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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**01/04/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

_____

TF

Appellant:

-and-

NORTHERN IRELAND PUBLIC SERVICES OMBUDSMAN

Respondent:

_____

The Appellant appeared as Litigant in Person, assisted by a "McKenzie" Friend Rachel Best, (instructed by EDG Legal Solicitors) for the Respondent

_____

Before: McCloskey LJ, Maguire LJ and Huddleston J

_____

ANONYMITY

By its order dated 15 February 2022 the court acceded to the appellant's application for anonymity. Hence the cypher in the title hereof. As a result, there must be no publication by any person or agency of the identity of the appellant or of anything which could result in her identification.

McCLOSKEY LJ (*delivering the judgment of the court*)

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Introduction

[1] In August 2018, TF ("the appellant") brought proceedings in the Industrial Tribunal ("the Tribunal") against the Northern Ireland Public Services Ombudsman ("the Ombudsman") complaining of direct discrimination on the ground of disability, and a failure to make reasonable adjustments, arising out of the conduct of an interview pursuant to her application for the post of Senior Investigating Officer ("SIO"), which she failed to secure, having been ranked the last of six candidates. The appellant was at that stage employed by the Ombudsman as an investigating officer ("IO"), albeit she had been on secondment with another public sector employer from around March 2018, an arrangement which ultimately terminated on 31 March 2019. In November 2019 the appellant initiated a second tribunal claim against the Ombudsman, arising out of her resignation from her employment on 15 July 2019, asserting unfair (constructive) dismissal and disability discrimination by reason of victimisation.

[2] Following a hearing conducted between 16 and 19 November 2020 the Tribunal, by its decision transmitted to the parties on 15 December 2020, determined unanimously that the appellant's claims would be dismissed. The appellant appeals to this court in consequence.

[3] It is appropriate to record at the outset that the appellant suffers from a particular form of dyslexia recognised as a disability under the Disability Discrimination Act 1995 ("the 1995 Act").

The Protagonists

[4] It is convenient to identify the protagonists. They are:

(a) The appellant.

(b) The presiding Tribunal judge.

(c) The Public Services Ombudsman ("the Ombudsman").

(d) Andrew Gallagher, Cognitive Behavioural Psychotherapist.

(e) John Eakin, Chartered Educational Psychologist.

(f) John Dunlop BSc, BABCP Accredited Cognitive Behavioural Psychotherapist.

(g) Michaela McAleer of NIPSO, Member of the Recruitment Panel.

(h) Paul McFadden of NIPSO, Chairman of the Recruitment Panel.

(i) Sean Martin of NIPSO, third member of the Recruitment Panel.

(j) Janice Wilson, NIPSO, Human Resources Advisor.

(k) Andrea Hegarty, NIPSO Data Protection Officer.

Material Dates and Events

[5] It is appropriate to preface what follows by noting that the events giving rise to these proceedings can be divided into two basic phases, namely [a] the pre-job interview period (to 8 May 2018) and [b] the period thereafter. The court, as is customary, directed the preparation of a schedule of agreed material facts. Unsurprisingly, two competing schedules materialised. The court would emphasise that the material facts are those which have a bearing on its determination of the issues raised by this appeal. Many of the material facts are objectively verifiable, uncontested or incontestable.

[6] As regards the first of the two periods in question, the narrative begins with the appellant's successful application for the post of Investigating Officer ("IO") in the Ombudsman's organisation, as a result of which her employment there began in 2016. Previously, having been admitted to the Roll of Solicitors in England and Wales, she worked in that jurisdiction. Next, having transferred her residence to Northern Ireland, she worked intermittently for an organisation which provides legal advice and services during a period of some two to three years. She also worked as a solicitor providing services to a high profile public inquiry for around one year.

[7] In February 2016, in advance of her first job interview, the appellant described her dyslexic condition in detail in an email to the Ombudsman's organisation. She

specifically requested advance provision of the interview questions, together with a pen and paper. Some adjustment was provided. (It is unclear what followed).

[8] On 6 August 2017 (evidently following an unsuccessful interview for another post in the organisation) Janice Wilson, the Ombudsman's Human Resources Advisor (see [4] (j) above) communicated electronically with the appellant, attaching a "further communication following your interview for the above post" and informing her of the availability of feedback. The appellant replied on the same date, stating inter alia:

> "I can sometimes feel a bit overwhelmed by a question which asks me to list things. For example, the first question, re the skills and experience. If that happens, what usually helps is if I come back to it later in the interview …
>
> I use this as a coping mechanism. It's not that I don't know or can't answer it. It's just that I need a bit more time to structure my thoughts in the proper order. **If he had agreed to that,** it would have helped me to stay calmer and focus my thoughts on the rest of the questions …
>
> Also, on a separate point, I wonder can I arrange to have a disability needs assessment. This is a workplace assessment where a dyslexia specialist comes in, looks at the role against my diagnosis and sees if there are some other adjustments which can be put in place to help me."

The highlighted words indicate that the appellant had not been given the facility of increased time to consider her answers or the mechanism of returning to a question. The "he" would appear to be the interview panel chairman who one deduces was Mr McFadden, Deputy Ombudsman (see [4](h) above). In an email to Mr McFadden the appellant stated:

> "….. I find it difficult and tiring to complete and proof read long application forms like this (with multiple sections and complex criteria). This form was particularly long and some sections I completed were not as detailed as others because tiredness affected my concentration. I think that the requirement to provide detailed and substantive evidence that I met all the criteria on the form was particularly problematic for me because of my dyslexia … I also think the depth and breadth of this experience could be explored at interview as this could be another reasonable way to assess whether I met these essential criteria. I would be grateful if you could reconsider the decision not to let me sit the assessment for these reasons."

[9] In his response, Mr McFadden affirmed his earlier decision refusing the appellant the adjustments she had been requesting. He emphasised in particular that the appellant had not raised the issue of reasonable adjustments until after the event (but see [7] above). He described his decision in unambiguous terms:

> "… my decision that we did not have a duty to make reasonable adjustments."

This exchange resonates strongly when one comes to consider the events which unfolded some eight months later, in May 2018.

[10] The final event of note during this discrete period of three months occurred when Andrew Gallagher, Chartered Occupational Psychologist [see [4](d) above] provided his report relating to the appellant, the subject matter being "Support to assist in regards to her diagnosis of dyslexia." This report, in tandem with the other expert reports, forming part of the evidence before the Tribunal (and this court), is considered at paras [11] and [53]–[63] *infra*.

[11] The next discrete chapter in the narrative unfolded during a period of some few days in early May 2018. The appellant, having applied for the vacant SIO post, became one of six candidates who were to be interviewed. The sequence of events thereafter was the following:

(i) On 2 May 2018 the appellant was notified of the interview arrangement.

(ii) On 3 May 2018 the appellant requested that the interview questions be provided for her 30–45 minutes in advance "… as a reasonable adjustment in order to make notes about the points I need to include in my answer …"

(iii) The appellant's request was accompanied by the report of Mr Gallagher (supra). This contained the following material passage:

> "Should [the appellant] be involved in applying for job vacancies when adjustments will need to be considered given her diagnosis of dyslexia. Consideration should be given to:
>
> *(a)* Awareness training for interviewers regarding dyslexia and the effect an interview can have on working memory …
>
> *(b)* Providing additional time to answer questions …

> *(c)* Assisting with prompting or clarifying of questions when appropriate …
>
> *(d)* Providing a written copy of the questions prior to the interview …
>
> *(e)* Considering the effects of dyslexia when scoring the interview, for example when a response may not be ordered in sequence."

(iv) The response of the recruitment panel, on 4 May 2018, was that the facilities of disclosing the questions with 15 minutes to consider them before the interview, supplemented by a further 15 additional minutes during the interview and a five minute break would be provided.

(v) The appellant replied an hour later:

> "That's fine, thanks."

(vi) The interview for the SIO post for which the appellant was competing was held on 8 May 2018.

(vii) On 9 May 2018, the day following the interview, by electronic communication the appellant contended that, in the event, the aforementioned facilities had proved inadequate and questioned whether the panel chairman had undergone dyslexia awareness training. (This training was provided later, on 2 August 2018).

(viii) On 10 May 2018 a further electronic communication from the appellant enquired whether she could "… submit written responses to augment the oral responses provided at interview …" on the ground that she "… did not have enough time to structure my answers in the way they needed to be structured …"

(ix) The response to this enquiry was one of polite but firm refusal.

(x) By his subsequent, post-interview communication to the Ombudsman's Office Mr Gallagher stated that the provision of the questions in written form should take place 15 minutes before commencement of the interview.

Some further objectively indisputable facts belonging to this phase may be added to this schedule:

(xi) The decisions about the facilities afforded to the appellant in response to her request were made by Mr McFadden, qua panel chairperson.

(xii) Six candidates for the post of SIO were interviewed.

(xiii) No specific qualifications for appointment to the post of SIO were required.

(xiv) The interview of all candidates was of the skills and competency based variety.

(xv) Of the six candidates, the appellant received the lowest score.

(xvi) Furthermore, the appellant was the only candidate assessed as "not appointable."

(xvii) The standard of "appointable" required a minimum score of 6/10 in respect of each of the six interview questions addressed to every candidate.

(xviii) The appellant failed to achieve the minimum score of six in respect of two of the six questions.

(xix) One of the six candidates for the post was, in common with the appellant, a solicitor. That candidate was appointed.

(xx) On 15 May 2018 the appellant was notified that her candidature had been unsuccessful.

[12] A further discrete chapter began at this stage. In summary:

(i) On 23 May 2018 the appellant lodged a grievance.

(ii) On 28 May 2018 a statutory questionnaire under the 1995 Act was presented by the appellant to the Ombudsman. This raised issues relating to reasonable adjustment, the conduct of the interview and the training of the interview panel members.

(iii) This gave rise to an "appeal meeting" on 21 June 2018, the ultimate outcome being dismissal of the grievance pursuant to a further appeal, affirmed on 13 August 2018.

(iv) On 23 July 2018 the Ombudsman provided a response to the statutory questionnaire (consisting of 13 pages).

(v) On 13 August 2018 the appellant initiated the first of the two tribunal claims.

(vi) On 30 January 2019 the dismissal of her final grievance appeal was notified to the appellant. The author of this decision was the Ombudsman.

(vii) On the same date the Ombudsman's witness statements were served.

(viii) Correspondence about the appellant's anticipated return to work in NIPSO followed. The appellant highlighted that Mr Gallagher's recommended reasonable adjustments for her had yet to be implemented.

(ix) By letter dated 29 March 2019 NIPSO's solicitors questioned whether the appellant had misrepresented her solicitor's qualifications when first applying for employment in the organisation in 2016 (see para [13] infra).

(x) On 1 April 2019, the date of her scheduled return to work in NIPSO, returning from her seconded external appointment, the appellant provided further certification of her incapacity for work on the ground of depression.

(xi) The appellant did not return to work. On 15 July 2019 she resigned from her employment, she began a new job elsewhere and on 14 August 2019 her employment in the Ombudsman's organisation ended.

(xii) On 13 November 2019, the appellant initiated the second tribunal proceedings.

[13] On 29 March 2019, in the context of the first tribunal claim, the Ombudsman's solicitor wrote to the appellant's solicitor raising the question of whether the appellant, in applying for employment in the organisation in 2016 had mis-stated her claim that she was a qualified solicitor and had failed to disclose a company directorship.

[14] This elicited a swift and robust response from the appellant's solicitors. The effect of this response was to demolish any suggestion that the appellant had misrepresented her professional qualifications when applying for employment with the Ombudsman in 2016. This brought this particular matter to a swift conclusion,

[15] The two claims were conjoined. The Tribunal conducted oral hearings on 16-19 November 2020. Its judgment was promulgated, with commendable expedition, on 15 December 2020.

Appeal to this Court

[16] The notice of appeal *("NOA")* to this court, dated 25 January 2021, followed. This triggered an intensive case management phase.

[17] The history thereafter is documented in the earlier decision of this court promulgated on 8 June 2021: see [2021] NICA 39. This history was one of regrettable delay and stagnation for a period of some months, stimulated by the appellant's application to the Supreme Court for leave to appeal against this court's decision of 8 June 2021 dismissing her applications for recusal and anonymity. Upon learning that the Supreme Court had dismissed this application, the court took steps to allocate a new substantive hearing date and made appropriate related case management directions. What transpired thereafter can be ascertained from the case management orders of the court.

[18] In a nutshell: the court allocated a new hearing date of 24 February 2022; two further case management review listings followed; the appellant made a renewed application for anonymity based on new evidence, to which the court acceded; at the second of the aforementioned case management review listings the court ventilated its concerns about whether its anonymity order could be fully and effectually implemented by 24 February and offered a later listing – on 15 March – accordingly; the appellant was steadfast in her opposition to this course, to which the Ombudsman's representatives assented. Given the reasons for and force of the appellant's objections to an adjournment the court affirmed the hearing date of 24 February; in the aftermath of the hearing, the appellant signified a change of mind on this issue; and, on the same date, the court reaffirmed the hearing date of 24 February 2022.

[19] The oral hearing proceeded as scheduled, on 24 February 2022. Unexpectedly, completion was not achievable. This gave rise to a further hearing date, which was quickly arranged for 7 March 2022. While this generated a little further delay it had the merit of providing an opportunity to finalise a series of prosaic matters relating mainly to the state and composition of the papers before the court which emerged in response to certain enquiries from the panel both before the first day of hearing and in the course thereof.

The appellant's First Tribunal Claim

[20] The appellant made the following material allegations in her first claim:

> "The claimant, prior to attending her interview on 8th May 2018, requested that she be provided with 30–45 minutes to review the interview questions as a reasonable adjustment. The respondent refused this request on 4th May 2018, limiting the review time to only 15 minutes. The claimant

would contend the very limited time afforded to her did not provide her with reasonable time to structure her answers to the interviewer's questions and did not provide her with enough time to plan and organise her thoughts in respect of the questions being asked. The claimant raised concerns with the respondent on the day following her interview (9th May 2018) … but received no reply to her communication …

The refusal of the respondent to provide the additional time requested placed the claimant at a substantial disadvantage when compared with other applicants ….

The claimant believes she was the best qualified applicant for this role because of her qualifications, skills and experience."
[Emphasis added.]

