SA-v-Department for Communities (DLA) [2020] NICom 38

Decision No: C6/18-19(DLA)

SOCIAL SECURITY ADMINISTRATION (NORTHERN IRELAND) ACT 1992

SOCIAL SECURITY (NORTHERN IRELAND) ORDER 1998

DISABILITY LIVING ALLOWANCE

Appeal to a Social Security Commissioner
on a question of law from a Tribunal's decision
dated 11 September 2017

DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. This is a claimant's appeal from the decision of an appeal tribunal sitting at Craigavon, leave having been granted by a Social Security Commissioner on 21 August 2018.

2. For the reasons we give below, we disallow the appeal.

REASONS

Background

3. The appellant claimed disability living allowance (DLA) from the Department for Communities (the Department), from 31 August 2015. Her claim was made on the basis of needs arising from fibromyalgia, depression and anxiety. The Department obtained a report from the appellant's general practitioner (GP) on 25 November 2015. On 27 November 2015 the Department decided on the basis of all the evidence that the appellant did not satisfy the conditions of entitlement to DLA from and including 31 August 2015. The appellant appealed.

4. The appeal was considered by a tribunal consisting of a legally qualified member (LQM), a medically qualified member and a disability qualified member. After a hearing on 12 August 2016 the appeal was disallowed. However, the appellant applied for that decision to be set aside on the basis that she had been present in the building where the appeal was to be heard, but had been unable to enter the hearing room due to anxiety. The LQM of the tribunal subsequently set the decision aside, albeit without referring to the particular circumstances asserted.

5. The appeal was heard by a differently constituted tribunal on 11 September 2017. The appellant did not attend, but was represented by Law Centre (NI). The tribunal disallowed the appeal in respect of the care component, but made an award of the low rate of the mobility component from 31 August 2015 to 12 March 2107. The appellant requested a statement of reasons for the tribunal's decision and this was issued on 17 November 2017. The appellant applied to the LQM for leave to appeal from the decision of the appeal tribunal but leave to appeal was refused by a determination issued on 5 February 2018. On 28 February 2018 the appellant applied to a Social Security Commissioner for leave to appeal.

Grounds

6. The appellant, represented by Law Centre (NI), submitted that the tribunal had erred in law on the basis that:

   (i) its hearing had been procedurally unfair, because it had not considered how procedures might be tailored to suit the particular mental health problems of the appellant, relying on *Galo v Bombardier* [2016] NICA 25; and

   (ii) it had drawn unfair inferences from a reference in GP records to the appellant's intention to run in the Belfast marathon.

7. The Department was invited to make observations on the appellant's grounds. Ms Coulter of Decision Making Services (DMS) responded on behalf of the Department. Ms Coulter submitted that the tribunal had not erred in law and indicated that the Department did not support the application. Ms Boland of Law Centre (NI) responded on the appellant's behalf, reiterating her submissions and addressing aspects of the Department's case.

The tribunal's decision

8. The LQM has prepared a statement of reasons for the tribunal's decision. From this we can see that the tribunal had documentary material before it consisting of the Department's original submission, papers relating to the previous tribunal proceedings, a healthcare professional (HCP) report for Employment and Support Allowance dated 26 June 2015, a HCP report for Personal Independence Payment (PIP) dated 31 May 2017, GP notes and records and a submission from the appellant's representative. The appellant did not attend to give oral evidence, but was represented by Ms Ballesteros of Law Centre (NI).

9. The tribunal noted the history of the case, and observed that the appellant had been awarded PIP from 13 March 2017 to 30 May 2021. It noted the HCP reports of 26 June 2015 and 31 May 2017. It noted entries in the GP records, including a letter from the GP confirming

serious mental health issues and inability to attend the appeal. On the basis of all the evidence it was satisfied that low rate mobility component should be awarded from 31 August 2015 until 12 March 2017 (the day before the commencement date of an award of PIP). The tribunal judged on the evidence that, while the appellant was experiencing generalised joint pain, there was little evidence to indicate functional limitations. It decided not to award care component at any rate.

