Appeal No. UKEAT/0054/20/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 25 May 2021
Judgment handed down
18 June 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

MS K BILGAN

MRS M V McARTHUR BA FCIPD

MS GISSELE BUCKLE APPELLANT

1) ASHFORD AND ST PETER'S HOSPITAL NHS TRUST
2) MS MONIKA MILLS

RESPONDENTS

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	ELAINE BANTON (Of Counsel) Instructed by: Bindmans LLP 236 Grays Inn Road London WC18 8HB
For the Respondents	BENJAMIN JONES (Of Counsel) Instructed by: Capsticks LLP 1 St. George's Road London SW19 4DR

SUMMARY

TOPIC NUMBER: 8 - PRACTICE AND PROCEDURE

The decision not to treat the first day of a hearing as a reading day so that the claimant, who had significant mental health conditions, could commence her evidence on the second day, and complete her evidence in one day, without there being a break over night, did not constitute a failure to make a necessary adjustment that rendered the hearing unfair.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. The parties are referred to as they were before the employment tribunal. The claimant is a midwife. She was engaged by an employment agency from February 2017. She was supplied by the agency to the first respondent from May 2017 to July 2017. The Labour Ward Coordinator, who managed the claimant, is the second respondent. There was an incident on the night of 12/13 July 2017 with a patient. The claimant alleged that she was subject to abuse and that she was forced to continue working in the room with the patient by the second respondent.

The proceedings in the employment tribunal

2. By a claim form received by the employment tribunal on 30 April 2018, the claimant brought a number of claims based on the protected characteristic of race, alleging that her treatment involved direct discrimination, indirect discrimination, harassment and victimisation. The claimant contended that she had suffered personal injury by reason of her treatment, with an eventual diagnosis of PTSD, resulting in her experiencing difficulty in sleeping, frequently being tearful and finding it difficult to remember things (ET1 paragraphs 38-40). The claimant accepted that the claim was submitted late but contended that, in part, this was as a result of her medical condition, and also because of an error that had been made in her original claim form in respect of the early conciliation certificate number.

3. Somewhat surprisingly, considering the extent of the personal injury asserted, at box 12 of the claim form, the claimant ticked "no" to the question, "do you have a disability" and did not set out any assistance she required as her claim "progressed through the system".

4. As the respondents note there was no request for reasonable adjustments in the claim form. The respondents assert, and it was not contested by the claimant, that the question of adjustments was not raised at a preliminary hearing held on 13 December 2018 to deal with the preliminary issue of whether the claim had been submitted out of time; or at a subsequent preliminary hearing for case management on 31 January 2019, at which directions were made for the full hearing, which was listed to commence on 30 September 2019.

The request

5. On 24 September 2019 the claimant's solicitors sent an email to the respondents' solicitors in the following terms:

> **Finally, given the length of the bundle and the fact we now have more time in the listed hearing due to it being liability only, we would propose for Monday to consist of housekeeping and thereafter be a full reading day, with the Claimant to start her evidence Tuesday. Given her health and the pressures of giving evidence it would be desirable for her to give her evidence in one day rather than start Monday afternoon and potentially have to recess overnight. We propose to write to the Tribunal in relation to this request (which will no doubt be dealt with Monday morning) but would prefer to do so by agreement if possible. Please would you let me know your position by return?**

6. It is notable that the claimant's representative suggested that it would be "desirable" for the claimant to start her evidence on the Tuesday, and did not refer to this being a "reasonable adjustment".

