

**Neutral Citation No. [2016] NICA 25**

Ref: **GIL9979**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: **02/06/16**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**IN THE MATTER OF AN APPEAL FROM A DECISION  
OF THE INDUSTRIAL TRIBUNAL DATED 12 DECEMBER 2014  
AND RELATED DECISIONS**  
—————

**BETWEEN:**

**PATRICK GALO**

**Claimant/Appellant;**

**-and-**

**BOMBARDIER AEROSPACE UK**

**Respondent.**

—————  
**Before: Morgan LCJ, Gillen LJ and Weatherup LJ**  
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**GILLEN LJ (giving the judgment of the court)**

**Introduction**

[1] This is an appeal from the decision of an Industrial Tribunal ("IT") which dismissed the claim of the appellant (a Slovakian national) for:

- Unlawful racial discrimination.
- Unlawful disability discrimination.
- Victimisation.
- Harassment on grounds of his disability and race.
- Detriment.
- Unfair dismissal.

[2] It is common case that the appellant suffers from a disability, namely Asperger's Syndrome ("AS").

[3] This appeal raises the question of the fairness of hearings relating to a person with such a disability. In light of the findings later set out in this judgment, it has been unnecessary for us to make a substantive ruling on the claims themselves other than the procedural fairness of the hearing.

### **The grounds of appeal**

[4] The appeal before this court may only proceed on a point of law.

[5] In essence the case made out on behalf of the appellant was that he was not accorded a fair hearing of his claim because the Tribunal failed to take properly into account his disability and his medical evidence, in circumstances where he was not represented from August 2014 onwards and in particular at the Tribunal hearing.

[6] In particular, the appellant submitted that a range of Tribunal acts and omissions were tainted with unlawfulness including:

- Failure to make reasonable adjustments for his disability.
- Unreasonably failing to adjourn the case on a number of occasions.
- Placing unfair and oppressive demands on the appellant in relation to the hearing and in the course of the hearing week.
- Striking out all claims except his unfair dismissal claim.
- Proceeding to hear his unfair dismissal claim in his absence and in the face of medical evidence supportive of an adjournment.
- Dismissing his unfair dismissal claim.

### **Representation**

[7] Mr Potter appeared on behalf of the appellant. Mr Wolfe QC appeared on behalf of the respondent. We are grateful to both counsel for the industry they had clearly invested in the preparation of this case and for their skilful skeleton arguments and oral submissions. In particular, we commend counsel for the array of authorities, commentaries, directives and legislation put before us. We also thank the Employment Lawyers Group for providing this appellant with *pro bono* representation in these exceptional circumstances.

### **Factual background**

[8] The appellant was employed by Bombardier Aerospace UK (“the respondent”) as a composite operator from 29 October 2007 until his employment was terminated on foot of allegations of gross misconduct, which allegedly occurred on 8 and 21 March 2013. On the former date he is alleged to have thrown an item of work equipment behind him. In the latter incident he is alleged to have attended with the occupational health doctor, Dr Jenkinson, and during his examination shouted “shit” into the face of the doctor and repeatedly shouted at him “you had better be clear”.

[9] These incidents led to the appellant being suspended on full pay from March 2013. On 17 April 2013 he lodged proceedings in the IT complaining of victimisation as well as disability/race/religious belief and political opinion discrimination. The latter two allegations were subsequently withdrawn.

[10] On 23 April 2013 he lodged a further complaint with the IT on the grounds that he had been unfairly dismissed and that his treatment constituted victimisation, disability discrimination, harassment and detriment.

[11] On 30 June 2014 the Tribunal consolidated these two cases.

[12] So far as the internal processing of his case by the respondent was developed, the appellant had lodged a grievance with the respondent on 12 April 2013 alleging victimisation and discrimination. This was investigated by the respondent and found to be without foundation. On 23 January 2014 at a disciplinary hearing the respondent determined that the appellant's behaviour had constituted gross misconduct and his employment was terminated. An appeal was convened on 19 August 2014, adjourned, reconvened on 11 September 2014 and on 15 September 2014 his dismissal was affirmed.