Directions

10. On 21 August 2018 the Commissioner granted leave to appeal. He accepted that it was arguable following the decision of the Court of Appeal in *Galo* that the tribunal ought to have made adjustments to its procedures in the light of the appellant's mental health, in order to enable her participation in its hearing.

11. On 1 October 2018 the Chief Commissioner directed that the appeal should be determined by a Tribunal of Commissioners consisting of two members, under Article 16(7) of the Social Security (NI) Order 1998.

12. In light of the subject matter of the appeal and its potentially wider relevance to the conduct of tribunals, the Tribunal of Commissioners further directed that the President of Appeal Tribunals (the President) should be invited to join the proceedings as an interested party, under regulation 24(6)(g) of the Social Security Commissioners (Procedure) Regulations (NI) 1999 (the Commissioners Procedure Regulations). He accepted that invitation, indicating a willingness to make written representations while indicating that he would not attend any oral hearing.

13. The Commissioners set out their understanding of the facts of the particular case to the President and requested him to address the following questions:

    (i) Does the President consider that the Commissioners' understanding of the facts of the appellant's case is broadly accurate, or are there any material circumstances, documents or procedural steps in the particular case that the Commissioners are unaware of? If so, please identify these.

    (ii) Observing the principles set out in *LO'L v Secretary of State for Work and Pensions* [2016] AACR 31 as regards disability discrimination, and noting that, whereas the territorial extent of the Equality Act 2010 is restricted to Great Britain, equivalent Northern Ireland provisions appear in sections 21B and 21C of the Disability Discrimination Act 1995, would the President agree with the proposition that courts and tribunals in Northern Ireland are not subject to any statutory duty to make reasonable adjustments? If no, please explain.

(iii) Observing the principles set out in *Galo v Bombardier Aerospace* [2016] NICA 25 at paragraph 53, as regards procedural fairness in courts and tribunals, does the President consider that *Galo* has direct application to tribunals determining social security appeals in Northern Ireland?

(iv) If not, please explain. In particular, observing that social security appeal tribunals are inquisitorial in nature, whereas the Industrial Tribunal as featured in *Galo* is adversarial, does the President consider that there are any implications arising from that fact for the applicability of *Galo* to social security appeal tribunals?

(v) Are there any systems in place within the Appeals Service to identify whether an appellant has a disability that might prevent him or her participating effectively in a hearing? Please identify same.

(vi) If an appellant claims to the Appeals Service that he or she has a disability which prevents him or her from participating effectively in a tribunal hearing, are there systems in place to determine whether that might in fact be the case, and to assess the extent of any limitation on participation? Please identify same.

(vii) If it is accepted that an appellant has a disability which limits him or her participating effectively in a tribunal hearing, are there any standard procedures followed within the Appeals Service to assess whether there are any proportionate measures that can be taken to ensure that any such limitations may be overcome? Please identify same.

(viii) Has the Equal Treatment Bench Book been adopted by the President for use by the judiciary within the Appeals Service and to what extent is it used? Is there alternative or additional relevant guidance issued to tribunals?

(ix) If the Equal Treatment Bench Book has not been adopted, and if there is not additional or alternative relevant guidance, are tribunals given training, such as to enable individual tribunal members to assess whether an appellant has a disability that might prevent him or her from participating effectively in a hearing and whether and how such a disability might be overcome? Please identify same.

(x) If an appellant is represented, by a lay or professional representative, does the President consider that any onus shifts to the appellant in seeking to identify whether he or she has a disability that prevents effective participation in a hearing, and whether there are any proportionate measures that can be taken to ensure that any such limitations may be overcome?

(xi) Does the President accept that the symptom of “severe anxiety and panic attacks” as evidenced in the present case can or should be

equated to a disability such as Asperger's Syndrome, as was the case in *Galo*, in terms of its limiting effects on an appellant's ability to present a case at hearing?