7. The respondents replied:

> **We have no objection to Monday being a reading day and our proposed timetable would be as follows:**
>
> **Monday- reading**
>
> **Tuesday - G's evidence and begin R's evidence**
>
> **Wednesday - R's evidence**
>
> **Thursday - any remaining evidence from R, submissions and retirement for deliberation**

> **Friday - deliberation and judgment on liability**
>
> **However, this agreement is on the understanding that this is a reasonable adjustment that the Claimant is requesting and it may require us to take witnesses in an order that fits around their availability as we had not anticipated that this would be necessary.**

8. It was the respondents that first suggested that the claimant's request might be for a reasonable adjustment.

9. On 26 September 2019 the claimant's solicitors wrote to the tribunal requesting that the first day of the hearing be treated as a reading day:

> **Whilst writing we respectively request that the timetable for next week include Monday 30 September as a full reading day. It is considered that this will be necessary for the Tribunal to have the time to read the bundle in full, and will enable the Claimant to start giving her evidence on Tuesday 1 October, rather than potentially having to recess overnight. The Claimant suffers from significant mental health difficulties and it is considered a reasonable adjustment to allow her to give her evidence in one day.**

10. As the letter was sent so close to the hearing the matter was not dealt with before the hearing commenced.

The hearing

11. The tribunal for the full hearing was Employment Judge Fowell, sitting with lay members. The letter sent by the claimant's solicitor and the question of whether the first day should be a reading day was raised by Employment Judge Fowell at the outset. He suggested that a full day of reading was probably unnecessary and that the tribunal would read for the morning and reconvene with the parties after the lunch break. We will come onto the detail of what was said later in this judgment. The claimant started giving her evidence after the lunch break. The claim was heard from 30 September to 3 October 2019. The claim was dismissed. After receiving the oral decision, the claimant collapsed and was taken to hospital by ambulance.

12. The issue of the reading day was not specifically referred to in the judgment, although there was a reference to adjustments to the proceedings to take account of the claimant's mental health at paragraph 7 (after having referred to the medical evidence at paragraph 6 and the view taken of the claimant's condition):

> **7. Given that view, we naturally treated Ms Buckle as a vulnerable witness. Although no particular measures were requested on her behalf, more frequent breaks were taken, generally at half hour intervals, and on one occasion Ms Buckle asked to break off herself. She found the process of giving evidence very difficult, particularly dealing with questions in which she was taken to her witness statement and then to other documents, and having to take in a number of points before responding. We rose early on the first day when it became clear she was unable to concentrate further, and on the next morning her solicitor, … sat with her to help her with finding the relevant pages in the extensive bundle. Efforts were also made to encourage simpler, more open questions and we were satisfied that she had been able to take an effective part in the hearing and to explain her account. We also explained to her that she did not need to remain in the room to hear the evidence of the Trust's witnesses if she felt anxious, but she remained throughout.**
>
> **8. We also remind ourselves that we need to take account of her vulnerability in assessing the credibility of that account, and the difficulty she may have experienced, for example, in recalling or interpreting events. Having done so, we make the following findings of fact.**

The appeal

13. By a Notice of Appeal received by the Employment Appeal Tribunal on 9 December 2019, the claimant appealed on two grounds. The first related to an alleged misunderstanding of the list of issues by the employment tribunal. The second ground contended that there had been a failure to make a reasonable adjustment and/or breach of the right to a fair trial because the claimant had not been permitted to start her evidence on the second day of the hearing.

The question asked of the employment tribunal

14. The matter was considered pursuant to rule 3(7) at the sift by HHJ Martyn Barklem who by an order with seal date 10 February 2020 stayed the matter so that questions could be asked of the employment tribunal. In respect of the second ground of appeal the question was:

> **The Employment Judge is asked to expand on the issues raised at Ground 2 of the numbered grounds which accompany this Order in order to assist the EAT in understanding why the Claimant was required to give evidence on the first day.**

