THE INDUSTRIAL TRIBUNALS
AND FAIR EMPLOYMENT TRIBUNAL

CASE REF: 751/13
700/14

CLAIMANT: **Patrik Galo**

RESPONDENT: **Bombardier Aerospace UK**

JUDGMENT ON A PRELIMINARY HEARING

The preliminary issues for the tribunal to determine were:-

1. does the President, acting alone as the tribunal, have power to determine whether the claimant has capacity to litigate his case?;

2. if so, what is the test to be applied in determining whether the claimant has capacity to litigate his case?;

3. having applied that test, does the claimant have capacity to litigate his case?

The President's judgment is that:-

1. the President does have power, acting alone as the tribunal, to determine whether the claimant has capacity to litigate his case. The reasons for the President's judgment are set out at paragraphs 74 to 82 of this judgment;

2. the test to be applied is set out at paragraphs 83 and 84 of this judgment; and

3. the President was unable to apply the test for the reasons set out at paragraph 85 of this judgment. The President considers that it is no longer possible to have a fair hearing of the claimant's claims. The President's reasons for that consideration are set out at paragraphs 85 and 86 of this judgment.

   Rule 32(1)(e) of the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020 states:-

   (1) At any stage of the proceedings, either on its own initiative or on the initiative or on the application of a party, a tribunal may strike out all or part of any claim or response on any of the following grounds:-

   …

(e) that the tribunal considers that it is no longer possible to have a fair hearing of the claim or response (or the part to be struck out),

Rule 32(2) states that:-

> "A claim or response may not be struck out unless the party in question has been given the opportunity to make representations, either in writing or, if requested by the party or ordered by the tribunal, at a hearing."

It is clear from rule 32(2) above that the claimant must be given the opportunity to make representations to the President, either in writing or at a hearing. The President considers that it would be in the interests of fairness if representations were made at a hearing to allow for clarification, if required. The President therefore orders that a further hearing will take place at **10.00 am on Wednesday 9 March 2022 at Adelaide House** at which the claimant and Ms McGinley will be given the opportunity to make oral representations, if they wish to do so, and which the President will take into account before deciding whether or not to strike-out the claimant's claims to the Industrial Tribunal.

4. The President's judgment is set out in two sections.

At section A, which starts at page 4, the President has:-

set out the relevant background to the Preliminary Hearing in detail to provide the context for the Preliminary Hearing and to record the efforts which have been made to progress the case to a final hearing, having regard to the judgment of the Northern Ireland Court of Appeal in the claimant's case and to contextualise the basis on which the President considers that a fair hearing is no longer possible.

At Section B, which starts at page 35, the President has:-

(a) summarised the claimant and the respondent's submissions in relation to the three preliminary issues;

(b) set out the President's judgment on the three preliminary issues;

(c) set out the President's reasons for her judgment on the three preliminary issues; and

(d) set out the President's consideration that it is no longer possible to have a fair hearing of the claimant's case and her reasons for that consideration.

5. The President's judgment on the preliminary issues only relates to the claimant's complaints to the Industrial Tribunal which are set out at page 1 of the Industrial Tribunals' decision which was appealed to the Court of Appeal and paragraph 1 of the Court of Appeal judgment, namely:-

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

for the following reasons:-

(a) the claimant's complaint of unlawful discrimination on grounds of religious belief or political opinion, which is contained in his first claim, case reference number 751/13 has not yet been adjudicated upon. That is because, although the Industrial Tribunal purported to determine this complaint by striking it out (see paragraph 3.43 of the Industrial Tribunal's decision), it had no jurisdiction to do so as such jurisdiction lies solely with the Fair Employment Tribunal;

(b) the claimant's complaint of discrimination on grounds of religious belief or political opinion and his other claims, set out above, should have been referred to the President or Vice President so that they could have made an order, pursuant to Article 85 of the Fair Employment and Treatment (Northern Ireland) Order 1998, permitting all of the claimant's claims to be heard and determined by the Fair Employment Tribunal as an Industrial Tribunal cannot hear and determine complaints of discrimination on grounds of religious belief or political opinion;

(c) this may not have been drawn to the attention of the Court of Appeal as there is no reference to the claimant's complaint of unlawful discrimination on the grounds of religious belief or political opinion at page 1 of the Industrial Tribunal's decision, or at paragraph 1 of the Court of Appeal's judgment;

(d) this matter came to the President's attention recently when she sought a copy of any determination of the claimant's complaint of discrimination on the grounds of religious belief or political opinion by the Fair Employment Tribunal and discovered that there was not any;

(e) the President will therefore also consider the way forward in relation to the claimant's complaint of discrimination on the grounds of religious belief or political opinion, including whether it would be appropriate to make an order under Article 85 of the Fair Employment and Treatment (Northern Ireland) Order 1998 at this stage, at the hearing on 9 March 2022.

CONSTITUTION OF TRIBUNAL

President E McBride (acting alone)

APPEARANCES:

The claimant appeared in person and was not represented.

The respondent was represented by Ms M McGinley, Solicitor, of EEF Northern Ireland.

SECTION A

Background to the Preliminary Hearing on 7 July 2021

1. On 17 April 2013, the Tribunal's Office received a claim form from the claimant to an Industrial Tribunal and/or The Fair Employment Tribunal. At paragraph 7.1 of the claim form it is stated:-

> *"If you select the religious belief/political opinion box we will regard your complaint as a matter for the Fair Employment Tribunal, which deals with unlawful discrimination on these grounds."*

The claimant who was self-representing at that time did not select the religious belief/political opinion box. His claim was not therefore registered as a matter for the Fair Employment Tribunal, although he had indicated at paragraph 7.4 of the claim form that one of his complaints was on the grounds of religious belief or political opinion. That claim form was registered as containing complaints of unlawful disability and race discrimination to the Industrial Tribunal only and was given the case reference number 751/13.

2. The claimant had legal representation from 16 January 2014 to 8 August 2014 and on 23 April 2014 the claimant lodged a further claim, which contained complaints of:-

- Unlawful disability discrimination;
- Unlawful race discrimination;
- Victimisation;
- Harassment on grounds of his disability and nationality;
- Detriment due to public interest disclosure; and
- Unfair dismissal.

It was registered as a claim to the Industrial Tribunal only and was given the case reference number 700/14

On 30 June 2014, it was ordered that the claimant's claims would be considered and heard together by an Industrial Tribunal.

3. Following a number of Case Management Discussions, the claimant's claims were heard by an Industrial Tribunal on 10, 11 and 13 November 2014. The claimant represented himself at the hearing and on 12 December 2014 the tribunal issued a decision dismissing all of the claimant's complaints.

4. On 30 January 2015, the claimant appealed the tribunal's decision to the Court of Appeal. The Employment Lawyers Group (NI) provided pro bono representation for the claimant and Mr M Potter, of Counsel appeared on his behalf. The respondent was represented by Mr M Wolfe QC.

5. **The Judgment of the Court of Appeal**

5.1 On 2 June 2016, the Northern Ireland Court of Appeal allowed the claimant's appeal and referred the claimant's claims back to the Industrial Tribunal for a hearing before a differently constituted tribunal. Gillen LJ gave the judgment of the Court of Appeal. At paragraph 66 Gillen LJ stated:-

> "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 appeal, and refer the matter back for a hearing before a differently constituted tribunal who will doubtless take the steps outlined in this judgment."

5.2 At paragraphs 47-50, Gillen LJ referred to R (Osborn) v Parole Board and Others [2014] AC 1115 in which Lord Reed had analysed the common law duty of fairness and of the relationship between the ECtHR and English Law which contained important elements for guidance in the Galo case.

5.3 At paragraph 51 Gillen LJ commented 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 ….;
- The UN Convention on the Rights of Persons with Disabilities ….;
- The Disability Discrimination Act 1995 ….;
- The European Union Charter on Fundamental Rights; and
- The Equality Act 2010."

5.4 At paragraph 52 Gillen LJ referred to the judgment in Re G and A (Care Order: Freeing Order: Parents with a Learning Disability [2006] NI Form 8, paragraph [5] which had been cited with approval in the Matter of D (A Child) (No. 3) [2016] EWFC 1.

5.5 At paragraph 53 Gillen LJ stated:-

> "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 need 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 of mental disabilities, specific learning difficulties and mental capacity.

(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 these adjustments needed under review."

5.6 Gillen LJ set out the Court of Appeal's conclusions at paragraphs 54-64.

At paragraph 55 Gillen LJ stated:-

> "We have come to the conclusion that the requirements of procedural fairness were not met in this case."

The reasons for that conclusion were set out at paragraphs 56-64.

At paragraph 56 Gillen LJ stated:-

> "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 (sic) 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."

At paragraph 57 Gillen LJ stated:-

> "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?"

At paragraph 58 Gillen LJ stated:-

> "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 (sic) 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."

At paragraph 59 Gillen LJ stated:-

> "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."

At paragraph 62 Gillen LJ stated:-

> "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."

At paragraph 64 Gillen LJ stated:-

> "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 (sic). 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."

Case Management Discussions

6. Following referral of the case back to the Tribunal for a hearing before a differently constituted Industrial Tribunal, a number of Case Management Discussions were conducted by the President to prepare the claimant's case for the hearing, having regard to paragraph 66 of the Court of Appeal judgment at which Gillen LJ stated:-

> "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 appeal, and refer the matter back for a hearing before a differently constituted tribunal who will doubtless take the steps outlined in this judgment.";

and the guidance provided by Gillen LJ, as set out at paragraph 5 above.

Case Management Discussion – 12 January 2017

7. The first Case Management Discussion, took place on 12 January 2017 to consider arranging a Ground Rules Hearing to determine the reasonable adjustments that could be made to enable the claimant to participate effectively in the Hearing and to ensure that both parties received a fair hearing. The claimant did not attend. The President was informed by Ms McGinley at the Case Management Discussion that the claimant had moved address. The Case Management Discussion was therefore adjourned and Ms McGinley provided the Tribunal Office with the claimant's new address after the hearing. A further Case Management Discussion was arranged for 9 February 2017.