[21] The gist of the Ombudsman's response is ascertainable from the following passages in Form ET3:

"Taking into consideration that the scheduled interview time was 35 minutes, it was considered that her request for 30 – 45 minutes advance notice of the questions was too long and that a combination of 15 minutes advance notice of the questions, together with 15 minutes additional time to answer the questions and a 5 minute break during the interview would be consistent with [the Chartered Occupational Psychologist's] recommendations and would enable the claimant to be effectively assessed at interview and enable the panel to select a candidate on merit …

The adjustments made afforded the claimant over 85% additional time overall to participate in the interview process and over 40% additional time for advance notice of the interview questions, with reference to the planned standard duration of the interviews ….

The respondent contends that it complied with its duty to make reasonable adjustments and that the further adjustments sought by the claimant were unreasonable ….

The respondent denies that it appointed a less qualified applicant to the role. The respondent contends that the

> appointments to these posts* were made on merit and to the candidates* who best met the selection criteria ….”
>
> [Emphasis added. * There were two appointments]

The appellant's Second Tribunal Claim

[22] The essence of the second claim can be discerned from the following passages:

> “The claimant was due to return to work on 01 April 2019. On 29 March the respondent's solicitor wrote to the claimant's solicitor making very serious allegations which were, namely, that the claimant had held herself out as a solicitor when she was not properly qualified as one … [and] … she had breached the Ombudsman's Code of Conduct by failing to disclose a company directorship …
>
> The respondent had information within their own records which proved that neither of these allegations was true ….
>
> The claimant subsequently served a supplemental statement … the respondent's Data Protection Officer …. [disclosed] that she was undertaking an investigation into potential statutory breaches arising from the claimant's supplemental witness statement, specifically that the claimant had referred to names of complainants in her statement … the claimant's solicitor confirmed that … the names could be anonymised … This was subsequently agreed ….
>
> This further suggestion that she may be acting inappropriately with regards information [sic] and an implication that she could have removed information was the final straw for the claimant. She felt that she no longer had trust and confidence in an employer that had discriminated against her and failed to promote her despite being the most suitably qualified candidate ….
>
> **The claimant therefore resigned on 15 July 2019 as constructively dismissed.**”
> [Emphasis added.]

Sickness absence payments continued until 14 August 2019, when the appellant's employment was formally terminated.

[23] The essence of the Ombudsman's response to the appellant's second claim can be gleaned from the following passages in Form ET3:

> "It is denied that the letter dated 29 March 2019 from the respondent's solicitor contained allegations against the claimant. No allegations were made in that letter. The express purpose of the letter was to raise concerns which arose out of information provided by the claimant by way of discovery …
>
> Ms McAleer's observations [in her witness statement] did not relate to her assessment of the claimant at interview …
>
> The claimant served a supplemental witness statement on 30 May 2019 … [including] … the names of complainants in relation to certain investigations which the claimant had been working on in the course of her employment with the respondent. That gave rise to two issues: a potential data breach and a breach of section 49 of the [2016 Act] …
>
> There was no inference that the claimant had potentially removed confidential information. The issue was that the claimant had disclosed confidential information in her supplemental witness statement. Nor was there any suggestion that the claimant had been acting in bad faith …
>
> It was necessary for the purpose of [the] investigation to ascertain the source of the information disclosed and to seek confirmation that the information was based on the claimant's personal knowledge and recollection alone …
>
> The respondent denies that this correspondence questioned the claimant's integrity or in any way breached its implied duty of trust and confidence towards the claimant."

Legal Framework

[24] Section 3A(5) of the 1995 Act provides:

> "A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are

the same as, or not materially different from, those of the disabled person."

An act contravening section 3A(5) is one of direct discrimination.

[25] An employer has a statutory duty to make reasonable adjustments for a disabled person in certain circumstances, by virtue of section 4A of the 1995 Act:

> "(1) Where –
>
> (a) a provision, criterion or practice applied by or on behalf of an employer, or
>
> (b) any physical feature of premises occupied by the employer,
>
> places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.
>
> (2) In subsection (1), "the disabled person concerned" means –
>
> (a) in the case of a provision, criterion or practice for determining to whom employment should be offered, any disabled person who is, or has notified the employer that he may be, an applicant for that employment;
>
> (b) in any other case, a disabled person who is –
>
> *(i)* an applicant for the employment concerned, or
>
> *(ii)* an employee of the employer concerned.
>
> (3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know –

(a) in the case of an applicant or potential applicant, that the disabled person concerned is, or may be, an applicant for the employment; or

(b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1)."

[26] The burden of proof in relation to all allegedly unlawful acts under Part2 of the 1995 Act is governed by section 17A(1), which provides:

"(1) A complaint by any person that another person—

(a) has discriminated against him, or subjected him to harassment, in a way which is unlawful under this Part, or

(b) is, by virtue of section 57 or 58, to be treated as having done so,

may be presented to an industrial tribunal."

It is well settled that in both discrimination and victimisation cases the claimant must prove facts upon which the Tribunal could reasonably infer, in the absence of an adequate explanation, that the respondent had unlawfully discriminated against or victimised the claimant. Where this burden is discharged the respondent assumes the burden of establishing, on the balance of probabilities, that it did not commit the alleged unlawful act/s. See, for example *McDonagh v Royal Hotel Dungannon* [2007] NICA 3 and *Nelson v Newry and Mourne District Council* [2009] NICA 3 at [22]–[24] and, more recently, *McCorry v McKeith* [2016] NICA 47 at [37]–[40].

[27] Article 130 of the Employment Rights (NI) Order 1996 provides:

"130. - (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this paragraph if it-

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under a statutory provision.

(3) In paragraph (2)(a)-

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

> (6) Paragraph (4) is subject to Articles 130A to 139, 144 and 144A."

[28] Article 3 of the Fair Employment and Treatment (NI) Order 1998 ("the 1998 Order") regulates discrimination by victimisation. The definitions of "discrimination" and "unlawful discrimination" respectively are contained in Article 3.

[29] In cases of this ilk the task for the tribunal is to determine whether a significant measure of discrimination, as defined, has occurred in the manner alleged by the claimant. See for example *Igen v Wong* [2005] IRLR 258 at [37]. A specially devised approach to the burden of proof must be applied in accordance with Directive 97/80/EEC (commonly known as the "Burden of Proof Directive"). At the first stage, the question for the tribunal is whether the claimant has established a prima facie case of discrimination on the prohibited ground by direct evidence or inference or a combination of both. If the claimant discharges this burden, there arises a second stage at which the respondent has the burden of proving that discrimination on the relevant proscribed ground did not occur. If the respondent fails to discharge this burden the tribunal must find that the alleged discrimination occurred. At the second stage the enquiry for the tribunal is directed towards whether a satisfactory non-discriminatory explanation has been established.

[30] There is ample guidance in the case law of this court. One salient illustration is found in *Nelson v Newry and Mourne DC* [2009] NICA 24 where Girvan LJ stated at [24]:

> "This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In **Curley v Chief Constable** [2009] NICA 8 Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."

The strong exhortation of Coghlin LJ in *Curley v Chief Constable* [2009] NICA 8 that the tribunal focus firmly on the allegation of unlawful discrimination from beginning to end is a faithful reflection of Lord Nichols' espousal of the simple question of why the

impugned act or conduct occurred, in *Shamoon v Chief Constable* [2003] UKHL 11 at para [11].

[31] The aforementioned two stage approach applies equally in cases of alleged victimisation: *Nagarajan v London Regional Transport* [1999] IRLR 572 (House of Lords). Furthermore, the impugned motivation on the part of the respondent need not be conscious: subconscious motivation will suffice. As the decision of the House of Lords in *Zaffer v Glasgow Council* [1997] IRLR 229 makes clear, a finding that the relevant conduct of the respondent was unfair or incompetent or otherwise questionable or worthy of criticism does not automatically impel to the conclusion that, by inference, discriminatory treatment had occurred.

The Tribunal's Findings and Conclusions

[32] The material findings of the Tribunal are rehearsed below. What follows is based on that section of the Tribunal's judgment entitled "Relevant Findings of Fact." As will become apparent, some of the components of this section of the judgment are conclusions rather than findings. We have found it convenient to insert certain comments of this court in appropriate places.

(i) The Ombudsman's response dated 23 July 2018 to the appellant's statutory questionnaire was "full and detailed."

(ii) The post of SIO within the Ombudsman's organisation would require the holder "… to deal with and to respond to unexpected and unfamiliar challenges and to questions, often with little or no notice."

(iii) The Ombudsman had arranged for a reasonable adjustments assessment of the appellant to be undertaken by an occupational psychologist (Mr Gallagher) and, pursuant to his report, extensive adjustments were made. The foregoing demonstrated "… a detailed and extensive effort on the part of the respondent to put in place reasonable adjustments in accordance with the 1995 Act in relation to the claimant's day to day working conditions."

(Comment: first, there is no recognition of the fact, objectively established, that the appellant was the instigator of this measure. Furthermore, there was no engagement with the email evidence of February 2016 above.

(iv) The aforementioned actions of the Ombudsman were not those "… that would be expected of an employer who held any animus towards disabled employees or who would consciously or deliberately seek to avoid their responsibilities under the 1995 Act."

(Comment: first, this is a conclusion and not a finding of fact. Second, it is clearly undermined by the immediately preceding analysis.)

(v) The interview measures described in Mr Gallagher's report were couched in the terms of non-binding "recommendations" which the employer would have to consider "… in line with their local business context and whether or not they can reasonably be implemented in their work environment."

(Comment: It is not clear from the voluminous evidence, including a full transcript of the Tribunal hearings available to this court, that either (a) the Ombudsman's "local business context" or (b) the reasonableness of implementation featured in <u>the Ombudsman's evidence/case</u> to the Tribunal.)

(vi) The essential criteria for the post of SIO included: a minimum of 2 years' experience in investigations or similar work; experience in obtaining and analysing evidence; experience of investigative interviews; and experience of the production of investigation reports.

(vii) The only adjustment suggested by the appellant in her completed job application was "… extra time in a quiet environment."

(viii) The appellant was informed pre-interview that the exercise would consist of a five minute presentation to the panel followed by competency and knowledge/experience based questions. The appellant was asked to indicate whether she was seeking "any special arrangements."

(ix) In response, the appellant stated "… I wonder if it would be possible to have sight of the interview questions approximately 30/45 minutes before the interview …"

(x) In response the appellant was informed that three specific measures would be implemented: provision of the interview questions 15 minutes in advance, an additional 15 minutes for responding at interview and a five minute break on request. The appellant replied "... that's fine."

(xi) The aforementioned response to the appellant "… had been clear and specific. Three adjustments were put in place and the claimant had consented in clear terms to those adjustment."

(Comment: This is a gloss on both [a] the evidential matrix, in particular the terms of the appellant's response and the abundant evidence of her disability and [b] the legal duty on the Ombudsman.)

(xii) The appellant's suggestion in evidence that she had been "reluctant … worried about provoking conflict", was rejected, for the detailed reasons provided in [95] of the Tribunal's judgment.

(Comment: See the comment immediately above.)

(xiii) At this point, in the same paragraph, the Tribunal stated:

> "… no reasonable employer, in those circumstances and in the light of Mr Gallagher's report, would have been expected to probe any deeper … in a situation where the claimant was a qualified lawyer who was fully familiar with the concepts of disability discrimination and of reasonable adjustments."

(Comment: This is another example of a consistent theme, already identified, namely an inclination to overlook that the statutory duty is imposed exclusively on the employer, with no concomitant legal duty imposed on the employee.)

(xiv) At the commencement of the appellant's interview the panel provided her with a document setting out with some precision the format and content of the interview to follow. Furthermore, this was read out loud.

(xv) This document repeated the three aforementioned adjustments and stated inter alia that if a question was not clear the panel would repeat it "... as often as you require" and would further, if required, "… assist with prompting or clarifying questions …"

(xvi) All members of the interview panel undertook dyslexia awareness training before the interview.

(Comment: This finding does not bear scrutiny)

(xvii) The appellant's assertions that she had expressed her reluctance to proceed with the interview upon its commencement and, further, stated "maybe I should be more positive …" were rejected.

(xviii) The standard of suitability for employment required a candidate to achieve a minimum score of six for each of the six interview questions. The appellant achieved this score in respect of the first four questions only, being allocated a score of five for questions five and six.

(xix) The panel kept the issue of reasonable adjustments under consideration as the interview progressed.

(xx) Following the interview, the appellant was not "happy with her performance" and mooted further adjustments which the Tribunal considered "extensive and remarkable."

(xxi) Those further adjustments sought by the appellant were not "compatible with maintaining the integrity of the competition."

(Comment: this is a conclusion.)

(xxii) During the interview, the appellant received a total of 20 prompts and clarifications from the panel.

(xxiii) The scores allocated to the appellant for her presentation and her responses to the first four questions exceeded the pass mark.

(xxiv) The example provided by the appellant in response to question 5 was not the type of example being probed or considered appropriate by the panel.

(xxv) The panel's assessment that the example provided by the appellant in response to the 6th question was consistent as among the panel members and was one which they were "… entitled to make" and there was no evidence that it "related in any way to the appellant's disability."

(Comment: this finding neglects the abundance of official guidance, including guidance to judges, augmented by legal principle, on the allowance to be made for dyslexic job interviewees in relation to their responses in interview.)

(xxvi) The appellant's allegation that <u>some</u> members of the interview panel had pre-judged its outcome on account of her dyslexia was rejected.

(xxvii) The ensuing internal grievance pursued by the appellant was dismissed, the appointed officer concluding that there had been no unreasonable failure to implement the adjustments recommended by Mr Gallagher and that reasonable adjustments had been made in respect of the job interview.

(xxviii) The Ombudsman dismissed the consequential grievance appeal.

(xxix) The appellant's allegation that she had suffered stress as a result of the grievance appeal dismissal was confounded by the medical evidence, which documented that stress had been diagnosed by her general medical practitioner almost two weeks earlier, on 18 January 2019.

(Comment: this finding makes no attempt to address the possibility that pre-existing stress had been exacerbated by the grievance appeal dismissal and, further, fails to address the extant expert evidence and the subsequent medical evidence some few weeks later and the further expert evidence of referrals and treatment during this period, relating to <u>depression</u>: see Chapter XII infra**.)**

(xxx) The probing by the Ombudsman's agents of representations made by the appellant about her legal qualifications in connection with her successful application for the post of Temporary Legal Officer circa January 2016 was "… not, in any sense, an exercise in victimisation for the purposes of the Act."

