Neutral Citation Number: [2019] EWCA Civ 815

Case No: A2/2016/0108

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Employment Appeal Tribunal
HH Judge Eady QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE IRWIN
and
SIR PATRICK ELIAS

- -

Between :

JADE ANDERSON	**Appellant**
- and -	
TURNING POINT EESPRO	**Respondent**
- and -	
(1) EQUALITY AND HUMAN RIGHTS COMMISSION **(2) MIND** **(3) LORD CHANCELLOR**	**Interveners**

- -
- -

Mr John Horan and **Mr Ruaraidh Fitzpatrick** (instructed by **Howells LLP**) for the **Appellant**
Ms Mary O'Rourke QC and **Ms Nicola Newbegin** (instructed by **DWF LLP**) for the **Respondent**
Mr Declan O'Dempsey (instructed in-house) for the **First Intervener**
Ms Ijeoma Omambala and **Ms Nadia Motraghi** (instructed in-house) for **the Second Intervener**
Mr Richard O'Brien and **Mr Matthieu Gregoire** (instructed by **the Treasury Solicitor**) for the **Third Intervener**

Hearing date: 16th January 2019

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The Respondent is a social care charity. On 17 October 2005 the Appellant, who is black, started work for it as a project worker. In April 2008 she brought proceedings against it in the employment tribunal alleging race discrimination, racial harassment and sex discrimination. By a reserved decision sent to the parties on 3 November 2009 her claims of race discrimination and racial harassment were dismissed but her claim of sex discrimination was upheld. A remedy hearing was directed.

2. There were extraordinary difficulties and delays about the listing and conduct of the remedy hearing. I give more details below, but it is sufficient to say at this point that the difficulties essentially derived from the facts that following the liability hearing the Appellant suffered a serious breakdown in her mental health and that she was at first unrepresented. The hearing did not commence until 5 March 2012 and there were no fewer than four further hearings before a judgment was eventually sent to the parties on 16 February 2015. I should mention in particular an abortive hearing on 22 January 2014, when the Appellant appeared, unexpectedly, without representation. The Tribunal expressed concern about her ability to conduct the hearing, and it was adjourned on the basis that representation would be sought through the Bar Pro Bono Unit. There were two further remedy hearings, in September 2014 and January 2015, at which the Appellant was represented by counsel instructed through the Unit.

3. The Tribunal's eventual remedy decision was promulgated on 16 February 2015. The Appellant was awarded £36,130.93 (including interest). She believed that that award was too low. She appealed to the Employment Appeal Tribunal. Her appeal was rejected on the papers by Lewis J under rule 3 (7) of the Employment Appeal Tribunal Rules 1993, on the basis that it raised no arguable point of law; and again by HH Judge Eady QC on 2 December 2015 at an oral hearing under rule 3 (10).

4. The Appellant sought permission to appeal against Judge Eady's decision. Permission was initially refused by Arden LJ on the papers, but at an oral hearing on 17 April 2018 Singh LJ gave permission on the basis of amended grounds of appeal which focus essentially on what are said to have been inadequacies in the way the ET handled the problems posed by the Appellant's mental ill-health.

5. The Appellant has been represented before us by Mr John Horan of counsel, leading Mr Ruaraidh Fitzpatrick. Mr Horan also appeared before Singh LJ but not at any previous stage. The Respondent has been represented by Ms Mary O'Rourke QC, leading Ms Nicola Newbegin. Ms O'Rourke also appeared in the remedy proceedings in the ET, save at the first hearing in March 2012.

6. Because of the basis on which Singh LJ granted permission the Court granted applications to intervene by the Equality and Human Rights Commission, Mind and the Lord Chancellor. Written submissions were lodged by all three, settled by Mr Declan O'Dempsey (for the Commission), Ms Ijeoma Omambala and Ms Nadia Motraghi (for Mind) and Mr Richard O'Brien and Mr Matthieu Gregoire (for the Lord Chancellor), all of whom attended the hearing.