Case Management Discussion – 9 February 2017

8. The claimant attended the Case Management Discussion on 9 February 2017 and informed the President that the Employment Lawyers Group, which had provided pro bono representation for him at the Court of Appeal, would not be

doing so for the rehearing and that he had made an application to the Equality Commission for assistance on 7 February 2017. That Case Management Discussion was therefore adjourned to enable the Equality Commission to consider the claimant's application and on 23 May 2017 the Equality Commission notified the tribunal that it had decided to represent the claimant. The Equality Commission instructed Mr M. Potter, of counsel, who had represented the claimant at the Court of Appeal, to represent him for the hearing of his case before a differently constituted tribunal.

Case Management Discussion – 28 June 2017

9. Following the Case Management Discussion on 9 February 2017, the President sought and obtained the services of Ms Smith (a Communications Specialist who also worked as a Registered Intermediary in the Courts in Northern Ireland), with the consent of the Office of the Lord Chief Justice. Ms Smith's role was to provide advice and make recommendations to the tribunal on the best ways to facilitate communication with the claimant.

10. The Equality Commission and Ms McGinley were informed on 6 June 2017 that a further Case Management Discussion had been arranged for 29 June 2017 and that Ms Smith would attend. They were told who Ms Smith was and that, if agreed by the claimant, Ms Smith would conduct an assessment of the claimant's communication abilities and needs. Ms Smith would then prepare a report for the tribunal, which would be shared with the parties' representatives with advice and recommendations for all who would be required to question the claimant during the tribunal hearing and which would be considered by the tribunal when determining reasonable adjustments to be put in place to enable the claimant to participate effectively in the hearing.

11. Ms Smith attended the Case Management Discussion on 28 June 2017. Mr Martin, a Conciliation Officer of the Labour Relations Agency, also attended. Ms Smith told the claimant that she was a Communications Specialist and Intermediary, that she could help people who have communication difficulties and who might be asked questions at a tribunal and how she could help him. The claimant agreed orally at the Case Management Discussion and later in writing to Ms Smith carrying out an assessment of his communication skills and needs. Ms Smith was provided with a report from Dr Losty (dated September 2013), who had been a Consultant Clinical Psychologist before her retirement and from Ms Douglas (dated August/September 2017) who was a Consultant Psychologist and a Chartered Psychologist. Ms Smith was also provided with the judgment of the Northern Ireland Court of Appeal in the claimant's case.

Ground Rules Case Management Discussion – 18 September 2017

12. Ms Smith met with the claimant on 6 September 2017. Ms Smith provided a report to the tribunal on 11 September 2017 and copies of Ms Smith's report were provided to the representatives. A Ground Rules Case Management Discussion took place on 18 September 2017. Ms Smith was in attendance.

Following consideration of the reports of Dr Losty, Ms Douglas, Ms Smith, the judgment of Gillen LJ, the relevant provisions of the Equal Treatment Bench Book and the representations of Mr Potter and Ms McGinley, the following adjustments were identified and agreed between the parties and were ordered by the President. They were reduced to writing by the representatives, as set out below, and were lodged with the Tribunal Office on 11 October 2017.

"TRIBUNAL PROCESS

1. ***Meeting with the Tribunal prior to hearing***
   Prior to the commencement of the final hearing, a short hearing will be convened for the primary purpose of ensuring all necessary steps, adjustments and measures have been put in place.

2. ***Environmental factors***
   Steps will be taken to optimise the 'environment' within which the hearing takes place:-

   a. *reduction/elimination of background noise;*

   b. *the lights will be switched off;*

   c. *minimising any distractions (e.g. use of a room on the first or second floor);*

   d. *people attending the tribunal including witnesses will be asked not to talk;*

   e. *a consulting room at the front of the building will be made available for the Claimant for the duration of the hearing; and*

   f. *checking that the environment is suitable throughout the hearing.*

3. ***Demeanour***
   The tribunal will take into account the Claimant's disability when observing his facial expressions and behaviour during the hearing:-

   a. *the Claimant may avoid eye contact;*

   b. *the Claimant may appear insensitive at times;*

   c. *the Claimant may speak in odd, monotone or pedantic manner;*

   d. *the Claimant may be forceful in his opinion which may appear as being rude;*

   e. *the Claimant may not sit still;*

f. *the Claimant may take extended periods of time to respond to questions.*

4. ***Breaks***

a. *The hearing will be scheduled to ensure, as far as is required, that the Claimant is not cross-examined on consecutive days.*

b. *There should be regular breaks during the Claimant's questioning: one offered every hour or at appropriate junctures in case and potentially more frequent breaks.*

c. *If the Claimant requires a break he can signal by raising his hand, or his advisers can indicate that a break is required.*

5. ***Interpreter***

a. *A Slovak interpreter will be present when the Claimant is giving evidence, but will only be utilised when the Claimant indicates that a translation would be helpful.*

*PREPARATION BY **CLAIMANTS REPRESENTATIVES***

6. ***Preparation***

a. *The Claimant will be provided with a written schedule to assist him in understanding what will happen during the tribunal proceedings.*

b. *A glossary will be provided to the Claimant explaining technical legal words and phrases that may be used during the hearing.*

c. *The Claimant's advisers will conduct role-play cross-examination. The Claimant's advisers understand that they are not permitted to coach the Claimant in his evidence.*

d. *The Claimant's legal team will help him understand the roles and functions played and discharged by the tribunal members and the Respondent's lawyers during the proceedings. It will be explained to the Claimant that the Respondent's lawyer is required to put the Respondents case which may involve her asking questions which could cause him to be annoyed, frustrated or angry.*

QUESTIONING OF WITNESSES

7. ***Questioning***

a. *A week before the commencement of the hearing, the Claimant will be provided with **the key themes/issues** to be addressed during his cross-examination.*

b. *During the hearing the questions asked will be typed onto a screen to enable the Claimant to visualise the questions.*

c. The questioning will be sequential or chronological.

d. Questions should be short and specific, preferably averting to one piece of information.

e. The questioning should not be hostile or aggressive. ***However it may be appropriately robust****.*

f. If the question is unclear it may be appropriate for the questioner to reframe the question, rather than have it translated.

g. It will be expected that the Claimant will take some time before answering questions, ie more time than would ordinarily be expected of witnesses.

TIMETABLE"

The parties agreed a timetable for the completion of the exchange of witness statements by January 2018 and to notify the tribunal of agreed dates for the re-hearing.

Case Management Discussions – 12 April 2018 and 15 May 2018

13. Before re-hearing dates had been agreed and notified to the tribunal, the claimant applied for a transcript of a Pre-Hearing Review which had taken place on 18 January 2013 in relation to an earlier claim (CRN 59/12) brought by him in December 2011. That claim had been dismissed on 29 May 2013 following a conciliated settlement between the claimant and the respondent. The respondent objected to the application and following Case Management Discussions on 12 April 2018 and 15 May 2018, the President ordered that the claimant should be given a copy of the audio recording of the Pre-Hearing Review.

Revised Time Table

14. On 31 July 2018, the tribunal was notified that the parties had agreed that:-

(a) the case would require a three weeks' hearing commencing on Friday, 18 January 2019;

(b) the claimant's cross-examination and re-examination would take place on alternate days to give him time to rest;

(c) the claimant's witness statement and schedule of loss (which had not been provided to the respondent on 10 November 2017) would be provided to the respondent on 5 October 2018;

(d) the respondent's witness statements would be provided to the claimant on 23 November 2018; and

(e) the bundles of documents would be lodged with the tribunal on 14 December 2018.

Case Management Discussion – 9 October 2018

15. A further Case Management Discussion took place on 9 October 2018 to ensure that the timetable was being met. The President was informed that the claimant had not provided his witness statement and schedule of loss to the respondent by 5 October 2018. Mr Potter stated that it was hoped that the claimant's witness statement could be provided to the respondent by 11 October 2018 and the time limit was extended to that date. Mr Potter also stated that a further report had been sought from Ms Douglas on behalf of the claimant and that it was due on 12 November 2018. Mr Potter applied for a transcript of the Pre-Hearing Review dated 18 January 2013 in addition to the audio recording and the President granted it as a reasonable adjustment.

16. On 11 October 2018, the Equality Commission notified the tribunal that they would not be in a position to serve the claimant's witness statement until 16 October 2018. Ms McGinley therefore applied for an extension of time for the respondent to serve its witness statements from 23 November 2018 to 7 December 2018 which was granted with the claimant's consent.

17. The claimant's witness statement was provided to the respondent on 18 October 2018. His schedule of loss was not provided. On 29 October 2018, Ms McGinley made an application to the tribunal for a Hearing to be arranged to consider the respondent's objections to parts of the claimant's witness statement. The tribunal was also informed that a number of additional issues had arisen between the parties which they were unable to resolve.

Case Management Discussion – 10 January 2019

18. A further Case Management Discussion therefore took place on 10 January 2019 to determine the following disputed issues.

(a) **The respondent's application to have certain parts of the claimant's witness statement excluded**

Having considered the representations of Ms McGinley and Mr Potter, the President ordered that:-

(i) the words "(scoliosis) and job-duty restrictions" should be removed from paragraph 4a. of the claimant's witness statement on the ground that it sought to introduce a claim that had not been made by the claimant;

(ii) the section at paragraph 4b. of the claimant's witness statement, commencing with the word "Finally" and finishing with the word "loss", should be removed on the ground that it was also seeking

to include a claim that had not been made in the claimant's claim forms; and

(iii) paragraph 6e. to r. should be removed, having regard to the overriding objective, to keep the proceedings, which had already been listed for three weeks, within reasonable bounds by concentrating on the actual claims in this case rather than peripheral allegations which involved wholly different people, wholly different acts and a time period going back 10 years.