15. Employment Judge Fowell replied on 4 March 2020. In response to the second question he stated:

> **Ground 2 concerns the claimant been required to give evidence on the first day of the hearing, the parties having agreed that she would not have to do this, as a reasonable adjustment for her mental health.**
>
> **It is correct that by letter dated 26 September 2019 claimant solicitors requested that she not give evidence on the first day and that it be occupied with reading. That was expressed to be a reasonable adjustment for her mental health.**
>
> **The respondent did not oppose the application but it is not clear that there was any agreement to that effect. Given the late nature of that application it had not been dealt with prior to the hearing, which began on 30 September 2019. Ms Buckle attended the hearing on that day.**
>
> **No explanation was given in that letter or at the hearing as to why it would be beneficial to Ms Buckle to commence the evidence on the second day, beyond the fact that she would not be "recessed" on the first evening.**
>
> **The Tribunal took the view however that it would be beneficial to her to begin her evidence, and it could then be broken up in several stages rather than tackled over the course of one day. No objection on health grounds was raised to the proposal when it was made after lunch on the first day. Reading had already been completed by lunch, and the alternative would have been to sacrifice half a day of tribunal time.**
>
> **It did prove an extremely difficult experience for the claimant to give evidence, with frequent breaks at the suggestion of the Tribunal. It was made clear that she was to be regarded as a vulnerable witness and efforts were made at various points to simplify questions or avoid unnecessary ones.**
>
> **Her evidence commenced at 1407 on the first day and cross examination began at 1422. It was interrupted by short break for the claimant to compose herself shortly afterwards and then a further short break at 1510. Evidence was brought to a close that date 1545 and the claimant became too upset to continue. Her cross examination on the first afternoon therefore lasted approximately one hour. It was not suggested that this was in anyway attributable to starting her evidence that day.**
>
> **Her evidence resumed at 1000 the following morning and the first break was taken at 1051. The next witness began at 1154 after a further break. Notes of the hearing revealed that very few questions were put during these intervals, which may have lasted for about an hour and 20 minutes in total.**

The preliminary hearing at the EAT and note of the relevant exchanges in the employment tribunal

16. The matter was restored for consideration by a judge of the EAT. By an order with seal date 27 April 2020 Judge Keith directed that the matter be considered at a preliminary hearing.

17. The preliminary hearing took place before HHJ Auerbach on 6 October 2020. The first ground of appeal was dismissed. The second ground was permitted to proceed to a full hearing. The parties were required to provide a note of the discussion about whether the first day should be a reading day. The sections of the note before and after lunch, that are potentially relevant to the question of whether the first day should have been a reading day as an adjustment because of the claimant's metal health, are agreed (In the note GB is the claimant, EJ the employment judge, DB the claimant's then Counsel and BJ the respondents' Counsel at the employment tribunal and in this appeal):

> **Note of hearing:**
>
> **The parties were called in at 11.43. The EJ introduced the panel, greeted the parties. EJ raised the Claimant's withdrawal of her claim against the (then) second respondent [the agency] before reaching discussion of the Claimant's application to treat the first day of the hearing as a reading day.**
>
> **EJ: I see there was an application to treat the whole of today as a reading day. Doesn't seem any action taken to it. GB doesn't want to have to come back. How long is her evidence going to take – it's not a very long witness statement.**
>
> **BJ: Half a day anticipated. I don't anticipate a full day. Sphere of factual dispute is constrained to one evening and the morning that follows. I understand the Claimant's concerns about not going overnight. The Respondent wasn't going to resist and I am not instructed to resist but am in Tribunal's hands.**
>
> **EJ: I would rather make the best use we can of today. Certainly half a day. Mr Brown – any concerns?**
>
> **DB: I would invite Tribunal to do some reading. Not entirety of bundle. Read the first 320 pages and from 458 to 507. You will see within those document – medical record pertains to the Claimant's health and how affected by events in question.**
>
> **EJ: That's 5 hours – all day – is it necessary to read all that?**
>
> **DB: I would invite you to read.**
>
> **EJ: GB's statement doesn't refer to any particular pages in the bundle. References some documents. How much of this is really key?**

DB: Certainly the majority of the first 320 pages is important. In relation to the other pages, some patient notes at the back of the bundle from page 505…from 496. From 489 sorry. They are the patient notes and important documents.