(xii) Does the President have any specific or general observations on the application of any systems, or the manner in which any guidance was followed, or on the conduct of the appeal by the tribunal, which might assist the Commissioners in reviewing the application of the principles of natural justice or procedural fairness in the particular case?

14. The President responded in due course. The first matter dealt with in the response was a confirmation that the Commissioners' understanding of the facts was broadly correct. The President indicated that he had consulted with the relevant LQM, who added his own comments at paragraph (i), elucidating the tribunal's reasoning. The President then responded to the Commissioners request for observations as follows:

> "…
>
> (ii) I agree with the proposition that courts and tribunals in Northern Ireland are not subject to any statutory duty to make reasonable adjustments.
>
> (iii) I am satisfied that that the principles set out in Galo -v- Bombardier Aerospace [2016] NICA 25, as regards procedural fairness in courts and tribunals, have a direct application to tribunals determining Social Security appeals in Northern Ireland.
>
> (iv) I repeat my response at paragraph (iii) above. I am satisfied that the principles and requirements mentioned in Galo apply to all courts and tribunals whether or not they are adversarial or inquisitorial in nature. I believe that the starting point in all cases should be that mentioned by Gillen LJ at paragraph 53(1), namely that
>
> *'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'*
>
> (v) Whilst I cannot speak on behalf of Appeals Service administrators I believe that they do have a system in place to identify whether an appellant has a disability which might prevent him or her from participating effectively in the hearing, but only in

respect of appellants who may have a hearing or sight impairment.

(vi) If it becomes apparent that an appellant may have a disability of the type envisaged by the Social Security Commissioners in their direction dated 16 January 2019 the issue can be addressed in any one or more of the following ways:

a it may be referred to me for specific direction;

b. it may be considered by an experienced legally qualified member within an interlocutory session;

c. it may be considered by the entire tribunal either prior to the commencement of the hearing or by way of direction during the hearing. This may require an adjournment with specific judicial directions.

I have informed all tribunal members during induction training in respect of Personal Independence Payment that as a result of the decision in Galo it will be necessary in all relevant cases to adjust their approach at hearings in order to ensure that 'effective participation' is afforded in all cases. This will include, but is not restricted to, a need to consider whether

1. an appellant should be expected to provide direct oral evidence;

2. a member of an appellant's family and/or a friend might be permitted to give written or oral evidence on an appellant's behalf;

3. the tribunal should prepare a list of questions to be answered by an appellant and/or his/her representative/friend/family member.

(vii) See answer at Paragraph (vi) above.

(viii) The Equal Treatment Bench Book has been adopted by me for use by the judiciary within the appeal tribunal. Training in respect of the implications of the Galo decision and the Equal Treatment Bench Book has been provided to all members. Members are aware of and have been

trained in the need to secure 'effective participation' of the type envisaged in Galo.

(ix) See (viii) above.

(x) I believe that the overall obligation to secure effective participation rests with the tribunal members as judicial office holders. Despite this the tribunal may seek submissions from representatives in relation to any adjustments which may be required in individual cases. This may depend on the capacity and/or experience of an individual representative.

(xi) It is impossible to be prescriptive in relation to any individual medical condition however tribunal members are aware that the Equal Treatment Bench Book contains a detailed glossary of physical and mental health conditions which may require adjustment in individual cases in order to achieve the overall aim of securing effective participation at hearing.

(xii) I refer the Commissioners to the comments made by [the LQM] at Paragraph (i) above. All tribunal members are well aware of the need to be sensitive to the needs of individual appellants at hearing and to adjust the hearing accordingly should the need arise. The overall aim in all cases must be to ensure that an appellant receives a fair hearing, irrespective of the ultimate outcome. Ongoing training seeks to reinforce that overall goal".