(b) **The claimant's application for a split hearing on liability and remedy**

Mr Potter informed the President that the application was made because:-

(i) the claimant had informed his legal team on 12 December 2018 that he wanted to obtain a psychiatric report in relation to remedy; and

(ii) the claimant's legal team had not yet arranged a medical examination because they were waiting for reports or notes relating to treatment the claimant had received from councillors and therapists. That was because the claimant had informed his legal team that, although he was registered with a GP, the GP had informed the claimant that he did not have any notes or records in respect of the claimant.

Ms McGinley objected to the application for a split hearing on the grounds that the case had been listed for three weeks commencing 18 January 2019 and that it would not be easy to separate liability from remedy.

The President refused the application for a split hearing and directed the claimant's legal team to make arrangements for the claimant to be examined by a psychiatrist in relation to remedy as soon as possible. The President was then informed by Mr Potter and Ms McGinley that they were considering obtaining a joint psychiatric report on the claimant in relation to remedy.

(c) **The claimant's application to have a further report from Ms Douglas admitted as evidence**

The claimant's application, which was opposed by the respondent, was granted.

(d) **The claimant's failure to provide his schedule of loss to the respondent**

The time limit for the claimant to provide his schedule of loss to the respondent was extended again, by consent, to 14 January 2019.

(e) **The respondent's application for reasonable adjustments to be put in place for one of the respondent's witnesses**

The application was granted.

(f) **The claimant's application for directions about the appropriate way to deal with the recording of a previous hearing in respect of which Mr Potter would be cross-examining the respondent's witness, Dr Jenkinson**

Directions were given.

Correspondence from the Equality Commission

19. On the 15 January 2019 the Equality Commission sent an email to the tribunal, and copied it to Ms McGinley in which they stated:-

> *"I refer to the above matter which is listed for hearing on 17 January 2019 for three weeks. Before the case can start there are a number of unresolved matters from the standpoint of the Claimant which we must raise with the tribunal. We cannot continue until these matters are resolved. We therefore request a Case Management Discussion prior to the case starting on Friday morning (18 January 2019) …"*

20. On 17 January 2019, the Equality Commission and Ms McGinley were asked to identify any outstanding issues in the case as soon as possible. They both replied on that same date. Ms McGinley informed the tribunal that the respondent had no outstanding issues which required the assistance of the tribunal. The Equality Commission sent an email to the tribunal, and copied it to Ms McGinley, in which they notified the tribunal of the issues the claimant was seeking to raise *"irrespective of any advice he may be receiving"*. The issues were:-

(1) the claimant wanted the President to reverse the decision she made, at the Case Management Discussion on 10 January 2019, striking out parts of his witness statement and to include the term '*institutional discrimination'* in his claim;

(2) the claimant wanted *"a Compliance Officer called to give evidence about the whistleblowing matter raised at his appeal and referenced at paragraph 45 of his witness statement".* The Equality Commission stated that *"This matter was explored by the Commission. The Commission does not believe the calling of a Compliance Officer would assist the Claimant in establishing that he was unlawfully treated by making a protected disclosure during the appeal process";*

(3) *related to 2 above, and following the hearing on 10th January 2019, the Claimant wants to reopen matters that were part of his previous case which was settled;*

(4) *the Claimant wants the reference to a remark allegedly made by him removed from the respondents witness statements;*

(5) *the Claimant authorised the disclosure of his schedule of loss on Monday 14th January 2019. He has now withdrawn that authority;*

(6) *the Claimant has not agreed the existing bundles*;

(7) *the Claimant wishes to seek further discoverable documentation;*

(8) *the claimant wishes to apply for a postponement of the hearing. He has indicated his intention to communicate with the tribunal directly in this regard; and*

(9) *the Claimant references difficulties arising from his disability as a basis for an adjournment".*

21. Having set out the above issues, the Equality Commission stated:-

"The above issues have been raised with the Commission following the hearing on 10th January 2019. Some of the issues have been explored with the Claimant previously, particularly numbers 2 and 7. The Commission engaged in an interlocutory process on the instructions of the Claimant and the replies are contained in the bundle.

The Claimant's representatives are conscious of the Claimant's disability and have made strenuous efforts to assist the Claimant in his claims and provide ongoing representation.

The Claimant's representatives have sought to assist the Claimant in presenting a meritorious case. The Commission funds meritorious discrimination claims. However the Commission is not funding or assisting the Claimant to bring any and every issue that he deems relevant before the tribunal notwithstanding the merit of same.

Counsel and the Commission are mindful of the Claimant's disability, have taken his disability into account in how he has been represented to date, and do not want to withdraw representation unless and until it is no longer practicable or possible to continue to represent him.

Following the tribunal hearing on Thursday 10th January 2019 and particularly because part of the witness statement was removed, the Claimant has become very greatly exercised and agitated in relation to his case. He has sent numerous detailed emails to the Commission raising his concerns. He indicated he was having difficulty sleeping and eating. We had further concerns by reason of his presentation,

demeanour and behaviour at the consultation on Monday 14th January 2019. For these reasons and the apparent deterioration in his ability to communicate constructively over the last few days, it was decided to ask [the first Consultant Psychiatrist] to address the Claimant's fitness to pursue the litigation at this time or at all in his psychological report.

*This morning (*Thursday 17 January 2019*) we have spoken to the [first Consultant Psychiatrist] who consulted with the Claimant as directed by the tribunal. [The first Consultant Psychiatrist] has informed the Commission that the Claimant is not fit to proceed. He is to provide a short report later today to that effect. He is to provide a lengthier report by Monday, 21 January 2019."*

Case Management Discussion - 22 January 2019

22. A Case Management Discussion took place before the commencement of the final hearing which had been moved from 18 January 2019 to 22 January 2019 to enable the matters raised by the Equality Commission in their email, dated 17 January 2019, to be considered. Shortly before the commencement of the Case Management Discussion, the clerk to the tribunal provided the tribunal with copies of the first Consultant Psychiatrist's report. At the outset of the Case Management Discussion Mr Potter addressed the tribunal, as summarised below:-

22.1 following the Case Management Discussion on 10 January 2019, the parties agreed to obtain a joint psychiatric report on the claimant, primarily to address alleged psychiatric injury relating to his case against the respondent. The parties agreed the letter of instruction to the first Consultant Psychiatrist, and the report was paid for by both parties and was owned by both parties;

22.2 up until the Case Management Discussion on 10 January 2019, Mr Potter and the Equality Commission worked with the claimant on the basis:-

(a) of the presumption that the claimant had capacity to litigate his case in accordance with the common law test in the ***Masterman-Lister v Brutton*** **(2003) 1 WLR 1511 (2003) 3AII ER 162** i.e. that he understood the litigation and could make relevant decisions in relation to it; and

(b) that they would do their very best to assist the claimant;

22.3 following the Case Management Discussion on 10 January 2019, Mr Potter and the Equality Commission became concerned by the claimant's behaviour as set out at paragraph 21 above. Following consultation with the claimant on 14 January 2019, Mr Potter and the Equality Commission became more concerned about the claimant by reason of his "*presentation, demeanour and behaviour"* at the

consultation and the "*apparent deterioration in his ability to communicate constructively*". The first Consultant Psychiatrist was therefore asked to address the claimant's fitness to pursue the litigation at that time or at all in his report, in addition to addressing the claimant's alleged psychiatric injury relating to his case against the respondent;

22.4 on Thursday 17 January 2019, the first Consultant Psychiatrist informed the Equality Commission orally that, in his opinion, the claimant was not fit to attend the tribunal hearing at that time. On Monday 21 January 2019 the first Consultant Psychiatrist provided his full written report, to the Equality Commission in which he added that he did not see the claimant being fit to attend a tribunal hearing at any point in the future. The Equality Commission provided a copy of the report to the respondent, and although the first Consultant Psychiatrist's report had been commissioned and paid for by both parties, it was the respondent who provided a copy of the report to the tribunal. That was because the claimant had rejected the report as he did not agree with its contents. The claimant wanted to proceed with the hearing of his case, subject to certain matters he considered to be outstanding being addressed, without the report being used;

22.5 notwithstanding the claimant's view of the first Consultant Psychiatrist's report, Mr Potter and the Equality Commission had read the report and were mindful of the first Consultant Psychiatrist's conclusions, (some of which Mr Potter opened to the tribunal) and in particular his opinion in relation to the claimant's unfitness to attend the tribunal hearing at that time or at any point in the future, and could not ignore it;

22.6 on the basis of their dealings with the claimant since 10 January 2019, as set out in the Equality Commission's email dated 17 January 2019 (see paragraphs 20 and 21 above) and the first Consultant Psychiatrist's report, Mr Potter and the Equality Commission's view was that they could not represent the claimant at the final hearing because they no longer believed that the claimant had the capacity to litigate. The only way they could continue to represent the claimant would be if an Employment Judge appointed a 'suitable and willing' person to act as a litigation friend for the claimant. The litigation friend would then take responsibility for the litigation and could instruct Mr Potter and the Equality Commission to continue to represent the claimant in his case;

22.7 in ***Jhuti v Royal Mail UKEAT 0061/17/RN*** Simler J., then President of the Employment Appeal Tribunal, held that under the 2013 Rules in Great Britain Employment Judges have power to appoint a litigation friend where a party to the proceedings lacked capacity to litigate. In light of the ***Jhuti*** judgment, if the claimant did not know someone who could act as his litigation friend for these proceedings, an Employment Judge has power to appoint a "suitable and willing" person to act as the

claimant's litigation friend or alternatively an application could be made to the Official Solicitor in Northern Ireland to have someone appointed as the claimant's litigation friend;

22.8 Mr Potter and the Equality Commission had explained the possibility of the appointment of a litigation friend to the claimant but they did not have instructions to make an application to the tribunal for a litigation friend to be appointed, and before appointing a litigation friend, the Employment Judge would have to be satisfied that the claimant did not have capacity to litigate;

22.9 although the first Consultant Psychiatrist had given his expert opinion on the claimant's fitness to attend the tribunal Hearing in January and February 2019 or at any point in the future, as he had been asked to do, he had not been asked to and had not given his expert opinion on the claimant's capacity to litigate and such a report would need to be obtained from a doctor who specialised in capacity.