[13] It is of substantial significance for the purposes of this case to observe that the respondent had secured a report on the appellant from a clinical psychologist, Dr Wendy Lusty. She had assessed the appellant on 22 August 2013 and 3 September 2013 and proceeded to provide a report dated 12 September 2013.

[14] In the course of that report Dr Lusty referred to a psychology report dated 10 April 2013 provided by Joanne Douglas, Chartered Educational Psychologist. Ms Douglas had opined that the appellant met the diagnostic criteria for an Autistic Spectrum Disorder; sub-group Asperger's Syndrome.

[15] Dr Lusty noted that the appellant had a psychiatric history dating back to his teenage years and observed as follows --

- In interviewing the appellant she found that he was challenging for a number of reasons including great difficulty with open questions demanding that they be reframed as specific questions and responding in a similar way to questions that addressed issues of feelings.
- The appellant was easily irritated by questions he found difficult or deemed to be inappropriate. He often responded by pedantic questioning of the exact meanings of questions or instructions. These responses were frequently in an irritable and abrupt manner.
- He rarely made any eye contact.

- Although his knowledge of English was good, he did at times struggle to find the words he wanted.
- He interpreted verbalisation in literal terms.
- He described coping with situations where his expectations were not fulfilled as emotionally and physically exhausting. In such situations he feels very vulnerable and experiences marked anxiety, frustration and anger.
- His verbal reasoning abilities were in the low average range and above those of only 16% of his peers.

[16] Dr Lusty made a diagnosis of AS and added:

- It is likely that the periods of acute anxiety that he suffers may interfere with his capacity to concentrate and remember at times.
- He displays difficulty understanding and responding appropriately to verbal communication particularly where some flexibility and thinking is required such as responding to open questions or hypothetical scenarios. These impairments would have an effect on learning and understanding verbal material in everyday life, such as understanding figures of speech.
- He has significant difficulty in everyday life in dealing with minor challenges or changes.
- The way in which the appellant thinks, communicates and behaves socially is significantly different in nature to most people. He experiences very high levels of distress in everyday situations and as a result is highly avoidant.

### **Case Management Hearings (“CMH”) before the Industrial Tribunal**

[17] On 25 July 2013 a CMH was held when a date for the substantive hearing was fixed for 18 November 2013. This was subsequently altered to 27-31 January 2014.

[18] On 19 November 2013 a CMH was held where the respondent conceded that the appellant suffered from a disability. It seems to be the situation that no enquiry was made as to the precise nature of that disability notwithstanding that the respondent would have had the report of Dr Lusty at this stage.

[19] On 22 January 2014 a further CMH occurred where the appellant was represented by a solicitor. At this stage, there was nothing in his documentation before the IT which would have indicated medical issues leading to an understanding of the precise nature of his disability. No application was made by the solicitor for reasonable adjustment in light of his disability.

[20] On 30 June 2014, during a further CMH, the appellant was directed to provide a witness statement by 26 August 2014 as part of a planned process of sequential exchange. This instruction included a direction to produce a schedule of loss by 15 August 2014.

[21] It is not clear if anyone at this CMH was aware of the nature of his disability, and certainly those representing him did not make an application for any particular adjustments in order to ensure his effective participation in the process.

[22] On 9 September 2014 a CMH was convened to address the appellant's failure to provide witness statements. He was not present because he was due to attend a medical appointment. He did not seek a postponement of this hearing. Accordingly it proceeded in his absence. The Tribunal extended the time for his witness statement to 23 September 2014 but did so in terms of an "unless order" which warned him that his claim would be dismissed if he did not comply with the time limits. Subsequently it was agreed to further extend the time limit for delivery of the witness statement until 30 September 2014.

[23] It is to be noted that even by this stage no attempt appears to have been made to engage with or address his disability of AS.

[24] On 16 October 2014 a CMH was convened because the appellant was still in default of the requirement to provide a witness statement and the respondent now sought to have his complaint struck out for failure to comply with the "unless order".