7. In the event, however, the Court had in November 2018 heard an appeal raising similar issues about how tribunals should deal with parties suffering mental ill-health, in which the Commission had also intervened – *J v K* [2019] EWCA Civ 5 – and judgment was due to be handed down in the week following this appeal. The parties (including the interveners – though the Commission had already seen it) were circulated with the judgment in *J v K* in draft, and at the hearing they were asked whether they wished to make any submissions with a view to the Court adding to the general guidance at paras. 33-41 of my judgment in that case. Mr O'Dempsey and Mr O'Brien identified a couple of particular points about which we might wish to consider saying something; but subject to that it was accepted that the interventions were rendered redundant by *J v K*. It is unfortunate that so much good work by the interveners and their counsel should have come to nothing; but it was not wholly wasted because it left the Court better educated about these sensitive issues.

8. In the light of *J v K*, we invited Mr Horan to focus his submissions on the particular issues raised by the facts of the instant appeal. Having heard his submissions we did not find it necessary to hear from Ms O'Rourke.

THE PROCEDURAL HISTORY

9. We are only concerned with the remedy proceedings. So far as necessary for the purpose of the issue before us, the history can be summarised as follows.

10. As already noted, there was a very long delay between the liability decision and the start of the substantive remedy hearing, primarily as a result of a break-down in the Appellant's mental health. In due course, however, her claim was formulated, and it included a claim for compensation in respect of that break-down on the basis that it had been caused or contributed to by the Respondent's conduct. That required expert psychiatric evidence to be adduced on that issue. Initially a report dated 25 August 2011 was obtained from Dr Alfred White, jointly instructed by the parties.

11. The remedy hearing started on 5 March 2012 before a tribunal comprising Employment Judge Beard and two lay members. The Appellant was unrepresented. Dr White attended and was cross-examined by the Appellant on his report. The Appellant herself gave evidence and was cross-examined by junior counsel then acting for the Respondent. However, following submissions on 6 March the Tribunal concluded that it was not in a position fairly to determine the remedy issues on the basis of the existing evidence. The hearing was accordingly adjourned with directions for further schedules and evidence.

12. On 7 August 2012 there was a directions hearing before the full panel. The Appellant was still unrepresented. She had served a new Schedule of Loss raising more extensive heads of claim and a far larger amount. This resulted in the claim being, as the Tribunal put it, "metamorphosed"; and it was decided that both parties would need to instruct their own psychiatric experts, to address the issues of the cause of the Appellant's ill-health and the risk that she might have suffered a similar break-down even apart from the conduct found against the Respondent. Following the hearing the Appellant instructed solicitors, though it appears on a somewhat limited basis.

13. Expert reports were duly obtained from Dr Nireeja Pradhan, for the Appellant, and Dr Adrienne Reveley, for the Respondent: they are dated 10 and 14 January 2013

respectively, with supplementary addendum reports dated 29 January and 14 February. The experts produced a joint statement dated 26 June 2013. There remained substantial points of disagreement between them. The Appellant also filed a report from a care expert.

14. The hearing resumed on 22 January 2014, with a three-day estimate. Although the Appellant still had solicitors on the record she appeared on the first day without representation. She told the Tribunal that she had expected to be represented until just before the hearing. Various points of importance about the conduct of the hearing, including which witnesses would be available when, had not been agreed. It was not, however, initially the position of either party that the hearing should be adjourned. The Tribunal required the attendance of the relevant solicitor from the firm that was on the record for the Appellant in order to establish why they were not representing her at the hearing. Following his explanation (which I need not seek to summarise), the Employment Judge reviewed the position as follows (as recorded in the Respondent's solicitor's helpfully full note):

> "Medical consequences if deal with case herself. (Reluctantly) either deal with case in piecemeal fashion or we recognise that the matter won't be concluded in next three days and re-list.
>
> There are organisations that are voluntary that might assist you. Given diversity between two experts, have to consider how we are going to progress matter.
>
> Equality Act applies to ET. On the evidence, it's likely you would meet criteria for being a disabled person, so ET have to make appropriate reasonable adjustments to hear case properly.
>
> Secondly in making reasonable adjustments and in light of new ET rules, same scope for an invitation for C to receive support.
>
> MO: You can refer the case to Bar Pro Bono unit. If you asked then to do so and give reasons.
>
> ETJ: C can't self refer. I have had it "done" to me.
>
> ETJ: C, what is your view?
>
> C: How long would it take?
>
> ETJ: Drafting Instruction is not a problem. If we did not finish in two days, as we don't think it will be, would you prefer the matter to be dealt with in part at this stage and calc [*sic*] with a gap or whether to be postponed and heard all in one go. Don't think it will affect the final end date.
>
> MO: Our position earlier was to get going. Having discussed with FM, you are right under Equality Act, confirmed by Dr R could do significant harm if we pressed on. We