23. The President asked Mr Potter if it was proposed to obtain a report on the claimant's capacity to litigate. Mr Potter replied that he and the Equality Commission were not ruling anything out. The President therefore rose to give Mr Potter the opportunity to consult with the claimant in relation to the matter.

24. Following consultation with the claimant, Mr Potter informed the tribunal that the claimant had consented to a report being obtained on:-

(a) his capacity to litigate his claims; and

(b) his capacity to be cross-examined during the hearing of his claims;

in the context of the potential appointment of a litigation friend.

The President asked Mr Potter if the claimant required additional time to consider the provision of his consent to a report being obtained on his capacity to litigate and to being cross-examined. Mr Potter confirmed that the claimant had given his consent and stated that no more time was required. Mr Potter informed the tribunal that the claimant's legal team would obtain a report on the claimant's capacity to litigate and to be cross-examined from a doctor who specialised in capacity as soon as possible and that if the claimant wished to use the report to make an application for a litigation friend to be appointed, the report would be shared with the tribunal and the respondent.

25. The respondent did not object to the course set out by Mr Potter and the tribunal adjourned the final hearing which had been listed from 22 January 2019 (moved from 18 January 2019) to 8 February 2020 to enable the claimant to be examined by a doctor, who specialised in capacity issues, on his capacity to litigate and to be cross-examined and, if appropriate, to enable an application for the appointment of a litigation friend for the claimant to be made.

26. Following the Case Management Discussion on 22 January 2019, the claimant sent three emails to the tribunal, the first two on 25 January 2019 and the third on 1 February 2019. The first email contained an application for the tribunal to revoke its Order excluding parts of the claimant's witness statement. The second email contained an application to exclude the first Consultant Psychiatrist's report. In the third email the claimant stated that he would be seeking "*further clarification over the issues connected to its* (the tribunal's) *process and directions, such as provision of the Bundle, serving of Discoverable documents, scope of the claim and proposed "limitations" of the claim".* No application was made by the Equality Commission to the tribunal in respect of any of the matters referred to in the emails and on 4 February 2019, the claimant's three emails were copied to the Equality Commission for clarification. On the same date the claimant was informed that his three emails had been copied to his representative, the Equality Commission, for clarification and that he should ask his representative to write to the tribunal on his behalf to avoid any confusion or misunderstanding.

27. On 14 February 2019, the Equality Commission informed the tribunal that when the claimant sent his emails to the tribunal, he believed that his representation by the Equality Commission had been suspended and that the Equality Commission advised him that they were still representing him and that they were waiting for his capacity to litigate to be assessed.

28. On 22 February 2019, the claimant sent two more emails to the tribunal asking for confirmation that his submission would be treated as an application by him but again no application was made by the Equality Commission on his behalf. On 26 February 2019, the claimant, the Equality Commission and the respondent were informed that a further Case Management Discussion would be arranged in relation to the claimant's emails on receipt of the medical report from the second Consultant Psychiatrist.

29. On 2 April 2019, the Equality Commission sent an email to the tribunal and copied it to Ms McGinley in which they stated:-

> *"I refer to the above matter and write to advise the tribunal that we are in receipt of [the second Consultant Psychiatrist's] medical report.*
>
> *We have consulted with the claimant and he has indicated that he is not happy for this report to be released as he disputes the conclusions therein. We have suggested that he takes some further time to consider his options going forward.*
>
> *We will revert back to the tribunal by 19 April 2019 with an update."*

30. On 4 April 2019 the Equality Commission sent a further email to the tribunal and copied it to Ms McGinley in which they stated:-

> *"I refer to the above matter and to my previous email of 2 April 2019. The position is that the Claimant has refused to consent to the*

appointment of a Litigation Friend. It is our view that this is necessary in order for the case to proceed.

We do not believe we can take forward the matter in seeking to have a litigation friend appointment without the Claimant's permission.

We have made this position clear to the Claimant.

We are disappointed that despite our best efforts that we do not have the Claimant's permission. In light of this, the Commission will be reviewing the grant of assistance at the next meeting of our Legal Funding Committee on 18 April 2019 in line with our internal policies. The decision made at this time regarding continued representation will be communicated as soon as possible thereafter."

31. On 9 April 2019, Ms McGinley, the respondent's representative, sent an email to the tribunal, in response to the Equality Commission's email dated 4 April 2019 and copied it to the Equality Commission, pointing out the steps that had been taken by the tribunal, with the respondent's co-operation, to have the claimant's case heard before a differently constituted tribunal. In relation to the claimant's refusal to consent to the appointment of a litigation friend Ms McGinley stated:-

"At a CMD, on 24 (sic) 22 January 2019 the Equality Commission stated that they then had concerns about the claimant's capacity to litigate. The tribunal allowed time for the Equality Commission to obtain a further report on the Claimant's 'capacity to litigate'. This is the report from the [second Consultant Psychiatrist] which the respondent and the tribunal have not yet seen as the Claimant is refusing his consent for its release.

As the claimant's representative has sought the Claimant's consent to appoint a litigation friend, the Respondent believes that the [second Consultant Psychiatrist] has stated that the claimant does not have the capacity to litigate. The Respondent presumes, as the Equality Commission are seeking the Claimant's consent to appoint a litigation friend and do not believe that they can appoint a litigation friend without his consent, that the Claimant must have capacity to make decisions (but not to litigate).

It also seems highly likely that in circumstances where the Claimant continues to refuse his consent to appoint a litigation friend that the Equality Commission will cease to continue to support his case. If that occurs then the Claimant will return to being a personal litigant, who it seems has been found as not having the capacity to litigate.

Despite all these efforts, it now appears that the parties are back in the position that the Claimant is unable to participate in a Hearing and unlikely to be able to do so in the foreseeable future.

The Claimant is withholding consent for the release of the report from the [second Consultant Psychiatrist] to the tribunal and the Respondent which causes real difficulties in understanding what, if any, further adjustment could potentially be made. The Claimant is also choosing not to appoint a litigation friend which perhaps would enable him to have his case determined.

In these circumstances the Respondent believes that its access to justice and right to a fair hearing is severely prejudiced and that it is coming to the point that it is no longer possible to have a fair hearing within a reasonable period under Article 6(1) of the Human Rights Act.

At this stage, the Respondent seeks an unless order that unless the Claimant agrees to the disclosure of the [second Consultant Psychiatrist's] report and or the appointment of a litigation friend that his claim is struck out."

On 16 April 2019, the tribunal sent the above correspondence to the Equality Commission for their information and any comments they wished to make.

32. On 18 April 2019 the tribunal received a letter from the Equality Commission in which they stated:-

"I refer to the above matter.

Please note that the Commission is no longer assisting the Claimant in the above matter. Please direct all future correspondence to the Claimant."

I also refer to the tribunal's recent email of 16 April 2019. I confirm that I have forwarded this to the claimant for his personal attention and comments."

33. On 18 April 2019, the tribunal also received an email from the claimant in which he stated that the respondent's application for an unless order at that stage was "*irrelevant and inappropriate before determination of the concerned matters*", which the President understood from his email to be:-

(a) the alleged introduction of a '*fraudulent plagiarised*' claim form by Ms McGinley which was "*adopted and pursued by the Claimant's Legal representatives regardless its legitimacy*";

(b) the alleged '*manipulation'* of the claimant by his legal representatives by appointing the second Consultant Psychiatrist, to provide a report on his capacity to litigate, which he considered '*should be rejected and void',* as '*ultimately failing on principles on capacity to litigate test (ref: Mental Capacity Act 2015 sic)*.

The claimant concluded his email by stating that he was also seeking clarification on those issues from his legal representatives.

34. On 1 May 2019:-

(a) the claimant's email dated 18 April was referred to Ms McGinley for comment;

(b) the claimant was informed that if he required clarification on the matters raised in his email dated 18 April 2019, he should contact his legal representatives;

(c) Ms McGinley informed the tribunal by email that the claimant had already sent her his email dated 18 April 2019 and that:-

> "*Regrettably I am unable to understand the contents of the Claimant's email in the context of his cases. However, I can confirm that at no stage have I introduced any fraudulent or plagiarised Claim form or any other fraudulent or plagiarised documentation in this case or indeed any other case*."

In light of the Equality Commission's emails dated 2 and 4 April 2019 and letter dated 18 April 2019, the claimant and Ms McGinley were informed on 11 June 2019 that a Case Management Discussion would take place on 26 June 2019 to consider the way forward in the case.

Case Management Discussion - 26 June 2019

35. At the Case Management on 26 June 2019 to consider the way forward in light of the Equality Commission's emails dated 2 and 4 April 2019 and letter dated 18 April 2019, which are set out at paragraphs 29, 30 and 32 above, the claimant and Ms McGinley were both given the opportunity to give their views on the way forward.

36. The claimant's view on the way forward was that the tribunal should proceed to hear his claims without appointing a litigation friend. The respondent took a neutral stance. The President informed the claimant and Ms McGinley that although she had not seen the second Consultant Psychiatrist's report, if the Equality Commission, having seen it, considered that a litigation friend should be appointed for the claimant, that is what the President should try to do. The President explained to the claimant that the purpose of a litigation friend was to ensure that he could participate effectively in the hearing of his case and could receive a fair hearing as well as the respondent. The President also informed the claimant and Ms McGinley that if a litigation friend was appointed for the claimant, the litigation friend could instruct a solicitor or other person to act on his behalf. The President then gave the claimant and Ms McGinley the opportunity to state any objections they had to the President's views on the appointment of a litigation friend for the claimant.

37. The claimant stated that he objected to the findings and conclusion in the second Consultant Psychiatrist's report because:-

(a) he believed that the second Consultant Psychiatrist had failed to follow the principles of the capacity to litigate test under the Mental Capacity Act 2015 (sic); and

(b) he felt that the second Consultant Psychiatrist's report was not objective, that it was misleading and was lacking in credibility.

38. Ms McGinley confirmed that the respondent was taking a neutral stance in relation to the consideration of the appointment of a litigation friend.