EJ: GB will be asked questions and referred to these documents and that helps us to focus issues and not to go hunting for information on our own account. My concern – don't want to simply give day for reading. All hearing overbooked – hundreds of people waiting for their cases to be heard and no time to waste - we have certain amount of time available. If we do reading GB may have to come back.

BJ: I don't contend you need to read the first 320 pages. Section A – the pleadings and List of Issues are the essential documents. Policies at B – don't consider you need to read those. Documents at Tab C – the substance of what relate to the case. Quite a lot of that is documentation relating to the Claimant's ongoing dissatisfaction with her complaint, which doesn't fall within scope of claim. Whilst referring to some of them a lot of that substantively isn't necessary. Section D, miscellaneous – only a couple of documents in there that actually need to be referred to. Claimant's medical records irrelevant to this liability only hearing. Whilst I'll make a couple of references – the only document in that tab which is significant are patient notes – they are primary evidence. Do think there is some reading but not as vast as suggested.

DB: I'm content for you to read the narrative but concern is given we are now at 11:50 and lunch break – real risk the Claimant's evidence will not be finished this afternoon. My submission is that is undesirable given Claimant's state of health.

EJ: It may not be desirable but not unusual. Let's see how we get on with reading the bundle. Resume at 14:00. To do extra reading. Let's see if we can make a start with some evidence then

DB then proceeded to make an application on behalf of C to amend the claim to add an additional protected act. Following this there was a further brief discussion about logistics for clarifying the contents of some unclear handwritten notes (and whether this would be best dealt with in chief or in cross examination). During this latter discussion GB was heard crying.

EJ: Ms Buckle, how are you feeling?

GB continued to cry

DB: During break I'll speak to her and see how we are.

EJ (to GB): I can see you are upset. That's not unusual. Obviously you have DB to represent you which takes a load off. It is important that hospital gets a chance to put questions to you and it may be better to get that out of the way. There shouldn't be any trick questions and there's no problems about memory. This is not a memory test. Plenty of paperwork here and DB can jog your memory if there are any documents you need to help you give your version of events. Might seem a bit daunting now but once you start it will seem more manageable. You will sit at that table and can swear on bible. Then DB will have some questions to read out bits of notes. Maybe 1 or 2 extra questions. We don't encourage trick questions, BJ won't be hostile. We will take a break and if you need a break just say.

DB: The withdrawal against second Respondent – email was sent to Tribunal on 7 August 2019 confirming that claim withdrawn against R2.

EJ: Was that also sent to Tribunal?

DB: Yes.

EJ: So it was – I have it now.

Hearing then adjourned for lunch and pre-reading.

Hearing resumed at 2pm

When the hearing resumed EJ stated that the ET was in a position to start hearing the Claimant's evidence (it felt that it had done sufficient reading). EJ did not enquire as to the Claimant's mental state or whether she felt in a position to give evidence.
EJ: We have read all the statements and all documents referred to in statements. We are in a position to start evidence. Is there anything before we start?

BJ and DB indicated that there were no other matters to raise.

GB then called to commence her evidence.

GB sworn at 2.07pm

Cross examination start

The law

18. The employment tribunal, in exercising its functions, is governed by the overriding objective provided for by rule 2 of the **Employment Tribunal Rules 2013**:

> **The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—**
>
> **(a) ensuring that the parties are on an equal footing;**
>
> **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;**
>
> **(c) avoiding unnecessary formality and seeking flexibility in the proceedings;**
>
> **(d) avoiding delay, so far as compatible with proper consideration of the issues; and**
>
> **(e) saving expense.**
>
> **A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.**

19. Although the legal duty to make reasonable adjustments pursuant to the **Equality Act 2010** does not apply to the employment tribunal, it is well established that the tribunal should

A make such adjustments as are necessary to ensure a fair hearing: **Heal v University of Oxford** [2020] ICR 1294, at paragraph 18.