> would ask to adjourn now and make an approval [*sic* – presumably "approach"] to Bar Pro Bono unit.
>
> Refer to my name as well known there.
>
> C: Represented self before, I've come this far, want to go ahead.
>
> Also, MO said she knows people at bar, do I want people from there representing me.
>
> ETJ: Need to take advice.
>
> Important that we achieve a just result and both parties present their case."

("ETJ" refers to the Judge, "C" to the Claimant, "MO" to Ms O'Rourke, and "FM" to the partner in the Respondent's solicitors.)

15. The Tribunal then retired to consider the position. When it returned the Judge said (again, as noted by the Respondent's solicitor):

> "This case will go part heard case where there are crucial issues that relate to issues of C and expert dispute. We believe it's better heard in one tranche. Case postponed. This will not postpone the end of the case, which will be the same, as if it was part heard.
>
> We are clear we have no jurisdiction to impose representations the C. We have no jurisdiction to deal with C on any other basis other than a presumption of capacity. Not entitled to Judge on capacity. On that basis, C is entitled to represent herself or any representative that she chooses.
>
> Part of our reasoning is that it will be better for C (evidence being heard will be fresh in her mind). If C feels she ought to be rep, prepared to make referral to Bar Pro Bono Unit. Entirely C's right to reject that rep. Urge C to recognise that the legal issues re medical causation are exceptionally complex. Senior lawyers will find it complex.
>
> If C wishes, ETJ will write letter of refusal [*sic* – presumably "referral"] and you can decide what to do with it or you can seek voluntary org help.
>
> What we ought to do, we'll give three weeks for parties to provide availability of parties, witnesses and representatives, for a period of six months. Will be heard asap in light of availability, at their earliest available date. Hearing will be listed for 4 days as easier to cut back."

There followed a discussion of various points, including an offer from the Judge, which the Appellant accepted, that the Tribunal would itself refer the case to the Bar Pro Bono Unit.

16. On that basis the hearing was adjourned. It was re-listed for 23-26 September 2014. In March Ms Emily Wilsdon of counsel accepted the case through the Bar Pro Bono Unit. She was supplied with the bundle from the previous hearing and had a number of telephone discussions of a case management nature with the Respondent's solicitors and counsel. She settled an updated Schedule of Loss on 16 September.

17. As already noted, the final remedy hearing resumed on 23 September 2014. The Appellant was represented by Ms Wilsdon and the Respondent by Ms O'Rourke. The Tribunal heard evidence from the Appellant and her care expert and from a witness from the Respondent's payroll office. However, on the third day of the hearing the Appellant disclosed an unredacted version of her GP notes (having previously only disclosed a redacted version). These had to be considered by the psychiatric experts, and there was accordingly a further adjournment for them to produce addendum reports.

18. The final stage of the hearing, during which both experts gave evidence, was on 12 and 13 January 2015. As I have said, the Tribunal's decision was sent to the parties on 16 February. Although it referred to and formally took into account the evidence which it had heard in March 2012, when the Appellant was still unrepresented, its focus was on the evidence heard in the two most recent hearings, and in particular that of Dr Pradhan and Dr Reveley.

THE APPEAL TO THE EAT

19. The Appellant drafted her own grounds of appeal to the EAT. The relevant ground reads:

> "*Conduct of Tribunal Hearing – Procedural Error*
>
> As a vulnerable witness giving evidence in my civil Tribunal hearing, I was subjected to criminal style advocacy which included a two day aggressive and or oppressive criminal cross examination of me, without any special measure being put in place. I was under immense stress which affected the quantity and the quality of my evidence. In criminal courts there are special measures put in place to compensate for evidence given by vulnerable witnesses. The Tribunal erred in law as they failed to (provide), put special measures in place, and/or prevent criminal style advocacy/cross-examination of a vulnerable witness. This procedural error or the conduct at the hearing; was an infringement of my human rights and/or rights to a fair trial."