[25] At this CMH the appellant produced a medical report from Dr Andrew Harper dated 15 October 2014 which recorded as follows:

"The patient ... is currently undergoing legal proceedings. He has struggled to comply with all of the courts requests. He tells me this is due to difficulty concentrating and completing tasks. He is under review with psychiatry for depression and post-traumatic stress related to the legal proceedings. We have not received any letters yet detailing the diagnosis."

[26] Inexplicably this report made no reference to his AS condition.

[27] The Tribunal refused the application by the respondent to strike out the proceedings and dispensed with the need to furnish written witness statements. It appeared to be conscious to some degree of the presence of a disability in that it referred to its desire to "alleviate any pressure on the applicant in this particular regard" but once again no reference was made to AS.

[28] Discovery issues were raised at this CMH and the parties were ordered to provide each other with documentation relevant to any issue in the matter not later than 23 October 2014.

[29] It has to be observed, however, that once again no specific reference appears to have been made to any adjustments in the process required to deal with his condition. It is highly questionable if anyone had really taken on board his learning difficulties. For example, in making the order to disclose documentation, it does not appear to have been explained to him that this could be done by obtaining a comparator in the workplace or perhaps even obtain the wage slips of one or two other people in order to establish his loss.

[30] The applicant applied to adjourn the substantive hearing but that was refused because the Tribunal found that it was not grounded on sufficient medical evidence. It determined that a postponement would adversely affect the respondent being able to assemble witnesses. The pending maternity leave of the respondent's solicitor was asserted as another reason why further delay would not be helpful. It was explained to the appellant that if he wished to advance a further claim for postponement it would need to be based on fresh medical evidence and that "any such medical opinion would be expected to inform the Tribunal as to when the Tribunal would be in a position to conduct his case".

[31] On 29 October 2014 the appellant wrote to the Tribunal seeking to overturn the decision to dispense with use of witness statements and to renew his application to adjourn.

[32] Having received the respondent's disclosure on 17 October 2014, on 5 November 2014 the appellant issued a request for further disclosure against the respondent. The respondent wrote to the Tribunal expressing concern at the fact that the appellant appeared to be continually ignoring directions and orders of the Tribunal. The Tribunal responded, indicating that these matters would be dealt with at the commencement of the full hearing on 10 November 2014.

[33] On 6 November 2014 the Tribunal replied to the appellant indicating that any application for a postponement would have to be based on "an up-to-date medical report giving details of his medical condition, each as of why he could not attend the Tribunal and an indication of when he would be fit to attend".

### **The IT Hearing**

[34] On the first day of the hearing on 10 November 2014, the appellant again applied for an adjournment relying on Dr Harper's report of 15 October 2014 and a report of 24 October 2014 from Dr McHugh, consultant psychiatrist, which recorded:

"This man was referred to the Primary Mental Health Team and seen at the Bradbury Health and Well-

Being Centre on 2/10/14. He was assessed by myself and has subsequently been referred for assessment to the Cognitive Behavioural Therapy Team.”

It is worthy of note that neither of these reports made any reference to AS.

[35] The Tribunal refused the application for the adjournment, indicating that the new report from Dr McHugh “did not add anything to the information before us”, and adding “there was no information regarding the nature of the claimant’s condition, how it affected his ability to appear before the Tribunal or when he might be fit to attend.” The Tribunal invoked the authority of Teinaz v Wandsworth London Borough Council [2002] ICR 1471 as authority for the proposition that the Tribunal had to be satisfied on the medical evidence that the appellant was unable to be present on a genuine basis and the onus was on him to prove the need for such an adjournment.

[36] The Tribunal also observed that, judged by his presence before them and his ability to articulate arguments on his own behalf, it did not appear he was unable to present his case. We pause to observe that had the IT been in possession of Dr Lusty’s report or obtained its own report on the appellant such a conclusion would have been unlikely.

[37] The Tribunal rejected an application by the respondent to strike out the appellant’s claim, but did order that by 9.30 am on 12 November 2014 i.e. within 1.5 days, the appellant had to provide:

- Particulars relating to any new employment.
- His earnings from any such employment.
- Steps taken to mitigate his loss.
- Details of Social Security benefit he had received.