15. The parties were afforded the opportunity to make observations on the President's submission and did so. Mr McCloskey of Law Centre (NI), on behalf of the appellant, took up two issues. Firstly, he submitted that the lack of information about possible options available to an appellant might be a relevant consideration in determining if he or she had been afforded a fair hearing. Secondly, he submitted that in cases where GP records contained information which appeared to conflict with other evidence before the tribunal, there could be a disadvantage to appellants with mental health difficulties who do not attend a hearing.

16. Mr Williams of DMS, on behalf of the Department, submitted that it was preferable that an appellant had as much input to a hearing as possible, but that the particular tribunal had given a balanced and reasonable decision. He further submitted that the previous practice of tribunals of obtaining medical records directly had changed, so that the appellant

was personally involved in obtaining these, mitigating the prospect of any unfairness.

Hearing

17. We held an oral hearing of the appeal. The appellant was not present but was represented by Mr McCloskey. The Department was represented by Mr Arthurs. We are grateful to the representatives for their helpful submissions in the case.

18. Mr McCloskey submitted that *Galo* required that procedural adjustments should have been considered by the tribunal and that a telephone hearing or video hearing could have been offered to the appellant, as provided for in the rules governing tribunal procedure. He submitted that a tribunal was obliged to consider such procedures of its own motion to ensure fairness.

19. He submitted that aspects of the medical records relied upon by the tribunal required written questions to have been put to her, in order to provide an opportunity for the appellant to respond to potentially negative evidence. In the particular case the tribunal appeared to be influenced by a reference in the GP records to the appellant's consideration of possible participation in the Belfast marathon. He submitted that unfairness resulted from the failure of the tribunal to put that issue to the appellant.

20. He submitted that a judicial body was obliged to ensure that the appellant had a fair hearing, and that it should also explain how it had done this in any statement of reasons. He accepted that, had the paragraphs set out by the LQM in the response of the President been contained in the statement of reasons, he might not now be bringing proceedings. However, he emphasised that the LQM's response was not in the original statement of reasons.

21. Mr McCloskey submitted that as there had been no "ground rules" hearing as referred to in *Galo*, the tribunal had erred in law. He acknowledged that there were some aspects of the representation in the case that were open to criticism, accepting that the representative should have reviewed the GP records and not proceeded with the hearing without first reviewing them. However, he submitted that the conduct of a representative doesn't take away from tribunal's responsibility regarding fairness.

22. Mr Arthurs submitted that the issue of participation in the Belfast marathon was a minor factor that was not considered by tribunal. In any event, the award of low rate mobility component made by the tribunal was self-evidently incompatible with participation in the marathon and confirmed that it was not considered relevant by the tribunal.

23, He submitted that *Galo* reiterated existing principles of procedural fairness and did not change the approach that tribunals should follow. He submitted that there was no evidence of care needs in the medical evidence before the tribunal. He submitted that the tribunal was entitled to proceed without considering whether the appellant could join by way of a video link to the tribunal hearing. He observed that the appellant's representative did not seek this.

24. In the course of the hearing reference was made to the employment law case of *Jade Anderson v Turning Point Eespro & (1) Equality & Human Rights Commission (2) Mind (3) Lord Chancellor* [2019] EWCA Civ 815, which had appeared to be relevant to the issues in the present case. The parties were afforded time to make brief written submissions on *Anderson* post-hearing.

25. Mr McCloskey observed that there are differences between employment tribunal cases and social security tribunal appeals, accepting that it would not be practical or desirable to hold a ground rules hearing or case management discussion in every case involving a vulnerable witness. Nevertheless, he submitted that issues identified in advance of a hearing can be dealt with by way of a legal member's direction and that adjustments can be considered at the outset of a hearing by the tribunal as a whole. He again submitted that the tribunal should note that it has considered the issue of an appellant's ability to participate. If it considers that adjustments are necessary, these should be directed, adjourning if necessary. He submitted that a tribunal, where an appellant was represented professionally, would need to satisfy itself that the representative had given sufficient consideration to the need for any adjustment to enable the case to proceed fairly.