(Comment: the Tribunal did not examine this issue in the necessary depth. Furthermore, this passage contains no finding of fact bearing on this issue, with a resulting gap in the Tribunal's judgment. This passage constitutes a conclusion in law.)

(xxxi) The issue raised by the Ombudsman's solicitor regarding the possible impermissible disclosure of confidential information in the appellant's tribunal witness statement was "… totally reasonable and not in any way an act of victimisation or aggression."

(Comment: we repeat the immediately preceding comment)

(xxxii) The appellant's claim that the foregoing was "the final straw", impelling her to resign from her employment, was rejected, being confounded by certain objectively incontestable facts, namely: she resigned some six months after the grievance appeal decision, some three months after this issue had first been raised in correspondence and some six weeks after a second related letter which, in cross examination, she "… had accepted as objectively reasonable."

(Comment: this is a mechanistic finding which neglects entirely the abundant evidence relating to the specific impacts of the appellant's dyslexia on her and the medical evidence of her depression and stress. Moreover, it does not engage with the fact that the appellant was working externally until 31 March 2019. Our comment at (xxix) above also applies fully.)

[33] We have identified above some specific conclusions of the Tribunal, interspersed among its findings of fact. In its judgment, the Tribunal next formulated further conclusions and its decision in the following way. Firstly, basing itself, inter alia, on its assessment of the appellant throughout the hearing, it concluded that the appellant has –

> "… a form of dyslexia which significantly affects her working memory and significantly affects her ability to process information."

(Comment: this was an uncontested fact, with ample supporting evidence, requiring no conclusion on the part of the Tribunal. It is unclear why it emerges in the judgment as a conclusion, in particular a conclusion based on the Tribunal's assessment of the appellant throughout the hearing. There was no judicial function

to be performed in this respect. More notably, there is no mention of the abundant expert psychological evidence: see para [57 ff infra)

[34] The Tribunal's next ensuing conclusion was that there were "… several incidents where the claimant either misinterpreted facts or mis-remembered evidence." This was followed by eight concrete examples (some of which are discernible from our rehearsal of the Tribunal's findings above). This was followed by the observation:

> "The Tribunal had to repeatedly remind the claimant not to misrepresent previous evidence when putting questions in cross examination. The claimant had clear difficulty in following or apparently even in accepting that advice."

Followed by:

> "In any event, and for the record, the Tribunal accepts that the claimant's difficulty interpreting facts and in remembering and interpreting evidence was a direct result of her medical condition. The Tribunal does not conclude that it was any form of a deliberate policy on her part."

[35] **Comment.** The terms in which these conclusions are formulated raise the question of whether the Tribunal really engaged properly and fully with the abundant expert evidence relating to the impacts of the appellant's dyslexia and her stress and depression. The first of these two conclusions is manifestly adverse to the appellant. It is not tempered in any way by the "in any event …" comment which follows. We shall elaborate on this in our examination of the hearing transcripts infra.

[36] The Tribunal then formulated the self-direction in law that the 1995 Act required the Ombudsman to "… put in place reasonable adjustments to enable the disabled person to compete on her merits with the other candidate."

There was no legal duty:

> "… to put in place adjustments to ensure that the claimant will be successful in her application, irrespective of the question of her merits, the merits of other candidates or her suitability for the post."

Next, the Tribunal described the test of reasonableness as objective in nature. The cases considered by the Tribunal in this context were *Archibald v Fyffe Council* [2004] UKHL 32 and *Burke v College of Law* [2012] EWCA Civ 37.

[37] The Tribunal's next conclusion was the following:

> "The respondent in this case had already made significant and substantial adjustments in favour of the claimant in relation to her ordinary working practices …
>
> The respondent had also made significant adjustments in favour of the claimant in relation to the interview process."

This conclusion was linked to its specific findings noted above.

(Comment: We repeat our comments above.)

[38] The Tribunal next concluded that further adjustments proposed by the appellant following the interview could not be regarded as reasonable:

> "They would put the claimant in an exceptionally advantaged position."

The Tribunal elaborated on this in a little detail, concluding further that:

> "… (2) Effectively allow the claimant, with the benefit of significant hindsight and with the ability to research her answers or indeed to have other persons assist her in providing those answers to supplement her answers or to be re-interviewed would have totally destroyed the integrity of the competition and would have effectively rendered the competition meaningless."

[39] This was followed by:

> "That cannot on any reading of the facts be regarded as objectively reasonable. There is no prima facie evidence of any failure to put in place reasonable adjustments. The burden of proof has not shifted to the respondent. Even if it had shifted, the evidence of the respondent has been clear and convincing. All reasonable adjustments had been put in place."

Following elaboration, the judgment pronounced the unanimous decision of the Tribunal that the reasonable adjustments claim must fail.

[40] Next, the Tribunal enunciated its conclusion that the direct disability discrimination claim must also fail. Its elaboration of this conclusion included the following:

> "…. No legal or other qualifications had been specified for the post of [SIO], neither had any particular level of

> experience beyond the minimum requirement of two years …
>
> The claimant … did not perform better than the other candidates despite the extensive adjustments put in place. She did quite well in her presentation and in the first 4 questions. She chose poor examples for the 5th and 6th questions."

Giving rise to the following conclusion:

> "There is no prima facie evidence of any direct discrimination on the ground of disability. The burden of proof has not shifted to the respondent. The claim of direct disability discrimination is dismissed."

[41] The Tribunal then concluded that the appellant's constructive unfair dismissal claim must also be dismissed, reasoning inter alia:

> "The claimant has identified no substantial, or indeed any, breach of her employment contract on the part of the respondent organisation …"

Having then described the offending letters written by the Ombudsman's solicitors as (in terms) entirely reasonable, the judgment continues:

> "Even if there had been a breach of contract on the part of the respondent, as the claimant alleged, her resignation, with one month's notice, was submitted on 15 July 2019. The second (solicitor's) letter was dated 7 June 2019, some 5 weeks previously and the claimant had accepted in cross examination that it had been 'objectively reasonable' …
>
> The Tribunal concludes that the claimant's decision to resign had not been in response to any alleged breach of contract. There had been none. Even if there had been, the contract has been affirmed by significant delay and the claimant had not resigned for any such reason. The claimant had resigned to go to alternative employment."

[42] Finally, the Tribunal dismissed the appellant's victimisation claim. This claim, it observed, was based on the offending two letters transmitted by the solicitors on the instructions of the Ombudsman:

> "It was explained to the claimant in the course of the hearing that effectively what she was alleging in this part

> of the claim was that [the Ombudsman] had been motivated in instructing (the solicitors) to raise these two issues in the correspondence, and in determining the grievance appeal, by the fact the claimant had performed a protected act. The claimant accepted that she had no evidence for such an allegation. It had simply been a matter of her belief."

Continuing: the appellant, having described the second letter as an act of "severe aggression", accepted in cross examination that it had been an objectively reasonable letter. The Ombudsman's bona fides were (in terms) unimpeachable. The Tribunal's conclusion is in these terms:

> "In relation to the claim of victimisation, the unanimous decision of the Tribunal is there is no evidence of unlawful victimisation in this respect. There is not even any prima facie evidence, and the burden of proof has not shifted to the respondent."

Appeals from Tribunals to this Court: General Principles

[43] These are summarised in *Nesbitt v The Pallet Centre* [2019] NICA 67 at [56]-[61]:

> "[56] What is the correct test to be applied in determining this second ground of appeal? The starting point is the statute which makes provision for appeals from Industrial Tribunals to the Court of Appeal. Article 22 of the Industrial Tribunals (NI) Order 1996 (the "1996 Order") provides:
>
> "(1) A party to proceedings before an industrial tribunal who is dissatisfied in point of law with a decision of the tribunal may, according as rules of court may provide, either –
>
> (a) appeal therefrom to the Court of Appeal, or
>
> (b) require the tribunal to state and sign a case for the opinion of the Court of Appeal.
>
> (2) Rules of court may provide for authorising or requiring the tribunal to state, in the form of a special case for the decision of the Court of Appeal, any question of law arising in the proceedings."
> [Emphasis added.]

The wording of this provision is uncomplicated. It conveys that in appeals of this species, the question for the Court of Appeal is whether the tribunal, within the confines of the grounds of appeal, erred in law in some material respect or respects.

[57] Of what does the error of law threshold consist? The decision in *Belfast Port Employer's Association v Fair Employment Commission for Northern Ireland* [1994] NIJB 36 concerned an appeal by case stated from a decision of the county court that the appellant had discriminated on the ground of religious belief or political opinion contrary to the Fair Employment (NI) Act 1976. The appeal was brought under Article 61 of the County Courts (NI) Order 1980 which provides in material part:

> "Except where any statutory provision provides that the decision of the county court shall be final, any party dissatisfied with the decision of a county court judge upon any point of law may question that decision by applying to the judge to state a case for the opinion of the Court of Appeal …"

The county court judge upheld the employer's appeal against a decision of the Fair Employment Agency that the employer had discriminated against the complainant, ruling that there was no case to answer. The test which the judge formulated was whether the respondent to the appeal, the Fair Employment Commission for Northern Ireland (the "FEC"), had discharged the onus of establishing the alleged discrimination. Carswell LJ stated at p 6:

> "… The judge seems to have apprehended that where evidence has been given on both sides, the complainant must ultimately prove that he was discriminated against on grounds of religion. He does not appear to have appreciated the correct application of the well-established principle that where one finds a person or group treated less favourably in circumstances which are consistent with that treatment being based on religious grounds it is generally right to draw an inference that that was the reason for it."

The judge's basic error was his failure to regard the circumstances as prima facie proof of discrimination which called for an explanation, compounded by his disregard of the principle that a holding that there is no case to answer should be restricted to exceptional or frivolous cases only.

[58] One of the reformulated questions which the Court of Appeal had to determine was:

> "Whether on the facts which I found my conclusion that the employers did not discriminate against the complainants on the ground of religion was one which a tribunal properly directing itself could reasonably have reached."

The Court of Appeal determined this question by the application of the well-known principles in *Edwards v Bairstow* [1956] AC 14. Lord Radcliffe stated at page 36:

> "When the case comes before the [appellate] court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the

> same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

The formulation of Viscount Simonds, at page 29, was the following:

> "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand."

Carswell LJ also cited with approval the approach of Philips J in *Watling v William Baird Contractors* [1976] 11 ITR (at pages 71–72) equating the same test with a finding that the tribunal's conclusion was "plainly wrong" or, in the legal sense, perverse.

[59] The *Edwards v Bairstow* principles have been applied by the Northern Ireland Court of Appeal in a variety of contexts. These include an appeal by case stated from a decision of the Lands Tribunal (*Wilson v The Commissioner of Evaluation* [2009] NICA 30, at [34] and [38]), an appeal against a decision of an industrial tribunal in an unfair dismissal case (*Connelly v Western Health and Social Care Trust* [2017] NICA 61 at [17]–[19]) and a similar appeal in a constructive dismissal case (*Telford v New Look Retailers Limited* [2011] NICA 26 at [8]–[10]). The correct approach for this court was stated unequivocally in *Mihail v Lloyds Banking Group* [2014] NICA 24 at [27]:

> 'This is an appeal from an industrial tribunal with a statutory jurisdiction. On appeal, this court does not conduct a rehearing and, unless the factual findings made by the tribunal are plainly wrong or could not have been reached by any reasonable tribunal, they must be accepted by this court.'

[60] A valuable formulation of the governing principles is contained in the judgment of Carswell LCJ in *Chief Constable of the Royal Ulster Constabulary v Sergeant A* [2000] NI 261 at 273:

> 'Before we turn to the evidence, we wish to make a number of observations about the way in which tribunals should approach their task of evaluating evidence in the present type of case and how an appellate court treat their conclusions.
> ……..
>
> 4. The Court of Appeal, which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.
>
> 5. A tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless—

(a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the tribunal (*Fire Brigades Union v Fraser* [1998] IRLR 697 at 699, per Lord Sutherland); or

(b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36."

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

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

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

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

> "To paraphrase, reticence on the part of an appellate court will normally be at its strongest

> in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses."

[44] In *Nesbitt*, this court also addressed the principles regarding procedural fairness, at [47]–[48]:

> "[47] It is instructive to reflect on the principles formulated by Bingham LJ in *R v Chief Constable of Thames Valley Police, ex parte Cotton* [1990] IRLR 344 at [60]:
>
> > "While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this:
>
> 1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
>
> 2. As memorably pointed out by *Megarry J in John v Rees* at p.402, experience shows that that which is confidently expected is by no means always that which happens.
>
> 3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
>
> 4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.
>
> 5. This is a field in which appearances are generally thought to matter.
>
> 6. Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a

right to be heard, and rights are not to be lightly denied. Accordingly if, in the present case, I had concluded that Mr Cotton had been treated unfairly in being denied an adequate opportunity to put his case to the acting chief constable, I would not for my part have been willing to dismiss this appeal on the basis that it would have made no difference if he had had such an opportunity (although the court's discretion as to what, if any, relief it should grant would of course have remained)."

Bingham LJ added at [65]:

> "I think it important that decision-makers and judges should fix their gaze on the fairness of the procedure adopted rather than on the observance of rigid rules."

The main relevance of this code of principles in this appeal is that the appellant was given no notice of the Tribunal's procedural intentions following the six days of hearing and, hence, had no opportunity to make representations on the issue of engagement of an independent expert by the Tribunal or, indeed, retaining her own expert witness.

[48] In every case where, on appeal, it is contended that the decision making process of the court, tribunal or authority concerned is vitiated by procedural impropriety or unfairness the question for the appellate court is whether the avoidance of the vitiating factor/s concerned could have resulted in a different outcome. In this case the Tribunal failed to address the mandatory statutory question of whether to instruct an independent expert witness in a context involving a substantial dispute concerning the roles, demands and responsibilities of the appellant's four chosen comparator employees, none of whom gave direct evidence. The respondent's evidence bearing on these issues had elements of the second hand and hearsay, together with the subjective. Furthermore, the appellant was unrepresented, and no expert witness testified on her behalf. In these circumstances we consider that the error of law which the court has diagnosed cannot be dismissed as trivial or technical. It was, rather, a matter of substance. Its avoidance could have given rise to an outcome favourable to the appellant in respect of her equal pay claim. Beyond this assessment it is inappropriate for this appellate court to venture. The appellant's hearing

was, further, unfair in consequence, in the sense explained in [47]. The first ground of appeal succeeds accordingly."