39. The President asked the claimant if he knew someone who could be appointed as his litigation friend. The claimant stated that he did not and that he disagreed with the notion of a litigation friend being appointed. The President informed the claimant and Ms McGinley that she was going to approach the Official Solicitor to ascertain if the Official Solicitor would consider appointing a litigation friend for the claimant and that she would write to the claimant and Ms McGinley after she had received a response.

40. The claimant stated that he was concerned by the President's decision to approach the Official Solicitor to appoint a litigation friend because:-

(a) it would be contrary to the claimant's interest in pursuing his case;

(b) a litigation friend should not be appointed until the President had satisfactorily proved that the claimant needed a litigation friend; and

(c) the President was referring to the second Consultant Psychiatrist's report which she had not seen.

41. The President asked the claimant if he was willing to let the President see the second Consultant Psychiatrist's report. The claimant stated that he was not willing to let the President see her report because:

(a) it would add to the confusion;

(b) it was not necessary for the President to see it; and

(c) it was lacking in credibility.

42. Having considered the above matters the President confirmed that she would contact the Official Solicitor with regard to the appointment of a litigation friend for the claimant and that she would write to the claimant and Ms McGinley after she received a response.

43. On 17 July 2019 the President wrote to the Official Solicitor, and asked if she would consider appointing a litigation friend for the claimant in relation to his claims. The President sent the Official Solicitor a copy of the Court of Appeal judgment in the case and summarised the background to her request.

44. On 12 August 2019 the President received a response from the Official Solicitor informing her that the Official Solicitor could only act as next friend or guardian ad litem in cases at County Court level and above where no one else was suitable, willing or able to do so and that she would only do so where the individual in question had been found to lack the capacity to give instructions as the result of a mental disorder as defined under the Mental Health (Northern Ireland) Order 1986 and that that required a report from a medical professional indicating incapacity in relation to the proceedings. The Official Solicitor suggested that it might be helpful for consideration to be given to the claimant receiving assistance from an advocate, a McKenzie friend or from a charity specialising in this area. The Official Solicitor also indicated that the Law Centre, Autism Network NI and Mind Wise might be able to assist the claimant. On 16 August 2019 the President sought permission from the Official Solicitor to send a copy of her response to the claimant and Ms McGinley as it contained helpful information and on 12 September 2019 the Official Solicitor gave permission for the President to do so. On 20 September 2019 the President sent copies of the Official Solicitor's letter to the claimant and Ms McGinley and informed them that a further Case Management Discussion would take place on 9 October 2019 to consider the way forward.

Case Management Discussion - 9 October 2019

45. At the Case Management Discussion on 9 October 2019 the President went through the organisations referred to by the Official Solicitor with the claimant and read aloud paragraphs 27 and 22 of the ***Jhuti v Royal Mail*** case.

At paragraph 27 Simler J. stated:-

> "*The appointment of a litigation friend for a person lacking capacity raises an issue not just of representation but of participation. If a person who lacks litigation capacity cannot have a litigation friend to assist her, then she cannot participate in proceedings in any real sense. Without a litigation friend the individual cannot access a court or tribunal to establish a wrong and cannot obtain any remedy for an established wrong ….*"

At paragraph 22 Simler J. stated:-

> "… *To continue with a hearing with an unrepresented litigant who lacks mental capacity to conduct litigation is tantamount to continuing with the hearing in that party's absence and flies in the face of a Rule* (the overriding objective) *designed to ensure so far as practicable that parties are on an equal footing* …"

46. The claimant stated that:-

(a) he had contacted the Law Centre previously;

(b) that he had probably contacted Autism Network NI for advice previously but they had no capacity in the area of employment law; and

(c) that he had contacted Mind Wise but he did not think they provided an advocacy service in employment law.

The President informed the claimant that if Autism Network NI or Mind Wise were willing to act as his litigation friend, they may be able to instruct a solicitor to act on his behalf and the claimant agreed to consider that. The claimant then reminded the President that he did not require a litigation friend and confirmed that it was still his view that the tribunal should proceed to hear his claims without a litigation friend being appointed for him.

47. Although:-

(a) the Equality Commission had obtained a report, with the claimant's consent (see paragraph 24 above) from the second Consultant Psychiatrist on the claimant's capacity to litigate because the first Consultant Psychiatrist's report had not addressed the claimant's capacity to litigate, as he had not been asked to do so (see paragraph 22.9 above); and

(b) the Equality Commission had informed the tribunal that, having received the second Consultant Psychiatrist's report, it was their view that it was necessary for a litigation friend to be appointed for the claimant in order for his case to proceed (see paragraphs 29 and 30 above);

the claimant still refused to let the President and the respondent see the second Consultant Psychiatrist's report. That was because the claimant considered that the second Consultant Psychiatrist's assessment of his mental capacity to litigate was flawed and contrary to the Mental Capacity Act and the Human Rights Act. However, in light of what Simler J had stated at paragraphs 27 and 22 of her judgment in the ***Jhuti v Royal Mail case*** (see paragraph 45 above) and pursuant to paragraph 58 of the Court of Appeal judgment in Galo at which Gillen LJ indicated that in some circumstances there may be a need for the tribunal to obtain a medical report on a party's condition and paragraph 59 at which Gillen LJ stated that the "*duty is cast on the tribunal to make its own decision in these matters*" (see paragraph 5.6 above), the President asked the claimant, if, as an alternative, he would be agreeable to:-

(a) the appointment by the President, of another medical expert to examine and assess the claimant's mental capacity to litigate; and

(b) a report being provided to the President, which the President would then share with the claimant and Ms McGinley.

The claimant made a number of representations and then stated that he was "*very cautious of being manipulated by some sort of specialist and was not*

comfortable with it on the basis of previous experience and so he did not know what to say".

Ms McGinley stated that the respondent had at all times accommodated the claimant and that the respondent was also entitled to a fair hearing. In addition, Ms McGinley stated that the respondent was concerned that if a further report confirmed that the claimant did not have the mental capacity to litigate his case, the claimant would still refuse the appointment of a litigation friend.

48. Having considered the representations of the claimant and Ms McGinley, including those set out above, the President adjourned the Case Management Discussion to 8 November 2019 to give the claimant time to consider whether he would be agreeable to:-

(a) the appointment, by the President, of another medical expert to examine and assess the claimant's mental capacity to litigate; and

(b) a medical report being provided to the President, which the President would then share with the claimant and Ms McGinley.

The President informed the claimant that he may wish to speak with Autism Network NI, Mind Wise, the Law Centre NI or to seek advice from a solicitor or to speak with the Labour Relations Agency before making a decision. The President also informed the claimant that if the other medical report was of the opinion that he had the mental capacity to litigate his claims against the respondent, then the claimant's case would proceed to hearing without the need to have a litigation friend appointed but that if the other medical expert was of the opinion that the claimant did not have the mental capacity to litigate his claims against the respondent, it would be necessary to appoint a litigation friend who would be able to instruct a solicitor to act on his behalf to enable his case to proceed.

Case Management Discussion – 8 November 2019

49. The purpose of this Case Management Discussion was to ascertain whether the claimant agreed or did not agree to:-

(a) the appointment by the President of another medical expert to examine and assess the claimant's mental capacity to litigate; and

(b) a medical report being provided to the President, which she would share with the claimant and Ms McGinley;

having been given from 9 October 2019 to consider the matter and to seek advice.

50. The claimant stated that he had contacted a solicitor by email on 7 November 2019 and that he needed more time to get advice from the solicitor. Ms McGinley stated that while the respondent had concerns about

the progress of the case, it did not object to a short managed adjournment to enable the claimant to obtain legal advice. The President directed that a further Case Management Discussion would take place on 29 November 2019 to give the claimant more time to obtain legal advice from the solicitor in relation to the matters at (a) and (b) of paragraph 49 above.

51. The President informed the claimant that she would determine the way forward at the Case Management Discussion on 29 November 2019, which may be to appoint another medical expert, if he agreed, or she may ask the Law Society, the Pro Bono Unit of the Employment Lawyers Group (NI) and the Pro Bono Unit of the Bar of Northern Ireland if they would consider appointing a litigation friend for him. That was because the claimant had already informed the President that he did not know anyone who could be his litigation friend, if one was required. The President also informed the claimant that if the solicitor he had emailed on 7 November 2019, agreed to represent him, he should ask the solicitor to attend the Case Management Discussion on 29 November 2019 and if the solicitor agreed to be his litigation friend, the President would take that into account.

52. The President then asked the claimant if there was anything else he wished to ask the President about her directions. In response, the claimant asked the President if she was going to investigate the *"fraudulent claim form"* before asking him if he would be agreeable to the appointment of another medical expert to examine and assess his mental capacity to litigate.

53. Ms McGinley denied again having provided a "*fraudulent claim form*" to the tribunal and suggested that the claimant may have been referring to his redacted witness statement. The claimant continued to refer to the *"fraudulent claim form"* and when the President asked the claimant if he could give her copy of it, he stated that he did not have it with him but that he had written to the tribunal about it.

54. The President was unable to locate the claimant's correspondence at the Case Management Discussion because the claimant had been unsure of the date of it. The President informed the claimant and Ms McGinley that, insofar as the claimant's allegation that Ms McGinley had presented a *"fraudulent claim form"* was relevant to the case, it would be considered at the final hearing.

55. Following the completion of the Case Management Discussion, the President located the claimant's email of 18 April 2019 which is referred to at paragraph 33 above and Ms McGinley's email dated 1 May 2019 which is referred to at paragraph 34(c) above. The President stated in the final paragraph of the record of that Case Management Discussion that, for the avoidance of any doubt, the claim forms which would be considered by the tribunal at the final hearing would be those which have been received by the Tribunal Office on 17 April 2013 (case reference number: 751/13) and on 23 April 2014 (case reference number: 700/14).

Case Management Discussion – 29 November 2019

56. The purpose of this Case Management Discussion was to ascertain whether the claimant agreed or did not agree to:-

    (a) the appointment, by the President, of another medical expert to examine and assess the claimant's mental capacity to litigate; and

    (b) a report being provided to the President, which the President would share with the claimant and Ms McGinley, on whether the claimant had the mental capacity to litigate his claims against the respondent;

    having been given more time to get advice from the solicitor he had emailed on 7 November 2019.