B 20. The employment tribunal will often have regard to the **Equal Treatment Bench Book**, including the guidance given about dealing with people with mental health disabilities which includes:

> **26. Ideally courts and tribunals should have systems for identifying at an early stage and before the final hearing / trial whether any adjustments for disability will be required. Where there is a question on the standard claim form for the court in question, this should be checked by judges or case workers at an early stage and follow-up enquiries made where an issue is identified. …**
>
> **Breaks and shorter hours**
>
> **54. It may be necessary to adjust the timing, length or number of breaks, eg to allow for tiredness, shorter concentration spans, anxiety and relief from stress, taking medication, receiving out of court explanation eg via an intermediary.**
>
> **55. It may be necessary to adjust the length of the day, starting later (eg to allow for medication or accessible travel) or finishing earlier (eg because of tiredness, medical appointments, avoiding rush hour travel).**
>
> **56. Ideally, the need for an additional number of breaks, shorter days and/or a slower communication style will have been identified in advance, as this will extend the estimated length of the hearing. If insufficient time is allowed, there may be a temptation to cut necessary breaks or to speed up the process, which may cause the disabled person additional stress.**
>
> **57. Longer hearings do increase costs and may prevent allocation to the fast track in civil cases. However, this has to be balanced against the need for adjustments to ensure a disabled person can participate as fully as possible.**
>
> **58. As well as breaks which have been pre-arranged at suitable times, tell the disabled person that he or she can ask for a break whenever necessary.**
>
> **59. There can sometimes be a temptation to cut breaks or extend hours in order to finish within the allotted time. This should be treated with great caution if the breaks and hours were initially considered reasonable and necessary. The disabled person should be consulted over whether he or she can manage, but there remains the risk that the person will feel unable to say no.**

21. Subsequent to the hearing in this matter, further similar guidance has been given in the **Practice Guidance (Employment tribunals: Vulnerable parties and witnesses)** [2020] ICR 1002. At paragraph 6 it is stated:

> **6 The tribunal and parties need to identify any party or witness who is a vulnerable person at the earliest possible stage of proceedings. This may be done**

> **via the ET1 claim form or the ET3 response form or separately by any reasonable method of communication with the tribunal. They should consider whether a party's participation in the proceedings is likely to be diminished by reason of vulnerability. They should also consider whether the quality of the evidence given by a party or witness is likely to be diminished by reason of vulnerability. If so, in either example, they need to consider whether it is necessary to make directions or orders as a result.**

22. The approach to be adopted in considering appeals against decisions about medical issues, and adjustments, depends on the nature of the decision taken. At one end of the spectrum a decision whether to postpone a hearing because of the ill-health of a claimant is a case management decision that may only be challenged on Wednesbury grounds: **Phelan v Richardson Rogers Limited:** UKEAT/0169/19/JOJ

23. Conversely, there may be circumstances in which a party requires an adjustment that is of such fundamental importance that without it being made there cannot be a fair hearing. In such a case it is for the appellate court to determine as a matter of substantive fairness whether the adjustment requested was such that the failure to make it rendered the hearing unfair because the party was not able to sufficiently participate in the hearing and so was not given a fair trial, just as would be the case if the hearing was improperly conducted in the party's absence.

24. There are other cases in which a party has a medical condition (that may be a disability) in response to which a number of approaches to the conduct of the hearing could be adopted, that may have consequences for the other party, and the tribunal's allocation of resources to other litigants. In such a case it is still a matter of substantive fairness, but there could be a number of courses of action that could have been taken by the tribunal that would have been fair. It is not for the appeal tribunal to determine that it might itself have chosen another of a range of fair options to that adopted by the tribunal. Put conversely, the real question is whether the decision taken by the tribunal was one that resulted in the hearing being substantively unfair. If it was, the appellate court should intervene. If it was not, the fact that there might have been a course of

A action that the appellate court thinks might have been better, does not change a fair hearing into an unfair hearing.