26. Mr Arthurs responded, submitting that it was evident from the submissions of the President that *Galo* principles were being observed by tribunals. He submitted that it would be only in exceptional cases that a tribunal would be required to take actions in the interests of fairness where a representative had not asked for them. He submitted that the needs of appellants had to be addressed on a case by case basis, and that in the particular case the experienced representative had not suggested any relevant adjustments.

Assessment

27. The evidence in this appeal supports the proposition that the appellant would have difficulty attending an oral hearing and giving evidence. Firstly, we understand that it is not disputed that the appellant was present in the hearing centre on 12 August 2016 but felt unable to enter the hearing room due to anxiety. Secondly, letters from her GP in January and February 2017 indicate that she is agoraphobic and "not able to leave her home currently". These difficulties are also reflected in the outcome of the appeal, as the tribunal awarded low rate mobility

component on the basis of inability to walk out of doors on unfamiliar routes due to anxiety.

28. Mr McCloskey submitted that the tribunal has erred in law by failing to conduct a fair hearing of the appellant's appeal. Relying on the decision of the Court of Appeal in *Galo*, he submitted that the tribunal ought to have made adjustments to its procedures in the light of the appellant's mental health in order to enable her participation in a hearing. Mr McCloskey further submitted that the tribunal erred in law by failing to document whether any consideration was given by the tribunal to the conduct of a fair hearing in the circumstances.

29. *Galo* is a decision of the Court of Appeal in Northern Ireland and, as such, is a binding authority. *Galo* is based on the long-standing common law principle of fairness and emphasises the need to ensure fairness in particular where a party suffers from a disability. It indicates that courts and tribunals can and should have regard to non-binding and practical advice of the kind given in the Equal Treatment Bench Book (ETBB) – a publication of the Judicial College of England and Wales. In *Galo*, the Court of Appeal found that a man suffering from Asperger's syndrome had not been afforded a fair hearing by the industrial tribunal on the grounds that it failed to engage with the issue of whether any reasonable adjustments to the tribunal process were necessary. It also found it to be a matter of concern that the ETBB 2013 did not appear to have been forwarded to the tribunal.

30. *Galo* concerned an adversarial tribunal, whereas the present proceedings concern an inquisitorial tribunal. As indicated above, in order to understand better how *Galo* might apply to social security tribunals we invited the President to make observations on this case.

31. Paragraph (vi) of the President's response makes clear that measures to address any disability affecting ability to participate in hearings are in place, that tribunal members are trained to adjust their approach to ensure that 'effective participation' is afforded in all cases and that the ETBB has been adopted by him for use by the judiciary within the appeal tribunal. Training to secure 'effective participation' of the type envisaged in *Galo* and the ETBB had been provided to all members.

32. It is common case that guidance of the kind articulated in the ETBB is not binding on tribunals. However, it is illustrative of good practice and we consider that, in general, tribunals should have regard to it when addressing the common law requirement, or the requirement under Article 6 of the ECHR, that the proceedings before them are fair.

33. We observe that the requirement to make reasonable adjustments, in order to avoid discrimination in the case of a person with a disability, is legally distinct from the requirement of procedural fairness. There is a duty on a public body such as the Appeals Service to make reasonable adjustments, as part of their duty under sections 3A(2) and 21B of the

Disability Discrimination Act 1995 (the 1995 Act) not to discriminate. However, in carrying out their judicial functions, tribunals themselves are exempt from the duty to make reasonable adjustments, under section 21C of the 1995 Act.