The Parameters of this Appeal

[45] In determining the parameters of this appeal ie identifying the grounds of appeal, this court's main focus has been on the following sources: the NOA; the ensuing "Statement of Legal Issues" document; the appellant's skeleton argument; her speaking note prepared for the hearing; and, finally, her oral submissions to the court. There are five generic grounds of appeal. Some of these are augmented by particulars, while others are couched in considerably leaner terms. Stated succinctly, the appellant contends that the decision of the Tribunal is unsustainable on the grounds of (a) "Unfairness", (b) "Errors of Law" and (c) "Errors of Fact."

[46] The third, and final, umbrella ground of appeal is "Errors of Fact." It is suggested that the Tribunal made four such errors which were material and "plainly wrong":

(a) The statement in [49] of the Tribunal's judgment that the appellant "… indicated that it was an 'easy case' and that she was happy to proceed" is incorrect.

(b) The Tribunal's attribution of the appellant's difficulties during the hearing to the effects of her dyslexia was incorrect, as these were rather due to "her depression and the effects of severe insomnia."

(c) The statement in [69] of the judgment that the Ombudsman's witnesses had been accused of lying in sworn evidence is incorrect.

(d) The description of Andrew Gallagher in [177] of the judgment as a "Chartered Educational Psychologist" is incorrect, as he is an Occupational Psychologist.

[47] In most appeals to this court the exercise of unravelling and excavating the real issues of law to be determined requires proactive and substantial judicial investment. This is the reality of contemporary litigation. In this respect, there is no real difference between appeals in which a party has no legal representation and those in which all parties are legally represented. The travails on behalf of the Northern Ireland Court of Appeal, in recent times and continuing, to address this mischief are known to all.

[48] The appeal in the present case has travelled a lengthy distance, the journey beginning with the lodgement of the NOA. The appellant is an unrepresented litigant. In common with almost every appeal, the grounds were not formulated with the necessary clarity, focus and concision. Specially tailored case management directions were required in consequence. Ultimately, the outcome was a highly positive one. This court, following its various interventions, was clearly apprised of the issues requiring its adjudication. The respondent's legal representatives made a material

contribution to this process. All in all, a paradigm illustration of the fundamental duty imposed upon litigants and their legal representatives in every forum and at every tier of our legal system, namely a discharge of the various duties arising from the partnership between courts and litigants.

[49] By the foregoing route, the court has determined that this appeal raises the following discrete set of issues:

(i) Did the Tribunal's refusal to grant the appellant an adjournment, either at the outset of the hearings or subsequently, deprive the appellant of a fair hearing?

(ii) Was the appellant deprived of a fair hearing by the failure of the Tribunal to make reasonable adjustments for her dyslexia?

(iii) Did the Tribunal's conduct of the proceedings generally deprive the appellant of her right to a fair hearing?

(iv) Did the Tribunal err in law in its application of section 4A of the 1995 Act (the "provision, criterion or practice" provision – see [24] above) to the case the appellant was making?

(v) Is the impugned decision of the Tribunal unsustainable in law by virtue of the *Edwards v Bairstow* principles?

The court has determined that these are the five real grounds of appeal as regards the first Tribunal claim. We would add that these grounds, thus diagnosed by the court, focus predominantly on the Tribunal's dismissal of the first of the two claims. This assessment is fortified by the appellant's written and oral submissions to this court.

[50] As the above resume indicates, the theme common to the first three grounds of appeal is that of procedural fairness. We consider that, properly analysed, these three grounds merge to form a single overarching ground, namely whether the impugned decision of the Tribunal is vitiated because the appellant did not receive a fair hearing. While these three elements are inextricably linked in this way, we shall, nonetheless, consider each of them separately prior to posing and determining the umbrella question.

Transcripts of the Tribunal Hearings

[51] A short preface is appropriate at this juncture. From a very early stage of these appeal proceedings the appellant contended strongly that a transcript of the tribunal hearings was essential. This court, in response, applied its normal practice. In short, the issue of generating transcripts of tribunal hearings is a matter between the litigant and the tribunal, to be resolved in that forum. This court has no power to order the tribunal to either provide a transcript of its hearings or something such as a CD rom which would enable the litigant to do so. Notwithstanding in any case where this

court considers it appropriate to do so, it will recommend that the tribunal take the necessary transcription steps. In the experience of this court tribunals are co-operative when such recommendations are made and are to be commended accordingly. Co-operation between every first instance court or tribunal and the Northern Ireland Court of Appeal is a matter of self-evident importance.

[52] In this case this court considered that it did not have sufficient material to make such a recommendation. However, the appellant, tenaciously and relentlessly, pressed the Tribunal to do so. Ultimately, the Tribunal agreed to this course: all of this is rehearsed in our first judgment, noted at para [17] above. As a result, transcripts of the Tribunal hearings were prepared on behalf of the tribunal by an appropriate agency. Following consideration by the Tribunal they were provided to the appellant who, in turn, transmitted them to this court and the respondent's solicitors. The appellant applied to have the transcripts admitted as fresh evidence, the respondent (properly) did not object and this court ruled accordingly.

[53] A further prefatory observation is appropriate. As has been frequently stated in this court, transcripts of first instance hearings have certain intrinsic limitations. In particular and inexhaustively, the bare print does not convey the full flavour of the hearing; the tone and elevation of the speaker's voice; the fluency with which the person is speaking; the prevailing tone and atmosphere of the hearing at any given moment; the speed with which questions are put and answered; and, perhaps most fundamentally, the appearance and demeanour of all concerned, ie the presiding judge, the panel members, the person giving evidence, the litigant (whether represented or not) and any legal representatives in attendance.

[54] Furthermore, tribunal proceedings are designed to be transacted with a degree of flexibility and informality and without the strictures of the rules of evidence. This is reflected in Rules 2, 4 and 35 of Schedule 1 to the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (NI) 2020 (the "2020 Regulations"). The subject matter of these three Rules is the overriding objective, the tribunal's general power to regulate its procedure, the overarching requirement of a fair hearing and the exclusion of strict rules of evidence. Of course, the proceedings in every court and tribunal must be conducted with an appropriate element of formality and solemnity. This is a practical requirement just as much as a reflection of the rule of law. Thus, in every case it is incumbent upon the presiding judge to strike a fair and appropriate balance.

[55] Thus, the Court of Appeal will always approach the transcripts of any segment of the first instance hearings giving rise to the challenge in this court with an appropriate degree of restraint and circumspection, the quantification whereof will vary according to the individual context. Having said that, this court, particularly in cases involving claims of procedural unfairness or other procedural irregularity, will not shrink from reviewing transcripts scrupulously and applying the experience of its members in doing so. One of the reasons for this – as explained more fully infra – is that where issues of procedural unfairness are concerned this court is unconstrained

by, for example, the *Wednesbury* principle or anything kindred. Rather this court forms its own, independent view, applying the fundamental test of whether it considers that the first instance proceedings were procedurally fair.

The appellant's Dyslexia

[56] During a period of some three years, beginning in October 2017, three expert reports on this subject were generated. The authors of these reports are qualified psychologists whose expertise and qualifications have at no time been in dispute.

[57] As noted above, the first of the reports is dated 20 October 2017 and its author is Andrew Gallagher. This was compiled in an exclusively workplace context. In its judgment the Tribunal states, correctly – see [32](iii) above – that this report had been arranged by the appellant's employer. However, as our rehearsal of certain indelible facts in [32] above demonstrates, the impetus for this had been the initiative and request of the appellant. We have made brief reference to this report at para [10] above. (With an unavoidable element of repetition) Mr Gallagher, following a meeting with the appellant at her workstation and an on-site assessment, compiled a report wherein he made reference to certain source materials which included (a) a "diagnostic assessment" report of Dr Sharon Lloyd, Educational Psychologist, dated 18 July 2009 and (b) a further report of Professor David McLaughlin, Educational and Occupational Psychologist, dated 26 October 2015. Pausing, there are, thus, in effect, five expert reports addressing the appellant's dyslexia.

[58] Mr Gallagher identified two particular features of the appellant's dyslexia, namely (a) impaired working memory and (b) impaired processing speed. He elaborates:

> "Working memory involves the characteristics of attention, concentration, mental control and reasoning. Working memory tasks require the ability to temporarily retain information in memory, perform some operation or manipulation with it and produce a result. Processing speed involves the speed of mental and eye/hand co-ordination."

The report continues:

> "The specific difficulties that [the appellant] reports experiencing in the workplace include:
>
> - Proof reading.
>
> - Reading large volumes of information in the time allocation.

- Administrative tasks such as photocopying.

- Taking notes.

- Taking longer to complete tasks based on the above difficulties."

The report notes that the appellant has "… several strengths in the workplace including an exceptionally high verbal ability, analysis, problem solving and technical knowledge."

[59] Mr Gallagher made 11 specific recommendations. It is appropriate to reproduce the first of these in full:

> "A dyslexia awareness session should be arranged with (the appellant's] employer. The British Dyslexia Association state that dyslexia awareness training is essential. For optimum performance an individual will need to have the support of colleagues and line managers. Employees with dyslexia can be prone to stress and this will exacerbate dyslexic difficulties. Where well supported, these difficulties will be less prominent."

The sixth recommendation was the provision of "Dyslexia coaching on a one to one basis, with a particular focus on working memory and processing speed related tasks … provided by a qualified tutor who has the experience and skills in coaching adults." This is followed by details of an appropriate service provider. In the 8th recommendation, Mr Gallagher identified a free online resource which would be beneficial to both the appellant and her employer. The 11th, and final, recommendation was this:

> "Should [the appellant] be involved in applying for job vacancies then adjustments will need to be considered given her diagnosis of dyslexia. Consideration should be given to:
>
> (a) Awareness training for interviewers regarding dyslexia and the effect an interview can have on working memory.
>
> (b) Providing additional time to answer questions.
>
> (c) Assisting with prompting or clarifying of questions when appropriate.

(d) Providing a written copy of the questions prior to the interview.

(e) Considering the effects of dyslexia when scoring the interview, for example when a response may not be ordered in sequence."

[60] The next of the expert psychological assessment reports is that of John Eakin. Chartered Educational Psychologist. This is dated 16 May 2019 and was prepared for the purpose of the Tribunal proceedings. Mr Eakin had available to him all of the three preceding reports noted above. Notably, Mr Eakin states:

> "The assessment by Dr Lloyd had clearly and measurably established **an exceptional degree of underlying processing inefficiency in [the appellant] …**"
> [Emphasis added.]

Mr Eakin, in this context, opined:

> "Having interviewed and assessed [the appellant] over a period of three and a half hours, I am of the opinion that all three of the areas of difficulty cited …. **very significantly apply in her case:** poor auditory memory/slow information processing; verbalisation difficulties; poor short term and working memory."
> [Emphasis added.]

[61] Referring to the British Dyslexic Association Code of Practice for Employers (the "BDA Code"), Mr Eakin observed that this contains (inter alia) eleven recommended accommodations in interviews. He continues:

> "Almost all, in my opinion, should apply for [the appellant] (the exception being the last one)."

He then quoted from the second of these 11 measures:

> "Some candidates may need to be given the questions in advance of the interview to allow for processing and understanding. They may need time to prepare notes. Providing the question only a short time before the interview is inappropriate. The candidate should be asked how long in advance they require the list."

This is followed by the analysis:

> "This accommodation is consistent with [the appellant's] request and with Mr Gallagher's recommendation (and his clarification in his email to [the appellant] dated 10 May 2018). I agree with the specification that **providing questions only a short time before an interview is inappropriate in some cases, [the appellant's] being such a case given the extent of her processing difficulties**." [Emphasis added.]

[62] Referring again to the BDA Code, Mr Eakin emphasised that with regard to job interviews:

> "The adjustments to be made should be considered, discussed and planned on an individual basis, in consultation with the candidate … [continuing] ….
>
> In my opinion, not only was [the appellant] at a substantial disadvantage given the extent of her dyslexia on her information processing efficiency, but the adjustments that were determined by the panel were insufficient fully to compensate for that disadvantage. More time than 15 minutes to study the questions and plan her answers would have been more appropriate and reasonable, particularly when the candidate had requested it. This would have been a much more helpful adjustment than the offer of 15 minutes additional time during the interview which I understand – not surprisingly given the nature of her difficulties and the circumstances – [the appellant] did not avail of. I do not think that any unfair advantage over other candidates without dyslexia would have resulted from 30 to 45 minutes of preparation time, as [the appellant] had requested."

Mr Eakin then restated the vital importance of individual assessment of dyslexic employees. Finally, he addressed – and rejected in robust terms – the case being made in the employer's witness statements. He rejected in particular the contention that the appellant's performance at interview was a reliable indication of her ability to fulfil the SIO role:

> "I disagree with the argument on several grounds: for example, the content and the demands of the interview were very different to those of the day to day working environment, the exacerbatory effects of negative emotions on performance would not be present in the working role; the reasonable adjustments required and previously practiced within the work role would be available; and the

> adjustments required to make the interview process fair and equitable were, as previously argued, insufficient."

[63] The last of the expert reports included in the evidence before the Tribunal is that of Mr John Dunlop, dated 30 October 2020. This report was compiled at a stage when the termination of the appellant's employment with the Ombudsman had occurred some 15 months previously, the Tribunal hearing was scheduled to commence approximately two weeks later, and the appellant was legally represented by solicitor and counsel. It states inter alia:

> "[The appellant] attended for counselling from March 2019 to June 2019 and was initially diagnosed with a major depressive disorder … as well as Generalised Anxiety Disorder (GAD). The depression has caused significant distress and impairment in her day to day life. Coupled with the anxiety caused by work related stress and worry about the future [this] had left [the appellant] with a strong sense of hopelessness about her future and lack of motivation to engage in daily activities. She also struggled to care for her family, who depend on her."

In recommending that the appellant be given the protection of anonymity in the forthcoming Tribunal hearings, Mr Dunlop continued:

> "Due to work related stress [the appellant] has been diagnosed with depression and GAD. The depression and anxiety have had a huge impact on [the appellant's] day to day living. The initial focus of therapy was unstabilising the levels of depression and focusing on helping [the appellant] manage her worry about the ongoing court proceedings and help her with her levels of concentration and sleep routine…
>
> [The appellant] has found the protracted experience of this litigation extremely unsettling and distressing and this has adversely affected her mental health because she finds it difficult to concentrate for long periods. Her sleep is also affected. The prospect of public reporting of her identity and details of her disabilities has activated additional worries and anxieties which are causing her distress and may impact on her ability to give evidence adequately in the upcoming hearing."