20. I need not set out Lewis J's reasons for not allowing the appeal to proceed under rule 3 (7). At the rule 3 (10) hearing before Judge Eady the Appellant had the advantage of being represented by Mr Daniel Matovu of counsel under the ELAAS scheme. The relevant parts of Judge Eady's judgment read:

> "8. The first basis on which the Claimant puts her proposed appeal is that she did not receive a fair trial. I am unable to see any proper basis upon which that complaint can be pursued. Whilst accepting that initially the Claimant was self-representing, for some at least of the days of the ET hearing she was represented by counsel. That was as a result of the ET having made a reasonable adjustment to assist her by making a reference to the Bar Pro Bono Unit so she might be legally represented. Significantly, she was so represented on the resumed hearing dates in the latter part of 2014 and in 2015. Had there been any concerns that the Claimant had not received a fair hearing when originally representing herself (let alone when legally represented), counsel had the opportunity to raise that matter when she appeared for the Claimant in September 2014 and thereafter. She apparently had no such concerns, and nothing appears from the ET's reasoning to suggest there was any basis for her to do so.
>
> 9. Mr Matovu has put the point somewhat differently before me, observing that – notwithstanding the ET's reasonable adjustment to protect the Claimant's interests – at the crucial stage when experts were instructed by the parties the claimant was still representing herself. That much is true. That said, the Claimant has confirmed that there was no application by her counsel to re-visit the expert evidence; she was apparently content to proceed on the basis of Dr Pradhan's reports of January 2013, when she had been instructed by the Claimant acting in person. Moreover, Dr Pradhan had produced a further report in December 2014, when the Claimant *was* represented. Even allowing for the fact that she may not have been involved at all interlocutory stages, counsel was apparently prepared to represent the Claimant's interests on the basis of Dr Pradhan's three reports, the last of which having been drawn up and disclosed at a time when counsel was herself instructed. Given thus that the Claimant's interests were protected by her legal representative at the time when the ET was considering the expert evidence and given that the opportunity had been taken to put in a further report on the part of the claimant's expert, after counsel was instructed, I am unable to see any unfairness."

THE APPEAL TO THIS COURT

21. The Appellant's Amended Grounds of Appeal, on the basis of which Singh LJ gave permission to appeal, were, as I have said, drafted by Mr Horan. They read:

> "1. The Employment Tribunal erred in law as it failed to make reasonable adjustments to accommodate the needs of the Appellant, a disabled person, and, thereby, failed to act fairly. In particular it:

1.1 failed to conduct a 'ground rules hearing' or the equivalent hearing;

1.2 failed to instruct an independent expert to address and inform the Tribunal as to what reasonable adjustments were required in order for there to be a level playing field between the Appellant and the Respondent; and

1.3 failed properly or at all to discuss with the Appellant various options available in relation to securing legal representation.

2. For the avoidance of doubt the Appellant will contend that:

2.1 there is a link between the domestic duty to make reasonable adjustments and act fairly in cases of disabled people and Article 13 of the UN Convention on Rights of Persons with Disabilities;

2.2 principles of international and European law are relevant in determining the same;

2.3 portions of the Equal Treatment Bench Book, Edition 2013 are material when deciding the same."

22. The reference at 1.1 to a "ground rules hearing" derives from the Equal Treatment Bench Book ("the ETBB"). The ETBB is a guidance document issued by the Judicial College to judges across the whole range of courts and tribunals (criminal and civil). Among other things, it gives guidance about the proper treatment of witnesses and parties who are vulnerable or otherwise disadvantaged by disability (physical or mental). Chapter 4 makes it clear that in cases where there is a vulnerable witness it is good practice, and may be essential in the interests of fairness, that in advance of the hearing at which their evidence will be required there be a separate hearing in which directions are given (so far as necessary) as to any special measures necessary to accommodate the vulnerability in question: see in particular paras. 30-37. In *Rackham v NHS Professionals Ltd* UKEAT/0110/15 the EAT suggested that in an appropriate case a similar hearing should be held in cases in the employment tribunal where one of the parties (typically the claimant) is suffering from mental ill-health: see para. 60 of the judgment of Langstaff P. That suggestion was endorsed by the Northern Ireland Court of Appeal in *Galo v Bombardier Aerospace UK* [2016] NICA 25, [2016] IRLR 703: see para. 53 (7).

