant's aforementioned claim is manifestly devoid of substance. This court is satisfied that the Tribunal's approach to this matter was entirely appropriate and demonstrably fair. This ground of appeal is without merit in consequence.

[31] The second aspect of this discrete ground of appeal relates to the disclosure of documentation. The appellant contended that there was a possibility of information being withheld by the respondents because there were certain documents in the bundle which had been redacted.

[32] The redacted documents were in fact documents provided by the appellant, and which had been obtained by her through a subject access request made to the first respondent in 2020. It is clear to this court that the redactions had been made before these proceedings were commenced. The redactions had been made by the first respondent and their purpose was unrelated to the Tribunal proceedings. The redactions were the result of the subject access request made by the appellant. There were no fresh redactions made by the respondents to the documents during the tribunal proceedings and many of the previously redacted documents appeared elsewhere in the bundles of documents before the Tribunal in unredacted form. The appellant did not raise any issue about these documents in the course of the Tribunal hearings. She did raise the issue in her request for a reconsideration of the Tribunal's decision. In the reconsideration decision the Tribunal confirmed that it had considered the matter and was satisfied that the fairness of the hearing was not affected by the redactions. We consider that this element of the appellant's case is insubstantial and speculative and, therefore, agree with that conclusion.

[33] The third aspect of this discrete ground of appeal relates to the allocated hearing time. The Tribunal was not able to sit continuously throughout the five-day period which had been allocated to hearing. The appellant asserted that this had a deleterious effect on her ability to effectively present her case. It is fair to say that the appellant, as a self-representing litigant, would not be familiar with the normal processes and case management decisions made relating to a hearing. Conventionally, in the case management process, the Tribunal makes an estimate of the length of time potentially required for a full hearing. It is often the case that this is slightly overestimated to minimise the risk of a hearing not completing within the allocated time and requiring the case to be relisted for completion at some future date. Both the Tribunal and the parties should be alive to the need to complete cases expediently and fairly to save Tribunal time and costs. This ground of appeal invites the same analysis and conclusion as in para [32] above. There is no procedural unfairness in this aspect of the matter.

[34] The fourth aspect of this ground of appeal relates to whether the appellant had "past disabilities" within the terms of the Disability Discrimination Act. The appellant relies on a comment from the Tribunal to the effect that her brain injury no longer substantially affected her daily activities. This, the appellant asserts, implies that she was found to be disabled at some point. The appellant's case throughout was that she was suffering from a current disability and that she suffered from a disability at the relevant time. She did not make the case that she suffered from any past disability. The statement made and attributed to the Tribunal does not confirm that the Tribunal found the appellant to be disabled at some point. This matter was also considered by the Tribunal in its reconsideration decision. The Tribunal pointed out that although it found that the appellant did not have a disability at the relevant time it went on to consider the claimant's claims in detail. The Tribunal said at para 19 of that decision:

> "Whilst the Tribunal noted that the claimant had not sought to amend her claim to rely on the past disability, it nevertheless concluded that even if an amendment application had been successful after the evidence had been completed, that claim would not have succeeded in any event as there was no evidence before the Tribunal capable of supporting a conclusion that her treatment was on the basis of a past disability."

This court endorses unreservedly this analysis and conclusion.

[35] The appellant relied on post-concussion syndrome as a disability which fell within the terms of the Disability Discrimination Act. The Tribunal recorded in some detail in its decision the history of that injury and the medical evidence provided by the appellant. The Tribunal noted at para 43 of its decision some internal inconsistencies in the appellant's evidence regarding her symptomology and also the fact found by the Tribunal that the appellant strongly disagreed with the conclusions of many of the medical professionals she had contact with. It was agreed that the relevant time in relation to any disability was 31 July 2020 until 14 October 2020. The Tribunal found that the claimant was not a disabled person at the relevant time. The Tribunal relied on an expert report from a consultant neurologist. At para 48 of the Tribunal decision, it is recorded that the neurologist said:

> "While the plaintiff may still have been suffering from the effects of post-concussion syndrome at this time, that any impairments were mild and not having a substantial adverse effect on her ability to carry out normal day-to-day activities."

Furthermore, much of the evidence put before the Tribunal by the appellant in relation to her medical condition substantially predated the relevant period. This

court considers that the Tribunal's treatment of this discrete issue is beyond reproach.

The Galo point

[36] The appellant asserts that it was only at the reconsideration stage of the proceedings that she became aware of the Court of Appeal decision of *Galo.* In light of this decision the appellant asserted that there were several failings in the Tribunal procedure. These included not having her assessed by a consultant psychiatrist, not convening a ground rules case management, not consulting the Equal Treatment Bench Book and a refusal to assess her condition.

[37] The *Galo* decision was in fact referred to at the case management hearing when the reasonable adjustments for the main hearing were determined. It was not however expressly addressed with the appellant or explained further to her. What is clear is the careful consideration given by the Tribunal at the case management hearing to the question of reasonable adjustments. It is also clear that the appellant was perfectly satisfied with the suggested reasonable adjustments at that time and indeed throughout the full hearing. There was a suggestion that it may be beneficial for the appellant to be assessed by a consultant psychiatrist, but that suggestion was made by the respondents, and it was entirely open to the appellant to seek such an assessment in her own right at any time. The other matters raised under this head of appeal really amount to a relabelling exercise. There may not have been a ground rules hearing but it is clear that this matter was carefully case managed throughout by the Tribunal. We repeat our analysis and conclusion in para [25] above.

Failure to apply the relevant law and evidence

[38] This was something of a "catch-all" ground in which the appellant asserted that there were instances when evidence was not considered by the Tribunal or that it had failed to apply or misapplied the law. The appellant also contends that the Tribunal made unreasonable findings of fact. These complaints are characterised by their manifest lack of particularity.

[39] The appellate function of this court does not engage in a rehearing of the merits of the original case. This ground of appeal is essentially taking issue with the decision of the Tribunal on its merits. We have carefully considered the entirety of the case management hearings, the transcripts made available to us and the final decision of the Tribunal. The Tribunal reached its decision after an extensive hearing. There was a detailed and extensive consideration of the evidence. Applying the principles set out in *Nesbitt* (para [19] above), it is our view that the decision and its reasoning have been clearly set out and the ultimate conclusions are unimpeachable.

[40] We are satisfied that the appellant has been genuine in pursuing her claim before the Tribunal and indeed in pursuing her appeal before this court. She

remains aggrieved by her treatment by the respondents and the decision of the Tribunal. Nevertheless, it is clear that there is no sustainable challenge to the Tribunal proceedings or its decisions. We have identified no merit in the centrepiece of her appeal, or any other complaint not embraced thereby.

[41] The appeal is, therefore, dismissed and the impugned decisions of the Tribunal are affirmed.

Costs

[42] We invited the parties to address the court on the issue of costs. Extensive written submissions were received from the appellant and the respondents. The award of costs is a matter for the court's discretion. However, the general rule is that costs follow the event. That means that the unsuccessful party is ordered to pay the costs of the successful party. In reaching our decision on costs we have taken into account that the appellant is a litigant in person but that alone is not a reason for refusing to award costs. We have determined that the appellant's case is without merit. The respondent should not be placed in the position of having to carry the expense of defending the appeal proceedings. After due consideration we are satisfied that the appropriate order is an order for the appellant to pay the respondents costs in this appeal. The costs shall be taxed in default of agreement.