This was the most recent expert evidence of the appellant's mental and psychological state when this issue fell to be considered by the Tribunal a couple of weeks later.

Codes of Practice: The Employer's Duties

[64] Having just noted certain aspects of the BDA Code highlighted in Mr Eakin's report, it is appropriate at this juncture to consider briefly certain other texts prescribing the steps to be taken by employers of dyslexic employees. These too were contained in the evidence before the Tribunal. We describe these for convenience as "codes of practice."

[65] As noted, the BDA Code to which Mr Eakin referred contains, in paragraph 3.7.3, eleven specific guidelines for employers under the rubric "Accommodations in Interviews." The first two of these are of particular significance in this appeal:

> "Candidates with known dyslexic difficulties should be contacted to ask about accommodations in interview …
>
> Some candidates may need to be given the questions in advance of the interview to allow for processing and understanding. **They may need time to prepare notes. Providing the question only a short time before the interview is inappropriate. The candidate should be asked how long in advance they require the list**."
> [Our emphasis.]

In this section of the code and throughout, one of the clearly identifiable themes is that of the proactive employer, to be contrasted with the proactive employee. This flows from the incontrovertible proposition and elementary legal principle that employer's duties to employees are to be performed by the employer. This has been a cornerstone of this sphere of the law from the beginnings of the more enlightened period, almost two centuries ago, signalled by a combination of the factories legislation and the developing common law.

[66] The second "code" in the evidence before the Tribunal is a 22 page document entitled:

> "Employer's for Disability NI – Interview Panel: Disability Awareness."

This contains the specialised disability interview training which was provided to (presumably amongst others) the members of the panel which interviewed the appellant on 8 May 2018. The significance of this document is that this training was not provided until some months afterwards, in August 2018. It would appear from the content and layout that this training was provided by an expert agency and took the form of a verbal presentation accompanied by slides. It is stated in the text that the objectives of the training were to:

> "Enhance understanding of duty to make reasonable adjustments ….
>
> **Provide interview-specific information and good practice** …
>
> Increase general disability awareness to enhance understanding about potential work-related adjustments." [Emphasis added.]

One of the notable illustrations given was that of a person with memory difficulties who requests (inter alia) the provision of the interview questions in advance and sufficient time to prepare answers. Furthermore, the dyslexic employee featured among the examples of employees suffering from a disability.

Dyslexic Litigants: The Judicial Duty

[67] The Equal Treatment Bench Book ("ETBB") is a publication of the Judicial College of England and Wales. It has been adopted for use in this jurisdiction for many years. The current edition was published in February 2021. It is a dynamic text, as noted in the Foreword:

> "It is a living document, constantly updated and amended to reflect changing circumstances and to incorporate the most up to date knowledge."

As its title indicates, it is fundamentally concerned with the provision of fair treatment to everyone who comes before a court or tribunal. From the outset, the ETBB states, in uncompromising terms, that the delivery of this fair treatment –

> "… is a fundamental principle embedded in the judicial oath and is, therefore, a vital judicial responsibility."

The text elaborates:

> "Treating people fairly requires awareness and understanding of their different circumstances, so that there can be effective communication and so that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage."

[68] The title of Chapter 4 is "Mental Disability." Its central theme is that of recognising and then accommodating every form of mental disability. It begins:

> "Mental disability is a broad concept which includes:

- Mental ill health eg depression, anxiety, personality disorder.

- Learning disabilities as well as developmental disorders/neurodiverse conditions such as autism and 'specific learning difficulties' such as dyslexia.

- Brain injury/damage."

Notably, the text immediately cautions:

> "These different areas are fundamentally different and should not be confused."

The general judicial duty is couched in these terms:

> "Judges should identify its implications in the court or tribunal setting and understand what should be done to compensate for areas of disadvantage without prejudicing other parties."

Notably, referring to an earlier addition of the ETBB, it was stated in *R (King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan) that the advice that it contains on the topic of disability –

> "… is important advice which every judge and every justice of the peace is under a duty to take into account."

[69] Under the rubric of "Adjustments for the Hearing", Chapter 5 states:

> "… depending on the individual's needs, adjustments for the trial/hearing might include:
>
> - Adjusting the timing, length or number of breaks and the length of the day.
>
> - Adjusting the order in which evidence is heard/the timing of the disabled person's evidence.
>
> - Avoiding the temptation to extend hours or to cut needed breaks in order to finish within the allotted time.
>
> - Accommodating a carer.

- Facilitating representation in a form which might not otherwise have been permitted."

The text continues:

> "There are numerous adjustments to facilitate communication which can and should be made by the judge and advocates eg length of cross-examination; language used; style of questions. In some situations, it is necessary for written questions to be supplied in advance or to go through an intermediary."

Repeated emphasis on the overarching judicial duty features in the next succeeding paragraph:

> "Advocates do not always have the necessary experience or understanding to know how to question appropriately a witness with a mental impairment. A judge should be ready, as necessary, **to ask advocates to rephrase their cross-examination, to interject when there is a clear potential for misunderstanding and to rephrase questions for the witness.**"
> [Emphasis added.]

While Chapter 5 makes clear that judges are not expected to diagnose mental disability, they nonetheless have a duty of alertness, which is especially acute in observing the conduct, appearance and demeanour of the person concerned.

[70] The title of Chapter 5 is "Capacity (Mental)." The central theme of this chapter is that of recognising and accommodating every type of lack of capacity. This chapter may be viewed as complementary to Chapter 4.

[71] At this juncture it is appropriate to consider an earlier decision of this court of some significance. In *Galo v Bombardier Aerospace UK* [2016] NICA 25 the appellant, a foreign national, appealed against the decision of an Industrial Tribunal which had dismissed his claims for unlawful racial discrimination, unlawful disability discrimination, victimisation, harassment on grounds of disability and race, detriment and unfair dismissal. The disability from which the appellant suffered was Asperger's Syndrome. He was self-representing in the tribunal proceedings. The essence of his appeal was that the tribunal had failed to afford him a fair hearing. The particulars of this umbrella complaint, set forth in para [6] of the judgment, included an asserted failure to make reasonable adjustments for his disability and failing to adjourn the hearing. Of particular note, when the appellant was suspended on full pay and prior to the commencement of the tribunal proceedings, the respondent obtained a report from a clinical psychologist based on an interview and assessment of him which concluded that he had been a long term sufferer of the aforementioned disability. The

respondent failed to bring this report to the attention of the tribunal in the course of a series of case management listings.

[72] Nonetheless, the appellant produced a short report, evidently from the General Practitioner, documenting some of the conventional symptoms of this condition and intimating that he was under current psychiatric review for depression and post-traumatic stress. Subsequently the tribunal refused the appellant's applications to adjourn the substantive hearing. He renewed this application – unsuccessfully – on the date of hearing based on the aforementioned short medical report and a further report from a consultant psychiatrist confirming his referral to the mental health team the previous month and consequential referral for assessment to the cognitive behavioural therapy team. The appellant was given a couple of days grace by the tribunal. This gave rise to a third medical report opining that he was not medically fit for the tribunal proceedings and would remain thus for the foreseeable future. The appellant sent this report by email to the tribunal. Unknown to him the tribunal had struck out his claims some 45 minutes previously on account of his failure to attend.

[73] At para [53] Gillen LJ, delivering the unanimous judgment of the court, rehearsed the following principles and guidelines:

> "(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 with mental disabilities, specific learning difficulties and mental capacity issues.

(7) An early ""ground rules hearing"" is indicated in the ETBB at Chapter 5. Such a hearing would involve a preliminary consideration of the procedure that the tribunal or court will adopt, tailored to the particular circumstances of the litigant. Thus, for example, the Tribunal may consider:

- The approach to questioning of the claimant and to the method of cross-examination by him/her. Adaptions to questioning may be necessary to facilitate the evidence of a vulnerable person.

- How questioning is to be controlled by the Tribunal.

- The manner, tenor, tone, language and duration of questioning appropriate to the witness's problems.

- Whether it is necessary for the Tribunal to obtain an expert report to identify what steps are required in order to ensure a fair procedure tailored to the needs of the particular applicant.

- The applicant under a disability, if a personal litigant, must have the procedures of the court fully explained to him and be advised as to the availability of pro bono assistance/McKenzie Friends/voluntary sector help.

- Recognition must be given to the possibility that those with learning disabilities need extra time, even if represented, to ensure that matters are carefully understood by them.

- Great care should be taken with the language and vocabulary that is utilised to ensure that the directions given at the ground rules hearing are being fully understood.

- As happened in the Rackham case, consideration should be given to the need for respondent's counsel to offer cross-examination and questions in writing to assist the claimant with the claimant being allowed some time to consult, if represented, with his counsel. These were deemed "reasonable adjustments."

- The Tribunal must keep the adjustments needed under review."

[74] The court concluded that the appellant had been deprived of his right to a fair hearing and allowed the appeal accordingly. In thus concluding it highlighted inter alia the tribunal's failure to arrange an early "ground rules" case management listing; associated with this, the tribunal's failure to consider the kind of adjustments documented in the ETBB; the tribunal's failure to act upon "clear indicia of observed

agitation and frustration [and its awareness] that there was a disability of some kind from an early stage"; more specifically, the tribunal's failure to act on the first of the medical reports noted above; its complete failure to even record the diagnosis of the mental condition concerned; the tribunal's failure to have recourse to the ETBB; the tribunal's failure to inform the appellant of the available legal representation possibilities namely the Bar pro bono unit, the Law Society's equivalent, the ECNI, the possibility of exceptional legal aid and the possibility of a McKenzie Friend; the tribunal's failure to act on the last of the medical reports; and, finally, the tribunal's wholly unwarranted assessment of deliberate obstruction and disruption on the part of the appellant: see paras [56]–[63].

[75] In this context the following statement of Gillen J in *Re G and A (Care Order: Freeing Order: Parents with a Learning Disability* [2006] NIFam 8 at para 5(2) resonates strongly:

> "(2) People with a learning disability are individuals first and foremost and each has a right to be treated as an equal citizen. Government policy emphasises the importance of people with a learning disability being supported to be fully engaged playing a role in civic society and their ability to exercise their rights and responsibilities needs to be strengthened. They are valued citizens and must be enabled to use mainstream services and be fully included in the life of the community as far as possible. The courts must reflect this and recognise their need for individual support and the necessity to remove barriers to inclusion that create disadvantage and discrimination. To that extent courts must take all steps possible to ensure that people with a learning disability are able to actively participate in decisions affecting their lives. They must be supported in ways that take account of their individual needs and to help them to be as independent as possible."

To like effect is the decision in *King* noted at [68] above.

First Ground of Appeal: Unfair Hearing

[76] The kernel of this ground is that the appellant was deprived of her common law right to a fair hearing. "Hearing", in this context, denotes the entirety of the process whereby her two appeals were determined by the Tribunal, from their inception.

[77] The factual matrix bearing on this ground of appeal is short, uncomplicated and uncontentious. The combined hearing which had been arranged for the appellant's two claims was scheduled to begin on a Monday; until the previous Thursday the appellant had been represented by solicitor and counsel in both cases;

on the Thursday she was informed that they were withdrawing their services; the appellant's abrupt response was to inform the Tribunal of her belief that she could represent herself; on the Friday, within a couple of hours, she communicated the very different response that she found herself in a state of shock; on the same date, she secured from her former solicitors the hearing bundles (for the first time); she was suffering from depression and generalised anxiety disorder (per Mr Dunlop's report: see [63] *supra*); she struggled on over the weekend in these wholly unexpected circumstances; she attended the tribunal building on the Monday morning, as scheduled; and she applied for an adjournment.

[78] The other elements of this discrete factual matrix are derived from the transcript:

(i) The appellant had, the previous evening, sent an email to the tribunal requesting an adjournment, in which she stated inter alia "… I am no longer legally represented …. If the hearing goes ahead … there is a serious risk of prejudice to the fairness of the outcome. I am currently experiencing depression and severe insomnia and I don't feel able to concentrate well enough to manage as a lay litigant … I collected the trial bundles and pleadings on Friday afternoon and it is now apparent from the papers that no preparations had been made for the hearing itself … [elaborating] … my lawyers have not provided me with any legal authorities and no notes or preparation has [sic] been done regarding cross examination of witnesses … The time allocated for my cross examination … is presently set within a timetable I will not be able to manage. Such a proposed period of lengthy cross examination is likely to leave me exhausted, with a diminished ability to concentrate and give evidence adequately. I will attend the ground rules hearing scheduled for 10.30 on 16 November 2020 [the Monday] and make a formal application then."

(ii) At the outset of the hearing, the presiding judge stated that the timing of the application was "simply surprising" and that it was "… not backed up by any medical evidence." He also referred to the factors of "considerable public expense" and the "severe pressure in listing cases." Finally, he suggested that there was nothing to indicate that the appellant was "… ever going to be any more ready than you are at the moment …"

(iii) In response, the appellant repeated much of what was already contained in her Sunday email (supra). She described the case as "complex … not my field of expertise …" She stated that she was suffering from "a lot of stress" and was "getting emotional, the meds that I am on is affecting my concentration, I'm not sleeping … and I don't think that I will be in a position to adequately give evidence if the matter proceeds. I was expecting my solicitor … I was expecting barrister to have done prep for cross-examination, I was expecting to have an authorities bundle … I was expecting to have agreed all the facts that were not in dispute because that will reduce the cross examination time that I will be subjected to, it will narrow the issues and focus the queries just on disputed facts

… I just need to take a step back for fairness and the impact of the fact that I am not legally represented and also the fact that I'm not very well at the moment."

(iv) The response of counsel for the respondent savours of one of formal opposition while, commendably, highlighting "the tribunal's obligations" and (in terms) the importance and complexity of the issues in the case.

(v) In rejoinder, the appellant stated "… I didn't have time to get medical evidence but there is medical evidence about my health at the moment on page 1031 of the bundle, its from my psychologist … and he's just explained the impact that it had on me and I'm still being treated for depression and …." [a clear reference to Mr Dunlop's report compiled some two weeks previously].

(vi) The presiding judge replied "... this report … does it say anything about when, is there anything which says you will be well enough in a month's time or two months' time or whenever"?