34. Thus, there is a conceptual difference between the obligation on those administering tribunals to, for example, provide accessible hearing rooms to appellants with physical mobility difficulties, or to issue documents in alternative formats to persons with sight disabilities, and the common law obligation that falls on the tribunal to conduct a hearing fairly. We observe that the Appeals Service pro forma documents make enquiries aimed at establishing whether or not a person has a relevant sight or hearing disability, which might, for example, require the Appeals Service to provide a sign language interpreter. Under the Disability Discrimination Act, the Appeals Service might have to provide an accessible hearing room for a person who has restricted mobility and uses a wheelchair.

35. Once the particular appellant is before the tribunal, however, the tribunal should assume responsibility for the fairness of the hearing. *Galo* reminds tribunals of the obligation to act fairly in the particular context of appellants who may have a recognised disability, such as Asperger's syndrome. However, it is not necessary to demonstrate any particular disability for the requirements of fairness to be engaged. They apply equally to all appellants. Where it is clear that a disability is involved which affects the ability of an appellant to participate in a hearing, a heightened level of attention to fairness may be required on the part of a tribunal. However, any appellant who cannot deal with the stress of attending a tribunal hearing, or who has difficulty articulating or presenting evidence, is no less entitled to consideration.

36. *Galo* does not impose general rules on tribunals. We agree with the words of Underhill LJ in *Jade Anderson v Turning Point Eespro* at paragraph 30 that there is no rule that in every case where there is a disabled or vulnerable witness there must be something specifically labelled a "ground rules hearing" or that a specific check list must be gone through in every case whether relevant or not. Fairness depends on the circumstances of the particular case.

37. It appears to us that the procedures adopted by the President with reference to the ETBB and *Galo* represent a model which addresses the risk of unfairness through pragmatic and proportionate steps. Among these are mechanisms for pre-hearing directions and for adjustments in the course of hearings to enable effective participation. It is also evident that appropriate training has been provided to tribunal members.

38. Against this background, a key issue is the process of identification of obstacles to effective participation in individual cases. This is a judicial task which is the responsibility of the appeal tribunal. Where appellants directly indicate that they have disabilities which might be expected to

affect their ability to participate in a hearing or issues are otherwise apparent from the tribunal papers, a tribunal would be expected to address these and seek to work around them. The fact that an appellant is represented might create an expectation that these issues should be raised on an appellant's behalf by the representative, but ultimately the responsibility for the fairness of the hearing lies with the tribunal. Having said that, once potential unfairness is identified by a tribunal, it is entitled to address a representative, who knows the appellant, to ascertain what steps might be taken to ameliorate the potential for unfairness.

39. Many appellants waive the right to a hearing and many others choose not to attend an oral hearing when it has been arranged. We consider that *Galo* does not place an onus on the tribunal to pursue the reasons for these choices, unless it is plain from the evidence that anxiety, stress or some other factor beyond the control of the appellant prevents attendance and participation. In those latter cases, it may be necessary for the tribunal to explore other ways of enabling participation, such as by directing written witness statements to address aspects of evidence normally adduced orally, enabling telephone or video connection by the appellant to the tribunal hearing, or hearing evidence from a family member or carer in place of the appellant. Again, we observe that the guidance of the President already addresses such possible steps.

40. Turning to the question in the present case of whether the tribunal has erred in law, the submission of Mr McCloskey was that the tribunal failed to conduct a fair hearing of the case, or alternatively to document how it had done so, and that it erred in the way that it dealt with specific evidence raised by the tribunal from the GP records.

41. Addressing the last ground first, the issue of treatment of specific evidence arose from the statement of reasons where the tribunal referred to an entry in the GP records, stating that:

> "There was a potential 'fly in the ointment' when it was indicated in April 2016 that she was due to run the Belfast Marathon for charity and was referred to physiotherapy in respect of left groin and leg pain, but the Panel had not sufficient evidence to consider this in its entirety and therefore give their opinion on any of the issues".