57. The claimant informed the President that he was still in the process of contacting legal advisers, having contacted Autism Network NI, Mind Wise, the Law Centre NI and having spoken with the Labour Relations Agency and he was not yet in a position to agree or disagree to the appointment, by the President, of another medical expert to assess him and to provide a report to the President which the President would share with the claimant and Ms McGinley.

58. Ms McGinley stated that:-

    (a) it would appear that we were no further forward than we were at the last Case Management Discussion on 8 November 2019;

    (b) time was certainly not a friend in this case;

    (c) the case now needed to be managed forward in whatever way the tribunal believed was the best way to dispose of the case; and

    (d) affording any extra time to allow the claimant to think or explore legal advice was unlikely to move the case any further forward.

59. In reply, the claimant stated that the delay in obtaining legal advice was because he was seeking advice on his mental capacity, his right to claim and (alleged) misrepresentation of him by the Equality Commission which he considered were complex issues.

60. Having listened to and considered these and other representations, the President informed the claimant and Ms McGinley that while the claimant was entitled to obtain legal advice and to participate effectively in these proceedings, it was also very important for the claimant and the respondent to be able to have these proceedings dealt with and as the claimant was still unable to tell the President whether he agreed or did not agree to:-

(a) the appointment, by the President, of another medical expert to examine and assess the claimant's mental capacity to litigate his claims; and

(b) to the other medical expert providing a report to the President, which she would share with the claimant and Ms McGinley, on whether the claimant had the mental capacity to litigate his claims against the respondent;

the President had decided to ask the Employment Lawyers Group, the Law Society of Northern Ireland and the Bar of Northern Ireland if they would consider appointing a litigation friend for the claimant. The President informed the claimant that he was entitled to continue to seek and obtain legal advice while those organisations were considering the matter.

The President stated that as soon as she received responses from those organisations, she would arrange a further Case Management Discussion.

61. On 23 December 2019, the President wrote to the Chair of the Employment Lawyers Group (NI), the Chief Executive of the Law Society of Northern Ireland and the Chief Executive of the Bar of Northern Ireland and asked each of them if they would consider appointing a litigation friend for the claimant.

62. On 30 January 2020, the Chief Executive of the Bar of Northern Ireland replied and informed the President that having consulted with the Chair of the Pro Bono Unit and the Bar Council, regrettably they did not consider that it was appropriate or possible for one of their barristers to act as a litigation friend in this case. Unfortunately, that response and a further response dated 23 March 2020 were not referred to the President until 23 September 2020, the latter as a result of the closure of the Tribunal Building between March and July 2020 due to Covid-19 and the restricted access thereafter. The President wrote to the Chief Executive again on 13 October 2020 and the Chief Executive of the Bar Council confirmed its earlier position on 29 October 2019.

63. On 11 February 2020, the Chair of the Employment Lawyers Group (NI) replied and informed the President that their constitution prevented them from making such an appointment.

64. On 27 December 2019, the Law Society replied and informed the President that her correspondence was under consideration and that they would reply as soon as practicable. Unfortunately before the Law Society replied, there was severe disruption to the working arrangements within the Tribunal Building and the Law Society premises due to Covid-19 and, notwithstanding further communication, the Law Society was unable to notify the President until 7 January 2021 that they were unable to appoint a solicitor as a litigation friend in the situation that had arisen in this case.

65. Prior to the Law Society's reply on 7 January 2021, the claimant sent a number of emails to the tribunal during November and December 2020 in which he criticised the President, on occasions, in strident and intemperate terms in relation to her alleged failure to conduct the proceedings fairly by pursuing the issues of his capacity to litigate and the appointment of a litigation friend and by failing to address matters of concern to him which included the alleged introduction of a "*fraudulent and plagiarised claim form*" by Ms McGinley, which was denied by Ms McGinley and the alleged fraudulent conduct and report of the first Consultant Psychiatrist. These matters have been referred to at paragraphs 26, 28, 33, 34 and 52-55 above.

Case Management Discussion - 20 January 2021

66. On 8 January 2021 the claimant and Ms McGinley were informed of the Law Society's response and reasons and that a Case Management Discussion had been arranged for 20 January 2021 to consider the way forward following receipt of the Law Society's response. Unfortunately, the Tribunal Building was closed for a second time on 18 January 2021 due to a cluster of Covid cases within it. The claimant and Ms McGinley were contacted by the Tribunal Office on 19 January 2021 to ascertain if they would be able to participate in the Case Management Discussion by WebEx. The claimant indicated that he would prefer an 'in-person' hearing and the Case Management Discussion was therefore postponed. The tribunal's building was reopened on 2 March 2021 with a very limited capacity for 'in-person' hearings. The President directed that the Case Management Discussion be relisted for 26 April 2021 if that date suited the claimant and Ms McGinley. The Case Management Discussion did not take place as the Tribunal Office was unable to make contact with the claimant.

67. On 21 May 2021, the claimant sent an email to the tribunal, in which he criticised the President in strident and intemperate terms and which the President understood to have been an application for the President to recuse herself from hearing the claimant's claims.

Case Management Preliminary Hearing – 22 June 2021

68. On 27 May 2021 the parties were informed that the Case Management Discussion (now called a Case Management Preliminary Hearing following the introduction of the 2020 Rules) had been relisted for 22 June 2021, to consider the way forward and the claimant's application for the President to recuse herself from hearing the claimant's claims.

69. On 3 June 2021, the respondent made an application for the claimant's claims to be struck-out "*on grounds that include that it is no longer possible for a fair hearing to take place*, *under rule 32(1)(e) of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020*".

The respondent summarised the history of the proceedings and then stated:-

> "*These cases have been before the tribunal for over eight years with some of the events referred to having occurred over nine years ago. Despite all efforts by the tribunal (supported by the claimant's previous representatives and respondent) to enable the claimant to participate in the hearing, no further hearing has taken place. Furthermore, it seems that there is little prospect of any hearing on merits taking place within the foreseeable future.*
>
> *The respondent believes it has now reached the stage, particularly with no reasonable prospects of a date for the hearing in the foreseeable future, that it is being denied the right to a fair hearing under Article 6(1) of Human Rights Act 1998. It is, in this case true that the fact that justice has been delayed means that justice has been denied. The respondent and its witnesses have endured the burden of this ongoing litigation for over eight years without any reasonable prospects of resolution. At this point, we believe this is unreasonable.*
>
> *Further, the respondent's circumstances have also changed with over half of the witnesses no longer in their employment, some having retired. Naturally with the passage of time, witnesses' memories will have faded significantly and we believe this puts the respondent in an unfair and prejudiced position.*
>
> *….*"

70. By email, dated 11 June 2021, the claimant objected to the respondent's application to strike-out his claims on the ground that it was "*absurd, and opportunistic", and "unreasonable and unjustified*" for the reasons set out in his email which the President understood to have included alleged failure on the part of the President to investigate the claimant's allegations against:-

    (a) his former legal representatives in respect of their representation of him and their conduct in relation to his claim form and the two Consultant Psychiatrists who had examined him; and

    (b) the conduct of the two Consultant Psychiatrists;

    which he set out in strident and intemperate terms.

<u>Case Management Preliminary Hearing - 22 June 2021</u>

71. The claimant stated at the outset of the Hearing that he had not made an application for the President to recuse herself in his email dated 21 May 2021. The claimant stated that his email, dated 21 May 2019, was a further request for the President to clarify her position in respect of the "fraudulent" claim form submitted on behalf of the claimant as the President had failed to reply to date in sufficient and appropriate terms.

The President informed the claimant and Ms McGinley that she would only be considering the issue of the claimant's capacity to litigate at that Case Management Preliminary Hearing.

The claimant queried whether the tribunal/President had power to decide whether he had capacity to litigate. In light of that, the President directed that a Preliminary Hearing would take place on Wednesday 7 July 2021, that date having been agreed with the claimant and Ms McGinley, to determine three preliminary issues:-

1. does the President acting alone as the tribunal have power to determine whether the claimant has capacity to litigate his case?;

2. if so, what is the test to be applied in determining whether the claimant has capacity to litigate his case?;

3. having applied that test, does the claimant have capacity to litigate his case?

SECTION B

The Preliminary Hearing – 7 July 2021 and Judgment with Reasons on the three Preliminary Issues

72. The claimant and Ms McGinley both made oral submissions (the claimant reading from a written statement) to the President in relation to the three preliminary issues (see paragraph 71 above). In his submission, the claimant made criticisms of his former legal representatives, the two Consultant Psychiatrists who had examined him and the President, in strident and intemperate terms and which the President understood to relate to alleged improprieties:-

    (a) on the part of his former legal representatives in relation to:-

        (i) their representation of the claimant;

        (ii) the claimant's claim/claim form;

        (iii) witness statements of witnesses for the respondent;

        (iv) the release of the claimant's medical records and notes to the first Consultant Psychiatrist;

        (v) the arrangement with the respondent of a joint medical report by the first Consultant Psychiatrist;

        (vi) the proposal of the appointment of a litigation friend for the claimant; and

(vii) their instructions to the second Consultant Psychiatrist who conducted an assessment of the claimant's capacity to litigate his claims;

(b) on the part of the first Consultant Psychiatrist in relation to his examination and assessment of the claimant;

(c) on the part of the second Consultant Psychiatrist in relation to her alleged disregard of the standards laid down in the Mental Health Act (Mental Capacity Act 2005 Section 1(2)-(6)), as a result of which the claimant stated that he withheld his consent for the release and sharing of the report; and

(d) on the part of the President in failing to address the claimant's application to have the first Consultant Psychiatrist's report removed from the evidence due to its alleged serious interference with the process.