(vii) In response, the appellant reiterated the asserted shortcomings in the preparations of her previously engaged legal representatives, her unawareness of the timetable for oral evidence (in particular the proposed six hours allocated for cross examining her). The appellant, responding to another question from the Bench, reiterated that she hadn't had "… a restful weekend and [had not] slept well", while repeating some of her earlier submissions.

(viii) The presiding judge's reply included the statement "Bottom line I don't see anything here which says you're going to be any better in terms of stress or depression in a year's time, two years' time, three years' time. This is a case which is already two years old and counting."

(ix) The appellant's response in part was "… I have been born with dyslexia which affects my information processing and that is exacerbated by the meds I am on at the moment and the anxiety that I am experiencing and it would be difficult for me to conduct the hearing fairly …"

(x) The judge then expressed himself in general terms, highlighting again various administrative considerations, including the "wasting of time" which an adjournment would entail.

(xi) The appellant, replying, emphasised her state of ignorance when she transmitted the first of the previous Friday's emails to the tribunal.

(xii) At this point, turning to respondent's counsel, the judge exhorted that the exercise of agreeing uncontentious facts be completed, adding "… **we'll sort out and get this case started"** and reiterating the various administrative considerations previously highlighted. He added **"… I want you to consider**

how you can concentrate and reduce the length of the cross examination in this matter and discuss with [the appellant] the necessary breaks etc …" (verbatim), as the panel left the court room.
[Emphasis added]

[79] Following a short recess the panel reconvened and the presiding judge pronounced their ruling, stating:

> "For the panel has considered here application for a postponement … the decision is that the case should proceed and there's no medical evidence before us that would suggest that the situation would alter in a year's time, two years' time, three years' time. And there is no indication before us that a further firm of solicitors would alter or alter the position significantly. And as you indicated to the tribunal last week, this is a relatively straightforward type of case. You are legally qualified, although I fully recognise it's not your area of expertise. But these are matters where the tribunal is well versed in the issues, which it has to consider on the questions that have to be asked. And we will bear all that in mind as the case progresses. And the other matter which has to be looked at this stage is the adjustments that are required in the hearing."

This was followed immediately by an exchange between the presiding judge and the appellant's McKenzie Friend (her sister). Here the judge reiterated, yet again, the consideration of administrative disruption if the hearing were to be adjourned.

[80] It is well established that in any case where a court or tribunal refuses a litigant's request for an adjournment of a hearing the test to be applied is whether the litigant was deprived of their right to a fair hearing in consequence. This test is stated in, one of multiple illustrations, the case of *Nwaigwe* [2014] UKUT 418 (IAC):

> "In the Rules matrix outlined above, rule 21(2) is a provision of critical importance. Its effect is that where a party applies for an adjournment of a hearing, the Tribunal is obliged, in every case, to consider whether the appeal can be "justly determined" in the moving party's absence. If the decision is to refuse the application, this must be based on the Tribunal satisfying itself that the appeal can be justly determined in the absence of the party concerned. This means that, <u>in principle</u>, there may be cases where an adjournment should be ordered notwithstanding that the moving party has failed to demonstrate good reason for this course. As a general rule, good reason will have to be

demonstrated in order to secure an adjournment. There are strong practical and case management reasons for this, particularly in the contemporary litigation culture with its emphasis on efficiency and expedition. However, these considerations, unquestionably important though they are, must be tempered and applied with the recognition that a fundamental common law right, namely the right of every litigant to a fair hearing, is engaged. In any case where a question of possible adjournment arises, this is the dominant consideration. It is also important to recognise that the relevant provisions of the 2005 Rules, rehearsed above, do not modify or dilute, and are the handmaidens, their master, and the common law right in play.

6. Viewed through this prism, rule 21(2) is to be considered as reflecting the common law right engaged. In every case, the Tribunal must have careful regard to rule 21(2). This provision of the Rules expresses the common law right of every party to a fair hearing. In considering rule 21(1)(b) in tandem with rule 21(2), together with the right to a fair hearing of the party or parties concerned, a balancing exercise must be conducted. In performing this task, tribunals should be alert to the doctrine of abuse of process. In cases where the Tribunal considers that an adjournment application is based on spurious or frivolous grounds or is vexatious, the requirement of demonstrating good reason will not be satisfied. However, this will not be determinative of the question of whether refusing an adjournment request would compromise the right to a fair hearing of the party concerned. In some cases, adjournment applications based on particularly trivial or unmeritorious grounds may give rise to an assessment that the process of the Tribunal is being misused and will result in a refusal. Tribunals should be very slow to conclude that the party concerned has waived its right to a fair hearing or any discrete aspect thereof. Where any suggestion of this kind arises, it will be preferable to evaluate the conduct of the party concerned through the lens of abuse of process and it will always be necessary to give effect to both parties' right to a fair hearing.

7. If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a

fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? Any temptation to review the conduct and decision of the FtT through the lens of reasonableness must be firmly resisted, in order to avoid a misdirection in law. In a nutshell, fairness is the supreme criterion.

8. The cardinal rule rehearsed above is expressed in uncompromising language in the decision of the Court of Appeal in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284, at [13]:

> "First, when considering whether the immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. **The test and sole test was whether it was unfair.**"
> [My emphasis]

Alertness to this test by Tribunals at both tiers will serve to prevent judicial error. Regrettably, in the real and imperfect world of contemporary litigation, the question of adjourning a case not infrequently arises on the date of hearing, at the doors of the court. I am conscious, of course, that in the typical case the Judge will have invested much time and effort in preparation, is understandably anxious to complete the day's list of cases for hearing and may well feel frustrated by the (usually) unexpected advent of an adjournment request. Both the FtT and the Upper Tribunal have demanding workloads. Parties and stakeholders have expectations, typically elevated and sometimes unrealistic, relating to the throughput and output of cases in the system. In the present era, the spotlight on the judiciary is more acute than ever before. Moreover, Tribunals must consistently give effect to the overriding objective. Notwithstanding, sensations of frustration and inconvenience, no matter how legitimate, must always

> yield to the parties' right to a fair hearing. In determining applications for adjournments, Judges will also be guided by focussing on the overarching criterion enshrined in the overriding objective, which is that of fairness."

In short, the lawfulness of an adjournment refusal decision by a court or tribunal is not to be evaluated by applying the criterion of reasonableness. Rather the sole test is that of procedural fairness. See also *Galo* in this respect.

[81] At this juncture it is appropriate to consider certain reported decisions invoked by Ms Best, of counsel, in her presentation to this court. The first of these is *Leeks v Norfolk and Norwich University Hospitals* [2018] ICR 1257, a decision of the English Employment Appeal Tribunal ("EAT"). In this case the first instance tribunal refused an adjournment application by a claimant who had no legal representation and was suffering from a disability. The adjournment request was based on the claimant's ill health and supported by letters from several doctors. The claimant also relied on medical evidence about her husband's ill health. The tribunal rejected both the claimant's application for an extension of time to comply with certain interlocutory orders and an adjournment of a forthcoming preliminary hearing arranged to consider the respondent's strike out application. On the eve of the hearing the claimant provided written submissions. The hearing proceeded in her absence, the respondent's representative attending, and the tribunal struck out her claim.

[82] The salient passages in the decision of the EAT are at paras 42, 50, 63, 74 and 88. In these passages there is a heavy emphasis on the discretionary nature of the power to adjourn, case management, administrative convenience, the adequacy and timing of the medical evidence required in cases where a claimant's ill health in play, the apparent merits of the parties' respective cases. At para [74]ff the EAT considered the decision of this court, differently constituted, in *Galo*. Ultimately, it distinguished *Galo*: see paras [84] and [86]. It did so on the basis of factual differences. The EAT dismissed the appeal on what it described in para [90] as "a conventional approach." We have set out immediately above the ingredients of this approach.

[83] Our analysis of the decision in *Leeks* is the following. First, as a matter of precedent, it is not binding on this court. Second, we consider that it fails to recognise the overarching test to be applied, namely whether the refusal of the claimant's adjournment request and the ensuing conduct of a hearing in her absence deprived her of her common law right to a fair hearing. This features nowhere in the judgment. The decision in *Leeks* exposes the potential for error, both at first instance and on appeal, when the prism applied by the tribunal is comprised of the several ingredients noted in the preceding paragraph. In particular, the strong emphasis on the discretionary nature of the exercise of a tribunal's power to adjourn led the EAT in *Leeks*, and indeed in other cases, to view the impugned adjournment refusal decision through the lens of a judicial review challenge: see especially paras [42] and [63]. This has given rise to according pre-eminence to the criterion of reasonableness at the expense of that of fair hearing. The latter criterion is the dominant theme of this

court's decision in *Galo*. We consider that in *Leeks* the EAT did not really recognise or engage with this.

[84] Next Ms Best referred the court to *Andreou v Lord Chancellor's Department* [2002] EWCA Civ 1192. This is another case in which an employment tribunal struck out the claimant's case in a context of non-attendance having refused her application to adjourn on medical grounds and based on medical evidence. The EAT allowed her appeal and, on further appeal, the Court of Appeal allowed the respondent's appeal, affirming the first instance decision. Notably, in substance, once again both the EAT and the Court of Appeal based their decisions on the reasonableness of the first instance tribunal's adjournment refusal decision. This is particularly clear from the following passage in the main judgment of the court, that of Peter Gibson LJ, at para [45]:

> "I find it impossible to say that no reasonable tribunal could have expressed the view which the tribunal did.
>
> I do not see that the tribunal can be shown to have acted in a perverse way …"

And at para [46]:

> "I cannot see how it could be said that in refusing the application the tribunal was perverse or otherwise plainly wrong in refusing a further adjournment."

Similarly, in the concurring judgment of Arden LJ pre-eminence is given to the criterion of irrationality in the *Wednesbury* sense: see paras [58] and [63]. There is no mention anywhere in this judgment of procedural fairness or the claimant's right to a fair hearing.

[85] In summary, what we have said about *Leeks* in [83] above applies fully to the decision in *Andreou*. We would add that, as a matter of precedent, it is not binding on this court. It is not in our view a precedent decision in any event. Rather, it is an illustration of an appellate decision entailing the application of certain legal principles to a given factual matrix.

[86] The third reported case featuring in the submissions of Ms Best is *O'Cathail v Transport for London* [2013] ICR 614. Factually this decision is, in essence, a replica of *Andreou*. In reversing the decision of the EAT and re-instating that of the first instance tribunal, the ratio of the Court of Appeal's decision is succinctly expressed by Mummery LJ at para [39]:

> "I have reached the conclusion that the appeal should be allowed on the short ground that there was no error of law in the judgement of the employment tribunal refusing to

> exercise its broad discretion to grant adjournments requested."

In this judgment the concept of fairness features, but only as another factor to be considered in tandem with the interests of the other party, the "exceptionally wide" case management powers of the tribunal, the discretion being exercised by the tribunal and the need to demonstrate an error of law. Mummery LJ elaborates at para [44]:

> "The tribunal's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise where there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one …"

The observation must be made that, once again, neither the doctrine of procedural fairness nor the question of deprivation of a litigant's right to a fair hearing features in this passage. We would repeat our analysis in [83] above.

[87] It must also be observed that the English Court of Appeal decisions considered above are prima facie irreconcilable with *SH (Afghanistan)* which appears in the excerpts from *Nwaigwe* in [80] above. There the legal role enunciated, in uncompromising and unambiguous terms, is that the single test to be applied in the context which we are examining is whether the adjournment refusal application was unfair. We would make clear our view – as appears from earlier passages in this judgment – that unfair in this context means procedurally unfair as the decision in *Galo* indicates. Fleshing this out a little further, we consider the correct test to be: was the litigant concerned deprived of its common law right to a fair hearing by reason of the adjournment refusal decision at first instance?

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

[89] The immediately foregoing analysis also serves to highlight the improper intrusion of the principle of *Wednesbury* irrationality in cases where an appellate court is required to determine a ground of appeal complaining that the first instance decision is vitiated by reason of an adjournment refusal determination. That is not to say that irrationality or kindred touchstones such as taking into account immaterial

facts or factors or failing to have regard to material facts or factors have no role to play in appeals to this court. Quite the contrary: the *Edwards v Bairstow* principles are as relevant today as they were when first enunciated almost 70 years ago, as the decision of this court in *Nesbitt v The Pallet Centre*, wherefrom substantial excerpts are reproduced at [43] - [44] above, demonstrates. However, the important consideration is that these principles belong to the exercise of determining whether a first instance decision is vitiated by an error of law of a kind other than procedural unfairness.

[90] It is also timely to re-emphasise paragraphs [47] and [48] of *Nesbitt* in this context. Within these passages there is a recognition that where the denial of a fair hearing, in particular denying a litigant or the subject of an administrative decision an adequate opportunity to put his case, is established, the enquiry for the appellate court or court of review will not invariably terminate at this point. That is because the central issue to be determined is whether the process as a whole deprives the person concerned of their right to a fair hearing. This conclusion will not necessarily follow in every case. However, as emphasised memorably by Bingham LJ, cases of this genre are likely to be "of great rarity" for the reasons articulated by the Lord Justice. Furthermore, as stressed by this court in *Nesbitt* at [48], the test at this judicial level is "… whether the avoidance of the vitiating factor/s concerned **could have** resulted in a different outcome."

[91] The last of the decisions on which Ms Best relied is *Phelan v Richardson and Another* [UK EAT/0169/19/J0J(B)]. This decision purports to give effect to *O'Cathail* (supra). In this case the first instance tribunal refused an adjournment application made approximately four weeks in advance of the scheduled hearing date. The application was based on a medical report which indicated that the claimant was suffering from severe anxiety, was under the care of the "Crisis Team", was receiving counselling and was being medically reviewed on a regular basis. The doctor opined that she was not fit for work or to attend court and that this would continue for the foreseeable future, adding "… I feel it will take her a long time to recover." The EAT construed the tribunal's decision as accepting that the claimant was "… unfit to participate in a hearing at present …": see [88]. In its decision the tribunal based its adjournment refusal primarily on its assessment that the medical report was insufficient, particularly because it lacked a more precise prognosis. The test applied by the EAT was the *Wednesbury* principle, the conclusion being that the tribunal's decision withstood appellate challenge by this standard: see [86]. The judgment mentions, but does not consider, *Galo*. The EAT considered *Galo* to belong to the same doctrinal stream as *O'Cathail*.