B 25. In **Rackham v NHS Professionals Limited** UKEAT/0110/15/LA Langstaff J (P) stated:

> **50. It seems to us we have to ask here whether there was any substantial unfairness to the Claimant in the event. We have to consider the whole picture, and we have to consider fairness not in isolation, viewing his case alone, but as one in which there were two parties.**

C 26. Where the absence of a particular adjustment is not so severe that it would render the hearing unfair the decision whether to make that adjustment, some other adjustment, or none is essentially a matter of case management discretion taking into account all of the relevant factors: **Heal** at paragraph 27.

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27. In **Rackham** Langstaff J placed great emphasis on the autonomy of disabled persons and the importance of listening to what they have to say about the adjustments they require. As Ms Banton put it, ensuring that the disabled person's voice is heard. What if the disabled person is represented? Ms Banton relied on **Galo v Bombardier Aerospace UK** [2016] IRLR 704, a decision of the Northern Ireland Court of Appeal, to contend that adjustments are a matter for the

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F employment tribunal and so it is effectively irrelevant that a party is represented. However, the Court of Appeal of England and Wales in **Anderson v Turning Point Eespro** [2019] ICR 1362 took a different approach. Underhill LJ stated at paragraph 27:

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> **In the generality of cases it is entirely appropriate for a tribunal to leave it to the professional representatives of a party who is under a disability, or indeed otherwise vulnerable, to take the lead in suggesting measures to prevent them suffering any disadvantage. The representatives can be expected to have a better understanding than the tribunal of what the party's needs are, and access to appropriate medical advice; and there is also a risk that if the tribunal itself takes the lead in seeking to protect a party (or witness) it may give the impression of taking their side. This involves no abdication of responsibility by the tribunal. Of course it retains ultimate responsibility for seeing that a disabled party receives a fair hearing, and I do not rule out the possibility that there may be cases where a tribunal should take steps for which the party's representative has not asked; but those will be the exception, and the default position is that the tribunal can expect a party's interests to be looked after by his or her representatives.**

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28. The tribunal should always have regard to the wishes of a disabled party about appropriate adjustments. Where the party is represented the employment tribunal will look to their representatives to take the lead on stating what adjustments the party requests. It is generally the representative who provides the voice of the party, and should be heard. As Underhill LJ noted, the ultimate responsibility for ensuring that a disabled party receives a fair hearing remains with the employment tribunal. But where an adjustment is not requested, or a request is not pursued with any vigour, there may be little prospect of establishing that it really was so fundamental that without it there was an unfair hearing.

29. In considering whether to permit the introduction of new evidence, that was not before the employment tribunal, the EAT adopts the approach derived from **Ladd v Marshall** [1954] 1WLR 1489, requiring that it be established that (1) the evidence could not have been obtained with reasonable diligence for use at the employment tribunal hearing; (2) it is relevant and would probably have had an important influence on the hearing; and (3) it is apparently credible.

The new evidence

30. We deal first with the application to introduce fresh evidence. The first two documents are an Emergency Department Discharge Summary from St George's Hospital dated 3 October 2019 and a report from the Psychiatry Department of St George's Hospital dated 6 October 2019, produced after the claimant collapsed at the employment tribunal after hearing that her claim had been dismissed. Having regard to the **Ladd v Marshall** criteria; the evidence could not have been obtained with reasonable diligence for use at the hearing because it was not in existence at that time. It is apparently credible. However, we cannot see how it would have had an important influence on the hearing. The documents do no more than support the contention that the claimant

suffered a collapse after she had been told that her claim had failed. They provide no evidence that her collapse was caused by giving her evidence after lunch on the first day, rather than on the second day, as she had requested.