The claimant concluded his submission by stating, what the President understood to be, that:-

(a) he did not lack and had not lost his mental capacity throughout this case; and

(b) the President should not pursue the issue of his mental capacity to litigate or the appointment of a litigation friend, as that would obstruct and deny his access to justice and would inappropriately interfere with his basic rights and his right to be treated fairly, equally and with respect and dignity.

Following a break and shortly before Ms McGinley commenced her submission, the claimant asked if he could add a final very short matter and he was permitted to do so. The claimant stated that his position in regard to the three preliminary issues was that they were "*irrelevant due to the stated facts and circumstance as a rather imposed, abusive and undignified condition by submitted false, fabricated evidence for such purpose*".

73. In her oral submission, Ms McGinley stated that the respondent's position was that it understood why the tribunal/President was considering these issues based on the sequence of events that had occurred since January 2019 and which were set out by the President at the last Case Management Preliminary Hearing.

In relation to issue 1, Ms McGinley stated that it was her view, based on the case law, that the tribunal/President did have power to determine whether the claimant had capacity to litigate his case and to appoint a litigation friend.

In relation to issue 2, Ms McGinley stated that the respondent was content that the tribunal/President would apply the correct test and arrive at an appropriate outcome.

In relation to issue 3, Ms McGinley stated that the respondent adopted a neutral stance.

Issue 1

Does the tribunal/President (acting alone) have power to determine whether the claimant has capacity to litigate his case?

74. The President is satisfied that she has power, (acting alone), to determine the preliminary issues in accordance with regulation 3 and rules 1(2) and 47-50 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020, which are attached to this judgment.

75. The President is also satisfied from the authorities set out below, that whenever there is good reason to suspect that a party's capacity to litigate may be in doubt, the presumption of capacity cannot be used to avoid taking responsibility for investigating, assessing and determining capacity. Instead, the tribunal should investigate the question of capacity at the first convenient opportunity with the assistance of a medical report before assessing and determining whether capacity exists. That is because it is unfair to permit proceedings to continue in those circumstances until the litigant's interests are properly represented by a litigation friend in the tribunal and so that the conditions in which the litigation may proceed can be determined.

76. In ***Masterman-Lister v Brutton & Co.*** *[2003] 1 WLR 1511* **(**2003) 3 AII ER 162 the Court of Appeal in England and Wales confirmed that in the context of proceedings in the High Court:-

> *"The Court should always, as a matter of practice, at the first convenient opportunity, investigate the question of capacity whenever there was any reason to suspect that it might be absent. That meant that, even where the issue did not seem to be contentious, a District Judge who is responsible for case management would almost certainly require the assistance of a medical report before being able to be satisfied that incapacity existed*."

77. In ***Johnson v Edwardian International Hotels Ltd UKEAT/0588/07/ZT*** Underhill J, then President of the Employment Appeal Tribunal (sitting alone), was of the view that employment tribunals did have power to investigate a party's mental capacity but:-

    (i) in light of his view that, unlike the ordinary courts under CPR 21, employment tribunals did not have power under their 2004 Rules (2005 in Northern Ireland) to appoint a litigation friend for a party who lacked capacity to litigate; and

(ii) because he was sure that a similar presumption of capacity to litigate that applies in High Court proceedings should apply in the employment tribunals;

he suggested that "*tribunals should be very wary of embarking down the road of trying to investigate a party's mental capacity*" because it could lead to such a claimant's case being struck out in light of the employment tribunal's lack of power to appoint a litigation friend.

78. In ***Jhuti v Royal Mail Group Limited UKEAT/0061/17***, Simler J, then President of the Employment Appeal Tribunal (sitting alone), held, at paragraph 32, that "*while there was no express power in the ETA 1996 or the 2013 Rules made under it* (the Industrial Tribunals (Northern Ireland) Order 1996 and the 2020 Rules in Northern Ireland) *the appointment of a litigation friend is within the power to make a case management order in the 2013 Rules as a procedural matter in a case where otherwise a litigant who lacks capacity to conduct litigation would have no means of accessing justice or achieving a remedy for a legal wrong*".

Although Simler J did not address directly whether an employment tribunal also has the power to investigate, assess and determine whether a party lacks capacity to litigate, it is implicit in paragraph 38 of her judgment at which she stated:-

> "*I fully endorse the observations of Underhill J in* ***Johnson*** *that employment tribunals should tread carefully if invited to embark down the road of investigating a party's mental capacity and should only accede to such an approach where there is clear evidence to support it.";*

that she was satisfied that employment tribunals do have the power to investigate, assess and determine capacity but that they should only do so where there is clear evidence to support it.

79. In ***Royal Bank of Scotland PLC v AB UKEAT/0266/18/DA*** the Employment Appeal Tribunal (Swift J sitting alone) stated at paragraph 22:-

> "*It is right that any tribunal must take care before concluding that assessment of a litigant's capacity to litigate is necessary. Simler P's words of warning, at paragraph 38 of her judgment in* ***Jhuti*** *are important. Tribunals must not permit arguments about litigation capacity to be used discriminately or unscrupulously. The risk of misuse must be carefully policed. However, where there is legitimate reason to doubt a litigant's capacity to litigate that issue must be addressed. A litigant who lacks the capacity to litigate lacks the ability fairly to participate in legal proceedings. It is unfair to permit proceedings to continue in those circumstances until that litigant's interests are properly represented whether by a litigation friend or a court-appointed Deputy".*

80. Section 1(2) of the Mental Capacity Act 2005, to which the claimant referred the tribunal states:-

> "*A person must be assumed to have capacity unless it is established that he lacks capacity*."

The Mental Capacity Act 2005 applies in Great Britain but not in Northern Ireland. However, as pointed out by Underhill P in the Johnson case, at paragraph 77 above, the presumption of capacity also applies in employment tribunals. At paragraph 26 of his judgment, Swift J stated, in relation to the presumption of capacity at section 1(2) of the Mental Capacity Act 2005, that:-

> "*The presumption of capacity is important; it ensures proper respect of personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet, the section 1(2) presumption like any other, has logical limits. When there is good reason for cause for concern, where there is legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. To do that would be to fail to respect personal autonomy in a different way. As Simler P pointed out in Jhuti a litigant who lacks capacity is effectively unrepresented in proceedings since she is unable to take decisions on her own behalf and unable to give instructions to her lawyers. Thus, although any tribunal should be alert to guard against attempts by litigants to use arguments about capacity improperly, if, considered objectively, there is good cause for concern that a litigant may lack litigation capacity, an assessment of capacity should be undertaken. What amounts to 'good cause' will always require careful consideration, and it is not a conclusion to be reached lightly. For example, good cause will rarely exist simply because a tribunal considers that a litigant is conducting litigation in a way with which it disagrees, or even considers unreasonable or vexatious. There is likely to be no correlation at all between a tribunal's view of what is the 'common-sense' conduct of a piece of litigation and whether a litigant has capacity to conduct that litigation. Something qualitatively different is required.*"

At paragraph 30, Swift J also stated that:-

> "*The purpose of an assessment of capacity to litigate is to determine the conditions in which litigation may proceed, not to bring it to an end*."

81. Although the claimant informed the President at the Preliminary Hearing on 7 July 2021 that he does not lack the mental capacity to litigate his case, the President is satisfied that there is good reason to be concerned about the claimant's capacity to litigate his case for the following reasons:-

(a) Mr Potter informed the tribunal at the Case Management Discussion on 22 January 2019 that:-

(i) prior to 10 January 2019, he and the Equality Commission worked with the claimant on the basis of the presumption that the claimant had capacity to litigate his case in accordance with the common law test in the ***Masterman-Lister v Brutton*** case, ie that he understood the litigation and could make relevant decisions in relation to it (paragraph 22.2 above);

(ii) following the Case Management Discussion on 10 January 2019, Mr Potter and the Equality Commission became concerned by the claimant's behaviour (paragraph 22.3 above);

(iii) following consultation with the claimant on 14 January 2019, Mr Potter and the Equality Commission became more concerned about the claimant by reason of his *'presentation, demeanour and behaviour'* at the consultation and the *'apparent deterioration in his ability to communicate constructively'* (paragraph 22.3 above);

(b) the opinion of the first Consultant Psychiatrist, that the claimant was not fit to attend the tribunal hearing listed from 22 January 2019 to 8 February 2019 or at any point in the future;

(c) the view of Mr Potter and the Equality Commission that on the basis of their dealings with the claimant since 10 January 2019 they could not represent the claimant at the final hearing because they did not believe that the claimant had the capacity to litigate and that they could only continue to represent the claimant if an employment judge appointed a 'suitable and willing' person to act as a litigation friend for the claimant, who could then take responsibility for the litigation and could instruct Mr Potter and the Equality Commission to continue to represent the claimant in his case (paragraph 22.6 above); and

(d) the email dated 4 April 2019 from the Equality Commission in which they stated that, following an examination of the claimant by the second Consultant Psychiatrist, who had expertise in capacity, it was the Equality Commission's view that the appointment of a litigation friend was necessary in order for the case to proceed (paragraph 30 above).

82. The President is satisfied that, in light of the matters set out at paragraph 81 above, the presumption of capacity cannot be used by her to avoid taking responsibility for investigating, assessing and determining the claimant's capacity to litigate his case, with the guidance of a medical report, before any further steps are taken in his case and so that the conditions in which litigation may proceed can be determined. However, in light of the fact that:-

(a) the first Consultant Psychiatrist, did not address the claimant's capacity to litigate as he was not asked to; and

(b) the claimant has refused to provide a copy of the second Consultant Psychiatrist's report, which did address the claimant's capacity to litigate to the President and the respondent;

the President considers that, in light of the Human Rights Act 1998, a further medical report on the claimant's capacity to litigate his claims before the Industrial Tribunal is necessary as part of any investigation, assessment and determination of his capacity to litigate his case.

Issue 2

If so, what is the test to be applied in determining whether the claimant has capacity to litigate

83. The claimant referred the President to the Mental Capacity Act 2005 which sets out the test for determining whether a person lacks capacity at Section 2. The Mental Capacity Act 2005 does not apply in Northern Ireland. In **Re J** (2014) NI FAM5, O'Hara J held that the legal test of capacity in Northern Ireland is that set out by the Court of Appeal in England and Wales, in ***Masterman-Lister v Brutton*** *[2003] 3 All ER 162 [2003] 1WLR 1511*.