[92] In common with the other cases considered immediately above, the doctrine of procedural fairness does not feature in the EAT's decision. While the claimant's right to a fair hearing flickers, it does not flourish and is, rather, engulfed by the tide consisting of the *Wednesbury* principle, the uncertainty of the medical prognosis, the imperative of expedition, administrative inconvenience and the recent advent of the claimant's unrepresented status. There was no engagement with the principle enunciated unambiguously in *SH (Afghanistan)*.

[93] In *R (Osborne) v Parole Board* [2014] AC 1115 the issue was whether a decision by the Parole Board should be set aside on the ground that it had been reached without an oral hearing. At every judicial level the prism applied was whether a fair procedure had been followed. Thus, this was a paradigm case of procedural fairness and the claimant's right to a fair decision making process. The Supreme Court stated emphatically at [65] that the question of whether the Board's procedure had been fair was not a matter of judgement for the Board to be reviewed on *Wednesbury* grounds:

> "That is not correct. The court must determine for itself whether a fair procedure was followed …"

This, it will have been noted, is precisely what this court did in *Galo*. In thus deciding the Supreme Court followed its decision in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2. In that case Lord Hope, with whom all other members of the House agreed, stated at [6] that the question of whether a tribunal had acted in breach of the principles of natural justice is "*essentially a question of law*" to be determined by the reviewing or appellate court.

[94] In *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284 (cited in *Nwaigwe* above), the matrix was that of an immigration appeal in which the central issue was the claimant's age. A so-called "fast track" first instance tribunal hearing was arranged to take place within approximately one month of his arrival in the United Kingdom. An application for an adjournment for the purpose of obtaining a suitable expert report was made one week in advance and repeated at the hearing. Both applications were refused, and the appeal was dismissed. This was affirmed by the Upper Tribunal. Moses LJ, delivering the judgment of the Court of Appeal, stated at [13] – [14]:

> "13. In relation to both the two issues I have identified, whether the Immigration judge erred in law in refusing an adjournment and as to whether he would have reached the same conclusion, in my judgement Judge King fell into serious error. First, when considering whether the immigration judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. The test and sole test was whether it was unfair. In *R v Secretary of State for the Home Department ex-parte the Kingdom of Belgium and Others* [CO/236/2000 15 February 2000] the issue was whether a requesting state and Human Rights organisations were entitled to see a medical report relevant to Pinochet's extradition. Simon Brown LJ took the view that the sole question was whether fairness required disclosure of the report (page 24). He concluded that the procedure was not

a matter for the Secretary of State but for the court. He endorsed a passage in the fifth edition of Smith Woolf and Jowell at pages 406-7:

> "Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue is not one for the discretion of the decision-maker. The test is not whether no reasonable body would have thought it proper to dispense with a fair hearing. The Wednesbury reserve has no place in relation to procedural propriety." (page 24)

The question for Judge King was whether it was unfair to refuse the appellant the opportunity to obtain an independent assessment of his age; the question was not whether it was reasonably open to the Immigration judge to take the view that no such opportunity should be afforded to the appellant. Where an appellant seeks to be allowed to establish by contrary evidence that the case against him is wrong, the question will always be, whatever stage the proceedings have reached, what does fairness demand? It is plain from reading his decision as a whole that that was not the test applied by Judge King. His failure to apply that test was a significant error."

[95] At this juncture, it is appropriate to draw attention to two reported Northern Ireland decisions, each directly in point, namely *R v SOSNI, ex parte Johnston* [1984] NIJB 10 and *In Re North Down Borough Council's Application* [1986] NI 304. Both decisions establish unequivocally the principle that the legal barometer to be applied to the lawfulness of an adjournment refusal decision of a court or tribunal (and by logical extension other public authorities) is that of natural justice, or fair hearing. The principle is expressed unambiguously by Carswell J in *North Down* at 323 a-d in a passage which bears repetition in full:

> "If a person entitled to appear at a hearing is unfairly deprived of an opportunity to present his case, that constitutes a breach of the rules of natural justice. The rule is necessarily qualified by reference to the standard of fairness, because **not every refusal of an adjournment will constitute a breach of the rules of natural justice. It has to be an unfair refusal which ties the concept of fairness in with the concept of observance of the rules of natural justice:** see

> *Ostreicher v Secretary of State for the Environment* [1978] 3 All ER 82, 86b, per Lord Denning MR; and see also the discussion in Wade on Administrative Law, 5th ed, pages 465-8. There are occasions when it would not be unfair to the applicant to refuse an adjournment, for example, because it would be even more unfair to other persons, or because the applicant has brought it entirely on himself, or because the applicant can be accommodated in some other way, or through a combination of factors. Cases are infinitely diverse and the tribunal has to balance out the factors to reach a fair decision. If it is not unfair to refuse an adjournment, the applicant may indeed be deprived of an opportunity to present his case but that deprivation does not constitute breach of the rules of natural justice.'"
> [Emphasis supplied]

Though not binding on this court as a matter of precedent, the correctness of neither decision has, to our knowledge, never been questioned and we can conceive of no reason not to follow them.

[96] In the present case, and in many of the cases considered above, the factual matrix has been one of the tribunal concerned refusing an application to adjourn the hearing by the claimant on medical grounds. Each of these cases is different, belonging to its particular fact sensitive context. In cases of this kind factual comparisons will almost invariably be inappropriate.

[97] The principle espoused by this court is that in any review or appellate challenge to a first instance decision to refuse an adjournment application advanced on whatever grounds, the test to be applied is whether this had the effect of unfairly depriving the litigant of a fair hearing. It is no answer, no objection in principle, to say, particularly in cases of asserted ill health, that this must almost invariably require the first instance court or tribunal to adjourn the hearing. There are three main reasons for this. First, a litigant's fundamental right of access to a court, which is constitutional in nature and its related common law right to a fair decision making process do not entitle the litigant to dictate how this process is to be undertaken. Second, every court and tribunal will be jealous to guard against a misuse of its process. Third, the terms of the test (above) are not absolute.

[98] It follows that a review or appellate court is unlikely to hold that a litigant has been deprived of their common law right to a fair hearing where an adjournment application is refused in any of the following illustrative situations: where medical evidence is provided which the tribunal considers inadequate – for example, where

there is medical evidence describing an ailment or illness but failing to address the central question of whether the litigant is fit to attend a forthcoming hearing for its duration and give evidence and/or present their case; where a reasonable opportunity has been afforded to provide medical evidence and none is forthcoming; alternatively, where a reasonable opportunity has been afforded to provide medical evidence and something which the tribunal considers substandard materialises; where there are demonstrable inconsistencies or discrepancies in the assertion that a litigant is unfit to attend a hearing; and where the absence of medical evidence or prima facie reservations about any medical evidence provided is coupled with indications in the history of the proceedings of reluctant prosecution of the case or delay/obstructing tactics. The reasons why an adjournment refusal in any of these illustrations is unlikely to be unlawful are the same as set out above. First, in each of these illustrations the litigant has been afforded reasonable facilities to vindicate their fair hearing rights. Second, particularly in the last illustration, there are indications of misusing the process of the court or tribunal concerned.

[99] Returning to the present case, the facts and considerations which inform this court's conclusion on this issue are readily identifiable in our rehearsal of the relevant factual matrix above. In short, throughout the history of the Tribunal proceedings, the appellant was legally represented, by solicitor and counsel, until one working day in advance of the scheduled hearing; throughout this period her perspective had been that of a legally represented party, to be contrasted with the perspective of a legally qualified party who might have to represent herself at extremely short notice; the appellant is afflicted by dyslexia, with the specific implications this has for her (rehearsed supra); in addition there was uncontroverted expert psychological evidence that she was suffering from depression and a generalised anxiety disorder having a "huge impact" on her; she offered to provide still further medical evidence (if required) within a matter of a couple of hours; and she was confronted by a party represented by solicitor and counsel; she had lost the services of her legal representatives at an inordinately late stage (and no criticism whatsoever of them is implied); her sterling efforts to prepare herself for the hearing had been ineffectual; no ground rules hearing had been held by the Tribunal; no reasonable adjustments had been determined by the Tribunal; no facts had been agreed between the parties; though legally qualified, the appellant had no familiarity with this sphere of the law; and her case had both legal and factual complexities (as this judgment demonstrates).

[100] All of the foregoing facts and factors belong to the matrix before the Tribunal at the stage when it made its decision refusing the appellant's adjournment request.

[101] Before turning to examine the second element of the procedural unfairness ground of appeal, it is necessary to address one discrete issue. At [78]–[79] above we have rehearsed in extenso certain passages from the transcript of the hearing conducted on the morning of the first of the four allocated days. From this the following analysis is appropriate. First, the Tribunal was far from enamoured by the timing of the appellant's adjournment application. Second, the factor of administrative convenience was dominant in the exchanges with the appellant and

the short ruling which followed. Third, the statements of the presiding judge immediately before the short recess convened, considered in tandem with all that preceded them, are indicative of a closed mind on the part of the Tribunal. Fourth, there was no examination or evaluation of the available medical evidence. Fifth, there was no mention, express or oblique, of the doctrine of procedural fairness or the appellant's right to a fair hearing. This criterion, which we have identified above as the overarching test to be applied, did not feature at all.

[102] We turn to consider the second element of the procedural unfairness ground of appeal. The central facts and factors bearing on this are the following. In the claim forms initiating the two tribunal cases the appellant's dyslexia and the inextricably related issue of reasonable adjustments dominated. Ditto in the respondent's formal responses. In response to the specific pro-forma questions, the appellant made clear that reasonable adjustments for her at the Tribunal hearings would be "necessary." It was further stated that the appellant's proposals in this respect would be provided at a later date.

[103] There were eight case management listings before the Tribunal during the period November 2018 to October 2020. On the first of these occasions, a tribunal judge proactively raised the issue of reasonable adjustments. The appellant's solicitor was to communicate further with the Office of the Tribunals about this matter. Having regard to the substance of that which was transacted at the second case management listing, a clear opportunity to consider and probe the issue of reasonable adjustments at the hearing arose. However, it was not taken. Precisely the same observation applies to the fifth of the case management listings. At the seventh of these listings, on 10 September 2020, the record of proceedings contains the following discrete passage:

> "It is likely that reasonable adjustments will be required in the course of the hearing to facilitate the claimant's particular condition, ie dyslexia. The claimant's solicitor will take further instructions from the claimant and from Mr Eakin and that matter will be addressed at the Preliminary Hearing by telephone on 28 October 2020."

[104] At the seventh of the case management listings the presiding judge did not raise the inter-related issues of reasonable adjustments or ground rules hearing. Exactly two weeks later the appellant's solicitors detailed in a letter the "reasonable adjustments" proposed on behalf of their client. This letter inter alia drew attention to the ETBB and attached copies of excerpts there from. The following specific measures were requested: an anonymity order; the formulation of questions "asked singly and a written prompt provided as an aid-memoire"; the allowance of thinking time "to assimilate information and produce a considered response"; refraining from asking the appellant "to read through large parts of a document and comment on it"; and finally, "providing questions in advance of the hearing." Notably this letter further stated:

> "As this litigation to date has been difficult and protracted, causing the claimant significant stress and anxiety, she has had to take medication to combat the impact of such mental stresses. This impacts on her concentration and sleep levels. Additional concerns about the details of her disability and medical conditions being publicised will impact on her ability to give effective evidence and cause distress."

This letter was copied to the respondent's solicitor.

[105] The preliminary hearing proceeded as scheduled the following day, on 28 October 2020. The record of proceedings contains the critical comment that the application for reasonable adjustments "… had been made at a very late stage." The upshot of this listing was twofold. First, the Tribunal directed that a "Ground Rules Hearing" would be conducted at 10.30am on the first day of hearing (ie 16 November 2020). Second, the parties (per the record) "… should endeavour to agree adjustments."

[106] In the event what was transacted on the morning of the first of the four allocated substantive hearing dates has been outlined in earlier passages in this judgment. It can be ascertained from the extensively reproduced transcript passages at [78]–[79] above. The Tribunal, appropriately, gave priority to the appellant's adjournment application and its determination thereof. From the transcript, the following matters are clear. First, there was no ground rules hearing. Second, echoing the exhortation at the conclusion of the last of the case management listings, the Tribunal expressly left the issue of reasonable adjustments in the hands of the parties. Third, having done so, the Tribunal did not revisit this issue. Fourth, in the wake of the adverse adjournment ruling, the appellant expressly stated:

> "I would like to make an application [for reasonable] adjustments …"

She endeavoured to elaborate. In the exchanges with the presiding judge which then materialised the main issue considered was that of reporting restrictions. There was then an adjournment for lunch. Following this the issue of reasonable adjustments was not raised. Rather, following some desultory exchanges, the cross examination of the appellant began.

[107] The substantive hearing continued during the following three and a half days. During the afternoon session on the first day there were two five minute breaks. This lengthy session was occupied by the appellant's cross examination. This continued throughout the morning of the second day of hearing. During this session there were two five minute breaks, coupled with one of 15 minutes requested by counsel for the respondent. During the afternoon session, when it fell to the appellant to cross examine the respondent's main witness, there was one break of five minutes. On the

morning of the third day, which was occupied by the appellant's cross examination of another important respondent's witness, there were two breaks of five minutes. During the afternoon session, when the appellant had to cross examine three of the respondent's witnesses, including the Ombudsman, there was one break of ten minutes.

[108] The transcripts make clear that following completion of the preliminary matters detailed above, from the beginning of the substantive part of the hearing until its completion some three and a half days later, the Tribunal did not raise the issue of reasonable adjustments at any stage.

[109] The third element of the procedural unfairness ground of appeal relates to the conduct of the hearing. The essence of the submission of Ms Best on behalf of the respondent was that the Tribunal should treat the bare print of the transcripts with appropriate caution. As appears from what we have stated at [53] above, we consider that this submission was well made. Furthermore, we remind ourselves that the transcripts must be considered as a whole and, further, in tandem with all of the other evidence amassed before this court.

[110] Bearing in mind the qualifications just noted, it is possible to reasonably identify from the transcripts in particular certain features of the four day hearing. First, as Ms Best correctly reminded the court, the tribunal did intervene in her cross examination of the appellant, five times altogether. However, there is no indication that these interventions were designed to further any appropriate reasonable adjustment for the appellant. Second, we accept that in her formulation of questions Ms Best was duty bound to put the respondent's case to the appellant. However, the most notable interventions by the presiding judge entailed challenging and reproaching the appellant for what she had said in answer to a question. Furthermore, these interventions were not of a balanced or neutral nature: rather they savoured clearly of cross examination of the appellant. Many of these interventions were lengthy. Moreover, the appellant was interrupted before completing her answers on a number of occasions and was not given the opportunity to begin and complete her answers afresh.