23. Mr Horan made it clear in his oral submissions that the focus of his criticism was on what had occurred at the hearing in January 2014, when it became clear that the Appellant would be unrepresented and the steps that the Tribunal took, or failed to take, on that occasion.

24. I am bound to say that my strong provisional view when I first read the papers was that the conduct of the Tribunal at the January 2014 hearing was unimpeachable. As appears from the notes quoted at para. 14 above, it appreciated, on the basis of the expert psychiatric reports which it had seen, that the Appellant appeared still to be

suffering a disability and that this might put her at a disadvantage in conducting her case in person, not least because of the complex nature of the issues: these might indeed have created a problem for any litigant in person, but the Tribunal specifically referred to the need for reasonable adjustments on account of her disability. The adjustment which it identified was that the hearing should be adjourned so that the Appellant could seek representation from the Bar Pro Bono Unit, which it offered to facilitate by writing a referral letter itself. It explained that to her and asked for her views. It is true that she was at first opposed to an adjournment; but the Tribunal was entitled not to treat her views as decisive, since she was not necessarily best placed to judge what was in the interests of justice, including her own interests. The result of the Tribunal's decision was that she was professionally represented by counsel, free of charge, at the two subsequent hearings which were in practice decisive of the remedy issue.

25. When that provisional view was put to Mr Horan in his oral submissions, he submitted that it was not enough for the Tribunal simply to take steps to ensure that the Appellant was professionally represented. It was bound to "take ownership" of the problem itself and make its own assessment about what substantive adjustments were needed in order to ensure that the Appellant was not disadvantaged by her disability. That was the whole purpose of a "ground rules hearing". In the circumstances of the present case it was particularly important that the Tribunal obtain its own expert advice on the Appellant's condition, because the aetiology and diagnosis of her condition was not straightforward.

26. A fundamental problem with this submission is that Mr Horan did not suggest that there was any specific adjustment that should have been made for the Appellant's benefit at the resumed hearings in September 2014 and January 2015 but which was not in fact made. No complaint was pleaded, or advanced by Mr Horan, about the fairness of those hearings. In particular, although, as we have seen, the Appellant originally complained that the ET had failed to protect her against cross-examination which was inappropriate because of her vulnerable status, that point was not pursued before us: indeed it was not a ground on which she had permission. I would add that it is not surprising that Ms Wilsdon should not (at least so far as the record shows) have sought any particular adjustments at the subsequent hearings. The Tribunal's original concerns were about the ability of the Appellant to represent herself, and the impact on her mental health of doing so. That problem was resolved once counsel was instructed. The Appellant's remaining role was as a witness (though in truth the dispositive issues principally depended on the expert evidence). The question whether she needed any special protection in that context is a separate one, and there is no reason to suppose that she did. (I should add for completeness that Mr Horan did not pursue either Mr Matovu's point rejected by Judge Eady at para. 9 of her judgment: her reasoning is evidently correct.)

27. That being so, even if Mr Horan's criticism is well-founded it is wholly academic. But I do not believe that it is well-founded. In the generality of cases it is entirely appropriate for a tribunal to leave it to the professional representatives of a party who is under a disability, or indeed otherwise vulnerable, to take the lead in suggesting measures to prevent them suffering any disadvantage. The representatives can be expected to have a better understanding than the tribunal of what the party's needs are, and access to appropriate medical advice; and there is also a risk that if the

tribunal itself takes the lead in seeking to protect a party (or witness) it may give the impression of taking their side. This involves no abdication of responsibility by the tribunal. Of course it retains ultimate responsibility for seeing that a disabled party receives a fair hearing, and I do not rule out the possibility that there may be cases where a tribunal should take steps for which the party's representative has not asked; but those will be the exception, and the default position is that the tribunal can expect a party's interests to be looked after by his or her representatives.