84. The test in **Masterman-Lister v Brutton** was summarised by the Employment Appeal Tribunal in **Stott v Leadec Limited UKEAT/0263/19/LA** Naomi Ellenbogen QC, Deputy Judge of the High Court (sitting alone) at paragraph 8 of her judgment:-

> *"d. The test to be applied is whether a party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and other experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings;* ***Masterman-Lister.***
>
> *e. Capacity depends upon time and context: a decision in one Court as to capacity does not bind another which has to consider the same issue in a different context. A final decision as to capacity rests with the Court, but, in almost every case, the Court will need medical evidence to guide it [*following the implementation of the Human Rights Act 1998*];* ***Masterman-Lister****.*
>
> *f. The question of capacity to litigate is not something to be determined in the abstract. The focus must be on the particular piece of litigation in relation to which the issue arises. The question is always whether the litigant has capacity to litigate in relation to the particular proceedings in which he is involved:* ***Sheffield City Council v E (Alleged Patient)*** *(2004) EWHC 2808 (Fam), at paragraph 38."*

Issue 3

Having applied that test, does the claimant have capacity to litigate his case

85. Although the President is satisfied that there is good reason for the claimant's capacity to litigate his case to be investigated and assessed to enable a determination to be made on the claimant's capacity to litigate and, if appropriate, the conditions in which the hearing of his case may proceed, the President has been unable to do so because the claimant has refused to:-

    (a) let the President see the second Consultant Psychiatrist's report in relation to his capacity to litigate; or

    (b) agree to the President obtaining another report from a different consultant who specialises in capacity.

    That is because the claimant's position is that he does not lack mental capacity to litigate his case and that he wants his case to proceed without the issue of his capacity to litigate being investigated and determined and without a litigation friend being appointed, if that is required.

86. Having balanced the claimant's position with:-

    (a) the concerns raised by the Equality Commission, in correspondence from them dated 17 January 2019 in relation to their continued representation of the claimant. (See paragraph 22 above.);

    (b) the parts of the first Consultant Psychiatrist's report that were opened to the tribunal by Mr Potter at the Case Management Discussion on 22 January 2019 in relation to the claimant's fitness to attend the hearing of his claims. (See paragraph 22 above.);

    (c) what Mr Potter told the tribunal at the Case Management Discussion on 22 January 2019 in relation to his and the Equality Commission's concerns about the claimant's fitness and mental capacity to litigate his claims, which is summarised at paragraph 22 of this judgment;

    (d) the Equality Commission's correspondence dated 2 and 4 April 2019 to the tribunal and Ms McGinley in which they stated that, having received, read and considered the second Consultant Psychiatrist's report (in respect of the claimant's capacity to litigate his case and to be cross-examined), which the claimant had agreed to being obtained, it was their view that it was necessary for a litigation friend to be appointed for the claimant, in order for the claimant's case to proceed. (See paragraphs 29 and 30 above.);

    (e) the dicta of *Simler P in* **Jhuti v Royal Mail Group Ltd** *at paragraph 22* that for a tribunal *'to continue with a hearing with an unrepresented litigant who lacks mental capacity to conduct litigation is tantamount to continuing with the hearing in the party's absence and flies in the face*

of a Rule (the overriding objective) *designed to ensure so far as practicable that parties are on an equal footing"* (Rule 2(a) of the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020);

(f) the dicta of Swift J in **Royal Bank of Scotland PLC v AB** at paragraph 22:-

> "*A litigant who lacks the capacity to litigate lacks the ability fairly to participate in legal proceedings. It is unfair to permit proceedings to continue in those circumstances until that litigant's interests are properly represented whether by a litigation friend or a court-appointed Deputy"*;

(g) the detailed guidance and principles set out by Gillen LJ in the Court of Appeal's judgment in the claimant's appeal of the tribunal's first decision in his case;

(h) the respondent's belief, as set out in correspondence from Ms McGinley, dated 3 June 2021 (see paragraph 69 above), that the stage had been reached, "*particularly with no reasonable prospect of a date for the hearing in the foreseeable future, that [the respondent] is being denied the right to a fair hearing under Article 6(1) of the Human Rights Act 1998*" which entitles everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law; and

(i) the extensive but unsuccessful attempts by the President to progress the case to a final hearing while securing the claimant's effective participation in it;

the President considers that it is no longer possible to have a fair hearing of the claimant's claims.

87. Rule 32(1)(e) of the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020 states:-

> (1) At any stage of the proceedings, either on its own initiative or on the initiative or on the application of a party, a tribunal may strike out all or part of any claim or response on any of the following grounds:-
>
> …
>
> (e) that the tribunal considers that it is no longer possible to have a fair hearing of the claim or response (or the part to be struck out)
>
> Rule 32(2) states that:-

> "A claim or response may not be struck out unless the party in question has been given the opportunity to make representations, either in writing or, if requested by the party or ordered by the tribunal, at a hearing."

88. It is clear from rule 32(2) above that the claimant must be given the opportunity to make representations to the President, either in writing or at a hearing. The President considers that it would be in the interests of fairness if representations were made at a hearing to allow for clarification, if required. The President therefore orders that a further hearing will take place at **10.00 am on Wednesday 9 March 2022 at Adelaide House** at which the claimant and Ms McGinley will be given the opportunity to make oral representations, if they wish to do so, and which the President will take into account before deciding whether or not to strike-out the claimant's claims to the Industrial Tribunal.

89. The President's judgment on the preliminary issues only relates to the claimant's complaints to the Industrial Tribunal which are set out at page 1 of the Industrial Tribunals' decision which was appealed to the Court of Appeal and paragraph 1 of the Court of Appeal judgment, namely:-

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

for the following reasons:-

(a) the claimant's complaint of unlawful discrimination on grounds of religious belief or political opinion, which is contained in his first claim, case reference number 751/13 has not yet been adjudicated upon. That is because, although the Industrial Tribunal purported to determine this complaint by striking it out (see paragraph 3.43 of the Industrial Tribunal's decision), it had no jurisdiction to do so as such jurisdiction lies solely with the Fair Employment Tribunal;

(b) the claimant's complaint of discrimination on grounds of religious belief or political opinion and his other claims, set out above, should have been referred to the President or Vice President so that they could have made an order, pursuant to Article 85 of the Fair Employment and Treatment (Northern Ireland) Order 1998, permitting all of the claimant's claims to be heard and determined by the Fair Employment Tribunal as an Industrial Tribunal cannot hear and determine complaints of discrimination on grounds of religious belief or political opinion;

(c) this may not have been drawn to the attention of the Court of Appeal as there is no reference to the claimant's complaint of unlawful discrimination on the grounds of religious belief or political opinion at page 1 of the Industrial Tribunal's decision, or at paragraph 1 of the Court of Appeal's judgment;

(d) this matter came to the President's attention recently when she sought a copy of any determination of the claimant's complaint of discrimination on the grounds of religious belief or political opinion by the Fair Employment Tribunal and discovered that there was not any;

(e) the President will therefore also consider the way forward in relation to the claimant's complaint of discrimination on the grounds of religious belief or political opinion, including whether it would be appropriate to make an order under Article 85 of the Fair Employment and Treatment (Northern Ireland) Order 1998 at this stage, at the hearing on **9 March 2022**.

Employment Judge: **President (acting alone)**
Eileen McBride

Date and Place of Preliminary Hearing: **7 July 2021, Adelaide House, Belfast**

Date Judgment recorded in register and issued to the parties:

Regulation and Rules of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedures) Regulations (Northern Ireland) 2020 referred to at Paragraph 74

Regulation 3

Interpretation

"Employment Judge" means one of:-

(a) the President;

(b) the Vice-President; and

(c) a member of the panel of employment judges,

and in relation to particular proceedings it means the employment judge to whom the proceedings have been referred by the President or the Vice-President.

Rule 1(2)

Interpretation

(2) Any reference in the Rules to a tribunal applies to a tribunal comprising of:-

(a) an employment judge acting alone; and

(b) an employment judge acting with one or two other members.

PRELIMINARY HEARINGS

Scope of preliminary hearings

Rules 47-50

47.-(1) A preliminary hearing is a hearing at which the tribunal, notwithstanding any steps taken under rule 24, may do one or more of the following:-

(a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);

(b) determine any preliminary issue;

(c) consider whether a claim or response, or any part, should be struck out under rule 32;

(d) make a deposit order under rule 34; and

(e) explore alternative means of resolving the issues in dispute, including the use of conciliation.

(2) There may be more than one preliminary hearing in any case.

(3) "Preliminary issue" means, as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed).

Fixing of preliminary hearings

48.-(1) A preliminary hearing may be directed by the tribunal on its own initiative following early case management under rule 24, at any time thereafter or as the result of an application by a party and the parties shall be given reasonable notice of the date of the hearing.

(2) Where the hearing involves any preliminary issues, that notice shall be given at least 14 days prior to the hearing unless the parties agree to shorter notice and shall specify the preliminary issues that are to be, or may be, decided at the hearing.

Constitution of tribunal for preliminary hearings

49. Preliminary hearings shall be conducted by an employment judge alone unless:-

(a) notice has been given under rule 48(2) that any preliminary issues are to be, or may be, decided at the hearing; and

(b) a party has requested in writing that the hearing be conducted by an employment judge acting with either one or two other members in accordance with regulation 10,

and in that case an employment judge shall decide whether it would be desirable for the hearing to proceed in accordance with the party's request.

When preliminary hearings shall be in public

50. Preliminary hearings shall be conducted in private, except that where the hearing involves a determination under rule 47(1)(b) (preliminary issues) or (c) (striking out), any part of the hearing relating to such a determination shall be in public, subject to rule 44 (privacy and restrictions on disclosure) and rules 91 and 92 (national security), and the tribunal may direct that the entirety of the hearing be in public.