[111] We consider it beyond dispute that some of the "questions" addressed to the appellant in cross examination were of inordinate length and frequently took the form of lengthy statements or mini speeches. That is not to criticise counsel. It is, rather, an irresistible analysis. We consider it abundantly clear that the appellant struggled in consequence and that her struggles were exacerbated by the judicial interventions already noted.

[112] The transcript demonstrates that the appellant became upset several times during the four day hearing. There is no suggestion that this was other than genuine. In this context one particular exchange began with the presiding judge stating:

> "You're getting upset again, [NAME], and I don't understand why …"

This was an interruption, the appellant having just said:

> "What I want, I …… please let me speak. I would …"

As this exchange advanced, the appellant reminded the Tribunal of the ETBB. Throughout this exchange she raised the issue of "reasonable adjustments." She repeatedly stated, in terms, that she was struggling, describing herself as inter alia "confused." None of this prompted the Tribunal to examine the reasonable adjustments issue.

[113] The question for this court is whether the appellant was unfairly deprived of her common law right to a fair hearing. This is an inalienable and fundamental right. This court is the arbiter of whether a violation of this right has occurred. The determination of this issue requires the court to view the proceedings at first instance panoramically, identifying all material facts and considerations bearing thereon. In this respect we refer particularly to chapters (viii) and (xii) of this judgment. In the interests of clarity and comprehension certain assessments, evaluations and analyses by the court have been interspersed in these passages. It is unnecessary to repeat these.

[114] Summarising, the following matters are both clear and of undeniable materiality: the requirement to make reasonable adjustments for the appellant at the substantive hearing was apparent from the initiation of the proceedings, long previously; the Tribunal failed to conduct a ground rules hearing; the Tribunal made no determination of the reasonable adjustments issue prior to, at the commencement of or at any stage during the substantive hearing; in this respect the Tribunal, rather than performing its absolute and inalienable duty, purported to delegate its performance to the parties; the Tribunal failed to engage with the expert psychological evidence pertaining to the appellant's dyslexia and the outworkings thereof; the Tribunal's adjournment refusal application did not engage at all with the relevant available evidence and was not made with an open mind; if and insofar as any adjustments specifically tailored to the appellant's statutory disability were made during the course of the hearing these were of a perfunctory and inadequate nature; the Tribunal permitted cross examination of the appellant in a manner which made no allowance whatsoever for her disability; the Tribunal intervened in a manner which similarly failed to make such allowance; the Tribunal's interventions were neither balanced nor neutral and, finally, the appellant was repeatedly interrupted in either attempting to reply to cumbersome questions or making submissions to the Tribunal.

[115] The conclusion that the appellant did not receive a fair hearing at first instance follows inexorably. We next ask ourselves whether there are any facts or factors which might support the view that the appellant was, in effect, doomed to lose in any event. We have addressed the doctrinal aspect of this question in para [44] above (citing para

[47] of *Nesbitt*). Having regard to the multiplicity, nature and substance of the various procedural defects and shortcomings identified, the answer to this question must unhesitatingly be in the negative.

[116] It follows that the first ground of appeal succeeds.

Second Ground of Appeal: Legal Misdirection

[117] We refer to para [49] (iv) above: Did the Tribunal err in law in its application of section 4A of the 1995 Act (the "provision, criterion or practice" provision – see [25] above) to the case the appellant was making?

[118] At [168] – [177] of its judgment the Tribunal addressed the issue of reasonable adjustments. Within these passages there is a clearly identifiable recognition that the appellant was a person suffering from a statutory disability and in respect of whom reasonable adjustments in the job application process were, therefore, appropriate. At [171] the Tribunal, noting that the legislation envisages an element of positive discrimination in favour of disabled persons, recognised the primacy of the requirement of reasonableness. The statutory duty in play is that contained in section 4A of the 1995 Act: this is rehearsed in [25] above. At [170] the Tribunal states:

> "The claimant at all relevant times was disabled for the purposes of the 1995 Act. The provision, criterion or practice (the PCP) which is relevant to this part of the claim is the requirement on the part of the respondent for applicants for the post of Senior Investigating Officer to undergo an interview and assessment procedure. The objective of the 1995 Act is to put in place reasonable adjustments to enable the disabled person to compete on her merits with the other candidates. It is not the case that the respondent is required to put in place adjustments to ensure that the claimant will be successful in her application, irrespective of her merits, the merits of other candidates or her suitability for the post. It is not the case that the respondent is obliged to put in place adjustments which effectively set aside the interview and assessment competition or which effectively destroy the integrity of that competition. There is an objective test of reasonableness."

[119] The appellant's contention is that the PCP identified by the Tribunal lacks specificity, failing to engage with two fundamental facts. First, the specific nature of her dyslexia, namely her impaired information processing and her impaired working memory which combine to detrimentally affect her performance in a job interview scenario. Second, a suggested failure to recognise that the concrete PCP which she

was challenging in her two Tribunal claims was "the requirement to give detailed oral answers to interview questions without the aid of effective notes."

[120] The real question raised by this ground of appeal is whether the Tribunal engaged adequately and accurately with a combination of (a) the specifics of the appellant's dyslexia and the consequential material detriments to her in the interview arrangements and (b) the concrete substantial disadvantage put forward by her, just noted. At [56] – [63] above we have outlined the evidence before the Tribunal bearing on the appellant's dyslexia.

[121] In its judgment the Tribunal rehearsed certain parts of the evidence and the course of the proceedings at [28] – [63]. This was followed by its consideration and rejection of the appellant's application for anonymity. The next section of the judgment is entitled "Relevant findings of fact", spanning paragraphs [72]–[163]. Within this section there is, in addition to the formulation of certain findings of fact, a rehearsal of other parts of the evidence. In this part of the judgment there is – unsurprisingly – a heavy emphasis on the evidence bearing on the issue of reasonable adjustments. In this respect the report of Mr Gallagher, particularly its recommendations in this respect, features prominently. However, strikingly, the Tribunal fails to consider that part of Mr Gallagher's report detailing the individual specifics of the appellant's dyslexia and the consequential impairments. Equally striking, there is no consideration of the report of Mr Eakin. We do not overlook [58] of the judgment in this respect. However, this simply records, in perfunctory terms, that the appellant called Mr Eakin as a witness at the hearing and his written report was adopted as his evidence in chief. It is incontestable that this expert evidence (which was uncontested) formed a significant part of the appellant's case. It was of central relevance to the first of her two claims, and it also bore on the issues of ground rules hearing and reasonable adjustments for the appellant during the Tribunal hearings. In our view it was incumbent upon the Tribunal in its judgment to grapple with this report, engaging fully with its contents. This exercise was not carried out.

[122] In argument Ms Best submitted, correctly, that the PCP formulated by the Tribunal at [170] of its judgment is crafted in broad terms. However, this in no way undermines or contra-balances our assessment in the immediately preceding paragraph.

[123] The second ingredient of this ground of appeal is the appellant's contention that the Tribunal failed to recognise that the PCP in play giving rise to the substantial disadvantage asserted by her was the requirement to give detailed oral answers to interview questions without the aid of effective notes. While it is clear that the appellant was also making the case that the pre-interview question reading time afforded to her was insufficient, her case further embraced the complaint that she was not given the reasonable adjustment of sufficient time to make effective notes in this pre-interview exercise.

[124] It follows from all of the foregoing that, in our view, the Tribunal erred in law in two specific respects. First, it failed to recognise and engage with the specific impacts and effects of the appellant's dyslexia. Second, probably consequential upon the first, it failed to correctly identify the ingredients of the PCP challenged in the appellant's first tribunal claim. This court diagnoses a freestanding error of law in consequence.

Third Ground of Appeal: The Edwards v Bairstow Ground

[125] We refer to para [49] (v) above: Is the impugned decision of the Tribunal unsustainable in law by virtue of the *Edwards v Bairstow* principles?

[126] In rejecting the appellant's disability discrimination claim based on the respondent's asserted failure to make reasonable adjustments for her in the job interview scenario and arrangements, the Tribunal held that there was no prima facie evidence of any failure to put in place reasonable adjustments, with the result that the burden of proof had not shifted to the respondent. In our determination of the second ground of appeal we have held that the Tribunal erred in law by failing to address and determine a key feature of the appellant's "PCP" case and by failing to engage with the expert and other evidence pertaining to the specific features of the appellant's dyslexia and its effects and impacts upon her in the job interview scenario and arrangements. These errors of law clearly permeate the conclusion just noted. It follows that the Tribunal's decision to dismiss the first of the appellant's two claims is unsustainable in law on this further ground.

The Second Tribunal Claim

[127] We have described this claim at paras [22]–[23] above. In dismissing it the Tribunal made two conclusions:

(i) To dismiss the appellant's case that the respondent's failure to appoint her to the relevant post was on the ground of her dyslexia disability.

(ii) To dismiss her constructive unfair dismissal claim.

We concur with the first of these two conclusions. As regards the second, the main issue relating to the constructive unfair dismissal claim was the letter of March 2019 from the respondent's solicitors to the appellant's solicitors raising the issue of how the appellant had represented her solicitor's qualification when she first secured employment with the respondent in 2016: see para [32] (xxx) and (xxxi) above. It was common case throughout that this letter was written on the instructions of the Ombudsman. This court has one main concern about the letter. Since it raised such an obviously grave and sensitive issue it should have been the product of the most careful research and consideration. The analysis that it was not flows readily from the swiftness of the riposte made on behalf of the appellant and the summary burial of

the issue which this stimulated. Thus, this court differs from the Tribunal's assessment in [183] of its judgment.

[128] Subject to the foregoing reservation, which is one of some significance, this court concurs with the remainder of the Tribunal's analysis of this issue at [185]-[187].

[129] The third of the Tribunal's conclusions in respect of the appellant's second claim entailed dismissing her victimisation claim. This court can identify no error of law in the analysis or conclusion of the Tribunal in [188]–[190] of its judgment.

[130] In thus concluding, this court has considered carefully whether its conclusion that the appeal in respect of the first Tribunal claim succeeds on the basis of inter alia procedural unfairness should have the effect of vitiating in law the Tribunal's rejection of the three elements of the appellant's second claim. We are satisfied that this is not appropriate for two fundamental reasons. First, the evidence of the transcript, which this court has found revealing, does not warrant a read across of this nature. The main reason for this is that the Tribunal hearings were manifestly dominated by the reasonable adjustments issue lying at the heart of the appellant's first claim. Second, the second Tribunal claim was, on any showing, manifestly frail.

The New Psychology Report

[131] The appellant applied to the court for the admission in evidence of a recently commissioned psychology report. The court determined to defer its ruling on this issue to the stage of preparing its judgment. This was based on the two fold considerations of (a) its preference to hear both parties' arguments and complete its review of the voluminous evidence and (b) a suggestion from the respondent's solicitors that there might be some improper passage in these. Given the latter suggestion the author of this judgment declined to read the report until this stage. Applying the familiar *Ladd v Marshall* principles, it is clear that this report could not with reasonable diligence have been commissioned for the Tribunal hearing, given the lateness of the events under scrutiny and, in particular, the Tribunal's rejection of the appellant's request on the first morning of hearing to allow her a period of some very few hours to obtain evidence of this kind; the report appears to this court credible; and (applying the third criterion) it has an important influence on the outcome of this appeal in the sense that it brings to the attention of this court medical evidence of the appellant's unfitness for work generated prior to and at the time of the Tribunal hearings. We would stress the word "important." It is not necessary for new evidence of this kind to be decisive or determinative.

[132] Our application of the three governing criteria impels to the conclusion that the report should be admitted in evidence. The timing of our consideration of this report means that those passages of concern to the respondent have had no bearing on our determination of the grounds of appeal. The addition of the report to the matrix before this court is, therefore, something which fortifies, rather than drives, our conclusions allowing the appellant's appeal in respect of the first of the two tribunal claims.

General Guidance

[133] The following, inexhaustively, is designed to guide courts and tribunals determining adjournment applications in future cases. In brief compass:

(a) It is entirely understandable that any court or tribunal at any tier of the legal system faced with a late adjournment application will, in many cases immediately – and understandably - reflect on administrative, organisational and resource considerations. The common human reactions of irritation and frustration may also feature: see, for example, the earlier judgment of this court, noted at para [17] above. However, having thus reacted, the challenge – and duty - for the court/tribunal is to identify the legal test to be applied. In this test administrative, organisational and financial facts and factors have little or no role to play.

(b) In cases where an adjournment application is based on inter alia issues of the litigant's health a careful consideration of any available relevant medical evidence must be undertaken.

(c) In such cases, the court or tribunal concerned must avoid "crystal ball" enquiries about when the litigant is likely to be medically fit to present their case: see (a) above.

(d) Where (as here) an adjournment refusal is based on recourse to administrative, organisation and financial facts and considerations, the outcome will in many cases be unsustainable in law.

(e) Generally, adjournment refusal decisions motivated by inter alia the impact on the court and tribunal system of the Covid 19 pandemic, or anything kindred, will struggle to withstand subsequent judicial oversight because they involve the application of criteria which are alien to the governing principle of procedural fairness to the litigant.

(f) None of the foregoing is modified in any way by the consideration that tribunals are designed to be less formal and less rigid than courts.

(g) Some litigants are considered, for whatever reason, to be troublesome. Others are regarded as meek, mild, co-operative and compliant. All have precisely the same fair hearing rights.

Our Conclusions

[134] These are:

(i) The appellant's appeal in respect of her first tribunal claim, specifically the first complaint therein enshrined, succeeds on the grounds of procedural unfairness and material error of law.

(ii) The appellant's appeal in respect of her second tribunal claim is dismissed.

We remind ourselves that the two Tribunal claims were consolidated. The effect of our conclusions is that the appeal is allowed.

[135] Applying the terms of section 38(1) (a) and (b) of the Judicature (NI) Act 1978, this court reverses the decision of the Tribunal to the extent specified in para [134] above and remits the case to a differently constituted panel of the Tribunal for rehearing.

[136] The court has made directions for dealing with ancillary issues, including costs. The parties are strongly urged to achieve consensual resolution of their differences in the interests of finality and saving further costs.