42. Earlier in the statement of reasons the tribunal addressed the issue of high rate mobility. It made reference to the GP factual report of 16 November 2015 that indicated that the appellant had independent mobility despite generalised joint pains, taking analgesia in the form of co-codamol 8/500, whereas more potent painkillers could have been prescribed. While noting that she had subsequently been awarded the enhanced mobility component of personal independence payment (PIP) from March 2017, the tribunal was satisfied from the all the evidence including the appellant's claim form, the evidence in the submissions and medical records that she was not virtually unable to walk in August 2015.

43. It appears to us that the tribunal elected not to place any weight on the evidence concerning the Belfast marathon. It was expressly excluded from the tribunal's consideration in the statement of reasons. There is no reason to doubt the tribunal's statement to this effect. It appears to us that there was ample evidence, leaving aside the disputed entry in the medical records, to support the conclusion that the appellant was not virtually unable to walk at the material date. We do not accept that the tribunal has erred in law on this ground.

44. Returning to the procedural fairness issue, it is evident that the tribunal accepted the appellant's difficulties with anxiety. This condition grounded the award of low rate mobility component from 31 August 2015 to 12 March 2017. In support of the award were two letters from the appellant's GP stating in January 2017 that the appellant was not fit to attend a hearing due to mental health issues, and in February 2017 that she had serious mental health issues made worse by stress and asking her to be excused from attending the hearing on the basis that she was agoraphobic and unable to leave home currently.

45. In the initial grounds of application for leave to appeal, Mr McCloskey submitted that the tribunal had held an unfair hearing in that it failed to conduct the hearing so as to allow effective participation by the appellant. The written submission of the President included an account by the LQM of the tribunal's consideration of the appellant's needs. The LQM had stated:

> "The Panel noted that the submission indicated on Page 1, paragraph 4 that "The Appellant is unable to give oral evidence to the Tribunal due to her severe anxiety and panic attacks" and asked the Tribunal to consider "alternative functional assessment conducted on behalf of the Department both before and after the date of decision", which `alternative functional assessments' were taken to be, or include, the ESA85A and ESA85's referred to above.
>
> The Panel felt it was appropriate to proceed -:
>
> - The submission indicated the Appellant was unable to give oral evidence (note it did <u>not</u> say unable to attend a centre to do so)
>
> - No indication was given by the Representative that she, or the Appellant, wanted alternatives considered in respect of the hearing
>
> - The Appellant had instructed her Representatives to submit written evidence and submission (it was not

known that the Representatives would even attend in the circumstances)

The Panel considered all aspects in deciding to proceed and made its decision based on the evidence available. We considered that the Appellant, especially in light of the move to such an experienced representative body as LSP, had been afforded every opportunity to have her case advanced, in light of her apparent inability to give oral evidence".

46. From the statement of the LQM, it appears to us that the tribunal had addressed the particular circumstances of the appellant. It had been told that the appellant was "unable to give oral evidence to the tribunal due to her severe anxiety and panic attacks" in the submission by her representative.

47. This, on its face, precluded alternative methods of facilitating oral evidence such as video or telephone conferencing. The representative asked the tribunal to consider assessments obtained for the purpose of employment and support allowance (ESA) claims in order to augment the documentary evidence before the tribunal. The tribunal considered this material. When asked what else fairness demanded in the present case, Mr McCloskey could not point to a specific aspect of unfairness in the conduct of the particular tribunal. He suggested, however, that the availability of procedural adjustments should have been made known to the appellant. In essence, Mr McCloskey's submission was that the tribunal had erred in law by failing to indicate to the representative that a video conference or a telephone conference was available to the appellant.

48. With advances in technology in recent years and their adoption by courts and tribunals, it is evident that tribunals have greater flexibility in how they obtain oral evidence from parties. The President and those administering tribunals no doubt issue appropriate information in that context. We consider that tribunals and representatives alike should have awareness of the general duties on tribunals and the relevant procedural adjustments that they might make. Responsibility for fair procedure is the tribunal's alone. However, when determining how to proceed, it may well wish to draw on a representative's knowledge of the appellant. We consider that it is entitled to rely on the representations made on the appellant's behalf by someone who knows or has taken instructions from him or her.