[38] It was noted that he had been in default of providing a properly formulated schedule of loss since 15 August 2014, and that discovery had been revisited on 16 October 2014.

[39] On 11 November 2014 the appellant made a further application for discovery. The Tribunal noted that he had failed to specify the material he was seeking on discovery or how any further discovery might be relevant to the issue.

[40] On this date the appellant informed the Tribunal he would be unable to:

- Commence the substantive hearing because of his medical condition.

- He required a visual aid i.e. he wished to submit a witness statement.

[41] After he had sought advice from the Labour Relations Authority, the Tribunal agreed to postpone the hearing until 13 November 2014 to afford him an opportunity to compose his thoughts and formulate a witness statement.

[42] It is noted that yet again-even at this very late stage—no requirement for specific adjustments in the procedure for his case had been considered.

[43] On 13 November 2014, at the appointed time for the Tribunal to commence, the appellant failed to appear. Accordingly, the hearing commenced at 10.15 am. He had not provided the information about his earnings etc. The Tribunal, upon application by the respondent, struck out all of his complaints except for the claim of unfair dismissal which we assume they determined to hear because the onus was on the respondent to establish reasonable grounds.

[44] The reasons why the Tribunal decided to proceed in his absence were:

- The delay already encountered.
- The medical evidence showed that he was not medically fit to attend for the foreseeable future (although this must have been a subsequent conclusion as such evidence was not yet before the IT when the decision was taken) and therefore any adjournment was open ended.
- The respondent had two witnesses who were leaving the company and it would be difficult to bring them to court at a later hearing.
- The maternity leave needs of the respondent's solicitor.

[45] At 10.57 am the appellant sent a further e-mail with a new medical from Dr Martin at the University Health Centre which recorded:

"I believe you are looking a reasonable timeframe at which Patrik would be deemed medically fit to attend the Tribunal. I see Dr McHugh and Dr Harper have already submitted letters. Further to their letters, Patrik is awaiting referral for further assessment and treatment and at present (having met with Patrik on several occasions) I do not feel that he is medically fit to attend a Tribunal for the foreseeable future. He may need specialist medical assessment organised by the Tribunal to ensure that he is medically fit to attend. I hope this is of help, but may I suggest that you contact Dr McHugh who has already submitted a letter to yourselves for further assessment."



[46] At 2.50 pm the appellant attended and handed in a further copy of Dr Martin's report together with written submissions for further grounds for postponement. By this time the Tribunal had already sat and completed its hearing. His outstanding claim was subsequently dismissed.

### **Principles governing this matter**

[47] We are satisfied at the outset that the issues in this case are governed by the obligation of every tribunal and court to act fairly. This principle of fairness was most recently and authoritatively dealt with in R (Osborn) v Parole Board and Others [2014] AC 1115.

[48] This was a case concerning the rights of prisoners to have an oral hearing before the Parole Board but the judgment has much wider application in the context of fairness as a whole.

[49] Lord Reed's careful analysis of the common law duty of fairness and of the relationship between the ECtHR and English Law set out between paragraphs [54]-[63] contains important elements for guidance in the instant case and can be distilled as follow:

- The protection of human rights is not a distinct area of the law, based on the case law of the European Court of Human Rights, but permeates our legal system. Where domestic law fails to reflect fully the requirements of the Convention, it is open to Parliament to legislate in order to fulfil the United Kingdom's international obligations and the courts have also taken account of those obligations in the development of the common law and the interpretation of legislation.
- The importance of the continuing development of the common law, in areas falling within the scope of the Convention guarantees, continues unabated. Whilst the courts endeavour to apply and, if need be, develop the common law, and interpret and apply statutory provisions so as to arrive at a result which is in compliance with UK international obligations, the starting point is our own legal principles rather than the judgments of the international court.

[50] Later in that judgment, Lord Reed adumbrated certain other principles which are equally relevant to this case, namely:

- In considering whether a fair procedure has been followed by a decision-making body (*such as the Tribunal in this case*), the function of the court on appeal is not merely to review the reasonableness of the decision-maker's judgement of what fairness requires. The court must determine for itself whether a fair procedure was followed.