28. That being so, it was sensible for the Tribunal in this case to try first to see if representation could be obtained: if it could be (as it was), then the representative could be trusted to propose whatever other accommodations might be necessary. It would, frankly, have made no sense for the tribunal to proceed with a ground rules hearing, either there and then or on some later occasion, in advance of the Appellant obtaining representation.

29. Those conclusions to a large extent cover the points raised by the pleaded grounds of appeal; but I should nevertheless briefly address them.

(1) Ground rules hearing

30. I have already made clear that I do not believe that the Tribunal can be criticised for the way that it proceeded at the January 2014 hearing. There is no rule that in every case where there is a disabled or vulnerable witness there must be something specifically labelled a "ground rules hearing" (which has its origin in the rather different world of criminal procedure); or that a specific check-list must be gone through in every such case, whether relevant or not. As Langstaff P went out of his way to emphasise in *Rackham*, what fairness requires depends on the circumstances of the particular case. For the reasons given, fairness did not require the Tribunal to do more than it did in this case.

31. I would add that in an ET case of any complexity there will be a case management hearing, and any difficult or contentious issues about accommodations that might be required as a result of a disability suffered by a party or other witness would typically be canvassed on that occasion – though where that has for any reason not occurred any problem can usually still be resolved at the substantive hearing itself.

32. The foregoing should not be regarded as qualifying the importance, as expounded in such cases as *Rackham* and *Galo*, of tribunals making whatever adjustments are reasonably required to ensure that vulnerable parties or witnesses are enabled to present their case and/or give their evidence effectively, or of their ensuring that they have the appropriate information for that purpose. That follows from the basic common law duty of fairness and is reinforced, where the vulnerability is the result of disability, by the various international instruments referred to in *J v K* (although, as there stated, it is not clear that they add anything to the common law position). But, as I have said, what particular measures are required will depend on the circumstances of the case, and I would deprecate any mechanistic approach.

(2) Instruction of expert by the ET

33. Mr Horan in his skeleton argument advanced some far-reaching submissions to the effect that whenever for the purpose of a ground rules hearing there is no, or no

adequate, expert advice provided by the parties as to the nature of any reasonable accommodations, the ET was under an obligation to commission such advice itself, at public expense. He said that that submission was supported by an observation in *Galo* (though it is far from clear that that is in fact what the Court in that case meant). It was no doubt this submission which prompted the intervention by the Lord Chancellor.

34. However, it follows from what I have said already that that question simply does not arise on the facts of this case. Both parties had access to expert psychiatric advice. The Tribunal was fully entitled to proceed on the basis that, if, as in the event occurred, the Appellant obtained representation, her counsel would consider what advice it was necessary to seek from her expert and make any necessary representations about reasonable accommodations based on that advice.

35. In those circumstances, it is unnecessary and inappropriate for this Court to say anything about the broad point raised by Mr Horan. I would only say that there are evident difficulties about his submission, as noted by Judge Hand QC in *Leeks v Norfolk and Norwich University Hospitals Trust* [2018] UKEAT 0050/16/2702, [2018] ICR 1257 (see at para. 88); and that the cases in which the issue may arise in practice are likely to be very few.

(3) Failure to discuss representation options

36. I can see nothing in this ground. The situation at the start of the hearing on 22 January 2014 took everyone by surprise. The Tribunal first of all investigated why the Appellant's expected representation had fallen through. It then proposed that an attempt be made to obtain representation from the Bar Pro Bono Unit. I can see nothing wrong in that; nor can I see what else it could or should have said. In his oral submissions Mr Horan submitted that the Appellant was not given enough time to consider her position and whether she really wanted to be represented. But the note quoted at para. 15 above shows that the Judge went out of his way to make it clear that she did not have to be represented at all; and she had plenty of time to consider her position following the hearing.

CONCLUSION

37. For those reasons I would dismiss this appeal. Judge Eady was right to conclude that the proposed appeal raised no arguable point of law. The points referred to at para. 7 above on which it was suggested we might give some general guidance were, with respect, marginal, and I do not believe that we need say anything about them.

Lord Justice Irwin:

38. I agree.

Sir Patrick Elias:

39. I also agree.