49. Mr McCloskey submitted that the tribunal should have informed the representative that it could permit evidence to be given by way of a video or telephone connection. However, the appellant's representative had indicated in submissions to the tribunal that she was unable to give oral evidence. Mr McCloskey invites us to hold that it was incumbent on the tribunal to go behind this statement, in effect to probe the limits of the

appellant's ability to participate. However, we have no evidence that the appellant would have been content to participate in the proceedings remotely from her own home or other safe environment. It remains therefore a hypothetical consideration.

50. Mr McCloskey submitted in essence that the representative had expressed the limitations on the appellant's ability to participate in a hearing too broadly. He submitted that whereas the appellant could not give oral evidence at a hearing, she might have been able to engage in giving evidence remotely. However, even if that was the case, it appears to us that there was not a material omission by the tribunal giving rise to unfairness. In all the circumstances of this case, in light of the specific submissions made by the appellant's representative, we do not accept that the tribunal had a responsibility to do more than it did. We cannot accept that it has acted unfairly.

51. Mr McCloskey relied on the alternative proposition that the tribunal had erred in law by failing to document its consideration of fair procedures in the light of the appellant's mental health problems. His essential submission was that the fairness of the proceedings needed to be demonstrated on the face of the record. He conceded at hearing that, had the LQM included the above passages in the statement of reasons, he would not be bringing the appeal on this ground. However, Mr McCloskey characterised the omission of a record of the tribunal's consideration of the appellant's needs as a procedural irregularity capable of making a difference to the fairness of the proceedings. In other words his challenge to the tribunal's decision was still focused on fairness, as distinct from a challenge focused on the adequacy of the tribunal's reasons.

52. The requirement to give reasons has a number of purposes, including the enhancement of public confidence in the machinery of justice and focusing the mind of the decision maker. However the main purpose of the requirement to give reasons is to explain to the parties why they have won or lost and to reveal whether there are grounds for further challenge. The tribunal in the present case has explained why the high rate mobility component or any rate of the care component was not awarded. Therefore its reasons are adequate to that extent.

53. Regulation 49(1) of the Social Security (Decisions and Appeals) Regulations (NI) 1999 provides, in practical terms that the procedure at a tribunal shall be as the legal member shall determine. Looking at the general purpose of reasons, it seems to us that there can be no requirement to state the reasons for a particular procedure being adopted under regulation 49. We consider that Mr McCloskey was correct not to pursue the line of argument that the tribunal's reasons were inadequate. Instead, he challenged the lack of any reference to the tribunal's consideration of what procedure to adopt as a procedural irregularity - in other words as an aspect of fairness.

54. However, we are not persuaded by Mr McCloskey. We cannot accept the submission that the omission by a tribunal of any formal record of consideration of an appellant's difficulties in attending a hearing is in itself an error of law. What fairness requires in individual cases may sometimes be obvious and sometimes more elusive. However, fairness is a matter of substance as opposed to a clerical exercise. Where the circumstances of a particular application or appeal are such that the procedure adopted by the tribunal calls for explanation, a statement of facts or other matters can be directed under regulation 20(2) of the Commissioners Procedure Regulations. We consider that this provision adequately permits investigation of the procedures adopted at a hearing if a consideration of the fairness of that hearing is required. While there is nothing to prevent a tribunal addressing such questions, and it might be good practice to do so, we do not accept that there is a general requirement to address its consideration of procedural fairness in a tribunal's record of proceedings or statement of reasons.

55. It follows that we do not accept the grounds advanced by Mr McCloskey on behalf of the appellant. We do not consider that the tribunal has materially erred in law and therefore we must disallow the appeal.

(signed): K Mullan

Chief Commissioner

Odhrán Stockman

Commissioner

18 May 2020