- The purpose of procedural fairness is to ensure there will be better decisions as a result of the decision-maker receiving all relevant information and that such information is properly tested.
- Equally, it is also important to remove wherever possible feelings of resentment aroused if a party to proceedings is placed in a position where he finds it impossible to influence the result.
- Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which had governed their actions.

[51] We trust we do not do a disservice to the industry of counsel by commenting that the basic principle to be followed in a case of this genre is the common law duty of fairness fed no doubt by the increased emphasis on fairness arising out of:

- The Human Rights Act 1998 including Article 6 involving the right to a fair hearing and Article 14 placing a positive obligation on States to ensure there is a benefit from anti-discrimination.
- The European Union Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation with particular reference to Article 9(1).
- The UN Convention on the Rights of Persons with Disabilities which reads at Article 13:

“1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodation, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice ....”

- The Disability Discrimination Act 1995 and the application of the judicial acts exclusion.
- The European Union Charter on Fundamental Rights.

- The Equality Act 2010.

[52] For many years now the courts in Northern Ireland have recognised the particular need to ensure fairness in hearings where one or more parties suffers from a disability. As far back as 2006 in Re G and A (Care Order: Freeing Order: Parents with a Learning Disability) [2006] NI Fam. 8 paragraph [5], cited with approval in In The Matter of D (A Child) No. 3 [2016] EWFC 1, the court said at paragraph 5(2):

“People with a learning disability are individuals first and foremost and each has a right to be treated as an equal citizen. Government policy emphasises the importance of people with a learning disability being supported to be fully engaged playing a role in civic society and their ability to exercise their rights and responsibilities needs to be strengthened. They are valued citizens and must be enabled to use mainstream services and be included in the life of the community as far as possible. The courts must reflect this and recognise their need for individual support and the necessity to remove barriers to inclusion that create disadvantage and discrimination. To that extent courts must take all steps possible to ensure that people with a learning disability are able to actively participate in decisions affecting their lives. They must be supported in ways that take account of their individual needs and to help them to be as independent as possible.”

[53] That theme has echoed through a number of the authorities cited to us including in particular CPS v Fraser (UKEAT/0021/13), R v Isleworth Crown Court ex parte King [2001] EWCA Admin 22 and Rackham v MHS Professional Ltd (UKEAT/0110/15 LA). From these authorities the following principles and guidelines can be discerned.

- (1) It is a fundamental right of a person with a disability to enjoy a fair hearing and to have been able to participate effectively in the hearing.
- (2) Courts needs to focus on the impact of a mental health disability in the conduct of litigation. Courts must recognise the fact that this may have influenced the claimant’s ability to conduct proceedings in a rational manner.
- (3) Courts and Tribunals can, and regularly do, have regard to general, non-binding guidance and practical advice of the kind given in the Equal Treatment Bench Book published by the Judicial College (Revised 2013) (hereinafter called “the ETBB”) in considering how best

to accommodate disabled litigants in the court or tribunal process. It is clear, therefore, that courts and tribunals should pay particular attention to the ETBB when the question of disability, including mental disability, arises.

- (4) The ETBB provides helpful information for judges about the problems experienced by such litigants in accessing the courts or tribunals or participating in proceedings. The authors point out that “this may lead to erroneous perceptions such as that the person is being awkward or untruthful and inconsistent. In fact the problem may come down to a difficulty in communication or understanding.” The ETBB has regularly been revised and updated. It has a section dealing with mental disabilities describing the different ways in which mental disability may arise and manifest itself .It points out that adjustments to court or trial procedures may be required to accommodate the needs of persons with such disabilities. Memory, communication skills and the individual’s response to perceived aggression may all be affected. Practical advice is given to particular situations when they arise. Decisions concerning case and hearing management “.... should address the particular needs of the individual concerned insofar as these are reasonable. The individual should be given an opportunity to express their needs. Expert evidence may be required.” (paragraph [20]). It is recognised that if a litigant has a condition that is worsened by stress, the difficulties will almost certainly become greater if he/she is acting in person (paragraph [25]).
- (5) The presence of a McKenzie Friend in civil or family proceedings or an independent mental health advocate in a Tribunal should be encouraged in order to help locate information, prompt as necessary during the questioning of witnesses and provide the opportunity for brief discussion of issues as they arise. A more tolerant approach to the use of a lay representative may assist.
- (6) A modified approach may be necessary when seeking to obtain reliable evidence from a person with mental health problems especially those who are mentally frail. It is necessary to ascertain whether any communication difficulties are the result of mental impairment. Section 7 of the ETBB stresses the need for particular assistance to be given in relation to those with mental disabilities, specific learning difficulties and mental capacity issues .
- (7) An early “ground rules hearing” is indicated in the ETBB at Chapter 5. Such a hearing would involve a preliminary consideration of the procedure that the tribunal or court will adopt, tailored to the particular circumstances of the litigant. Thus, for example, the Tribunal may consider:

- The approach to questioning of the claimant and to the method of cross-examination by him/her. Adaptions to questioning may be necessary to facilitate the evidence of a vulnerable person.
- How questioning is to be controlled by the Tribunal.
- The manner, tenor, tone, language and duration of questioning appropriate to the witness's problems.
- Whether it is necessary for the Tribunal to obtain an expert report to identify what steps are required in order to ensure a fair procedure tailored to the needs of the particular applicant.
- The applicant under a disability, if a personal litigant, must have the procedures of the court fully explained to him and be advised as to the availability of pro bono assistance/McKenzie Friends/voluntary sector help.
- Recognition must be given to the possibility that those with learning disabilities need extra time, even if represented, to ensure that matters are carefully understood by them.
- Great care should be taken with the language and vocabulary that is utilised to ensure that the directions given at the ground rules hearing are being fully understood.
- As happened in the Rackham case, consideration should be given to the need for respondent's counsel to offer cross-examination and questions in writing to assist the claimant with the claimant being allowed some time to consult, if represented, with his counsel. These were deemed "reasonable adjustments".
- The Tribunal must keep the adjustments needed under review.

## Conclusions

[54] We must determine for ourselves whether a fair procedure has been followed in this instance and ensure that we are not merely reviewing the reasonableness of the decision-maker's judgement of what fairness required.

[55] We have come to the conclusion that the requirements of procedural fairness were not met in this case. Our reasons for so doing are as follows.

[56] First, this was, and should have been recognised as such from the outset, a case involving a person under a disability of mental health. The respondent had accepted this position from an early stage, namely 2013. There was already in existence a fulsome report from Dr Lusty to this effect. As soon as this emerged, enquiries should have been made as to whether reasonable adjustments to the

process were necessary. In particular, an early “ground rules” case management discussion should have been convened to meet the specific challenges of this man’s AS condition. Had this been done, we are confident that the procedure to be adopted and the adjustments that were necessary would have been considered through a completely different prism from that which occurred.

[57] Secondly, had this been done, we are satisfied that the sort of measure that surfaced in Rackham’s case would have been considered. How was the evidence in chief to be taken? Was the claimant to be provided with questions in advance of cross-examination? Should greater latitude have been given in the timeframe provided for compliance with the orders or indeed should the orders have been made in the form that they were, given his condition? Would there have been greater understanding of his failure to comply with various directions and more thought have been given to how compliance might have been achieved? How was the Tribunal to put itself in a position to receive all the relevant information from this appellant?

[58] In particular, no positive thought appears to have been given to the need to obtain a report on the appellant’s condition. In truth, the cost of obtaining a report would probably have been obviated once it became clear that Dr Lusty had prepared a very comprehensive report on his condition. Such a report would have been sufficient to have governed a fresh and different attitude to the appellant’s case and to how it was to be managed.

[59] We pause to observe that it is not a sufficient argument to state that, even when the appellant was represented, no application for adjustment was made on his behalf. The duty is cast on the Tribunal to make its own decision in these matters. There were clear indiciae of observed agitation and frustration on the part of the appellant. These should have put the Tribunal on notice of the need to investigate the precise nature and diagnosis of his condition. That said, this case highlights perhaps the need for there to be better training of both judiciary and the legal profession in the needs of the disabled.

[60] Thirdly, the fact of the matter is that everyone was aware that there was a disability of some kind from an early stage and yet it seems from the records of the CMHs that not only was there a complete failure to record (or indeed even become fully aware of) the nature of his AS, but no tailored directions were given at any time. Even if Dr Lusty’s report had not been available, which it clearly was, there is no reason why one of the other doctors could not have been requested to attend in order to assist the Tribunal as to the real problem. We record that even as late as the 30 June 2014 CMH it is clear that the condition of AS had not been fully identified to the Tribunal.

[61] Fourthly, we find it a matter of great concern that no reference appears to have been made to the ETBB by the IT. The Secretary to the Vice President of the Office of the Industrial Tribunals and Fair Employment Tribunal has indicated by e-

mail to the court that, whilst the Tribunal has the 2004 edition of the ETBB, the up-to-date 2013 version does not appear to have been forwarded to the Tribunal. That is an unsatisfactory state of affairs. We have formed the clear impression that the ETBB does not appear to be part of the culture of these hearings. That is a circumstance which must fundamentally change with a structural correction to ensure that this situation does not recur. Had there been proper cognisance of the contents of the ETBB, we are satisfied that a different approach would have been adopted to this case.

[62] Fifthly, no attempt was made, as we see it, to explore the possibility of alternative representation for this man once he lost the services of his solicitor in August 2014. This is a matter that should have been dealt with as soon as it became apparent that he was without representation. Steps ought to have been taken at least to appraise him of the possibilities of getting assistance from the *pro bono* services of the Bar and solicitors professions, the Equality Commission for Northern Ireland, the exceptions that apply to the granting of legal aid and even the use of a McKenzie Friend.

[63] Sixthly, the report of Dr Martin was clear medical evidence that the appellant was not in a position to proceed. The Tribunal had observed the distress and agitation being exhibited by the appellant on 11 November 2014. The determination by the Tribunal at paragraph 3.46 of its decision that his failure to attend on 13 November “was deliberate and the timing of his e-mail scheduled to disrupt any planned hearing” was patently unjustified given the medical evidence. In such circumstances we can understand how this would generate a feeling of resentment or injustice on the part of the appellant.

[64] Finally, the conclusion that the Tribunal “would not have any power to oblige the claimant to undergo an assessment” does not really address the issue. There was already a good assessment from Dr Lusty. Even without this there was no attempt to invite any of the doctors to attend to outline his condition in detail or to invite the appellant to undergo examination by a doctor on behalf of the IT and thus to permit the Tribunal to come to its own conclusion as to his mental state.

[65] One final matter. Counsel cited to us some authorities on the question of the discretion of a tribunal/court to grant or refuse adjournments. In particular our attention was drawn to Cathail v Transport for London [2013] IRLR 3010, Teinaz v Wandsworth London Borough Council [2002] ICR 1471 and Kotecha v Insurety t/a Capital Health Care UKEAT/0537/09 [2010] All ER (D) 94. We do not need to deal with these matters in detail simply because the issue of procedural fairness goes much wider than the narrow issue of failing to adjourn. We simply pause to observe that we do not accept the assertion of Mr Potter that it is unlawful for a tribunal to insist that a condition for adjournment is that a medical report is produced outlining the reasons why the appellant is unfit to attend, together with a prognosis as to when he will be fit to attend. There is nothing improper *per se* in a court doing this where otherwise a court would be in the impossible position of having no idea when

the court could be convened for a hearing. Moreover, in circumstances where no adequate medical evidence can be produced, it would not of itself be unlawful for a tribunal to take a view as to the litigant's fitness to present a case based on seeing and hearing from him in person, albeit that would probably be a rarity.

[66] In the circumstances of this case we have concluded that this appellant did not benefit from a fair procedural hearing in the course of the various CMHs and the hearing. We, therefore, allow the appeal, and refer the matter back for a hearing before a differently constituted Tribunal who will doubtless take the steps outlined in this judgment.