31. The second two documents are complaints made about the employment judge and the Employment Tribunal Service. Ms Banton told us that she did not know the outcome of the complaints. In those circumstances, she did not persist in her attempt to rely on the complaints. The letters do no more than set out the claimant's complaints about the way the case was dealt with, including the subject matter of this appeal, to which they add nothing of substance.

32. We reject the application to introduce new evidence.

Conclusion on the substantive appeal

33. The substantive ground of appeal is that the failure to allow the claimant to commence her evidence on the second day breached her right to a fair trial because it was a required adjustment that was not provided.

34. We accept that the claimant has very significant mental health conditions including substantial post-traumatic stress disorder and depression, with the additional features as set out in paragraph 7 of Ms Banton's skeleton argument and the two medical reports referred to therein. We have had regard to the specific aspects of the condition to which Ms Banton refers and the potential there was for giving evidence to trigger the claimant's symptoms.

35. The claimant's contention is that in the light of her severe mental health condition her request for an adjustment of being permitted to commence her evidence on the second day, so

that the evidence could be given in one day without a break overnight, was so vital that the failure to provide it rendered the hearing unfair. Ms Banton vehemently submitted that the claimant was not listened to and that her requirement for an adjustment necessary for her to have a fair hearing was disregarded in an insensitive manner. Ms Banton submitted that the claimant had understood that the adjustment would be made. She expected to be able to take the first day to familiarise herself with the tribunal environment, knowing that her evidence would commence on the second day, and would be concluded without an overnight break. Ms Banton contends that when the claimant was informed that that was not the approach the employment judge intended to adopt, she broke down in tears, which should have made it obvious to the tribunal how serious the situation was.

36. Powerfully made, though they were, Ms Banton's submissions are fundamentally different to the way in which the matter was put to the employment tribunal. It is hard to see how, if the adjustment was considered to be so important, it was not raised until so shortly before the hearing. There were opportunities to request adjustments in the claim form, at the preliminary hearing on the time point (at which hearing we were told, the claimant found giving evidence difficult), at the case management hearing thereafter, or at an earlier stage of preparation for the final hearing.

37. When the possibility of the claimant commencing evidence on the second day was first raised by her then solicitors they did not refer to it being a reasonable adjustment. It was stated to be "desirable" in the light of the claimant's health and the pressure of giving evidence. It was the respondents that referred to the proposal as amounting to a reasonable adjustment, in their response to the request, to which they did not object. In the claimant's solicitor's letter to the

Tribunal, it was referred to as a reasonable adjustment on the basis of seeking to avoid the potential of the claimant having to recess overnight.

38. While it is correct that the respondents did not object to the claimant's proposal, and the parties put a timetable together with the aim of completing the hearing within the time allotted, because the application was made so late in the day there was no opportunity for it to be determined prior to the first day of the hearing. Even where parties propose a timetable, the tribunal always has to consider it with great care to ensure that time is used efficiently because time estimates, and timetables, are notoriously inaccurate. While the claimant commencing her evidence on the second day was referred to as being a reasonable adjustment, it was the second factor referred to, the first being the suggestion that a full day was required for reading because of the amount of documentation the claimant's representatives wished the tribunal to read before commencing the evidence.

39. At the commencement of the hearing, the claimant's Counsel merely stated the concern that there was a real risk that the claimant's evidence would not be finished that afternoon and that it was "undesirable" given the claimant's state of health. The claimant's Counsel did not suggest that it was a vital adjustment, without which there could be no fair hearing, or seek to take the employment judge to the medical evidence if it was thought that there was something in it that would support a contention that the adjustment was required.

40. It was not correct, as asserted on behalf of the claimant, that when the employment judge suggested that the claimant's evidence should commence in the afternoon she started to cry. That occurred after a further application had been made. The agreed note does not support the contention that it was the proposal to commence evidence in the afternoon that caused the

claimant to cry. The employment judge immediately addressed her distress, noting that she had the benefit of representation. It is also clear from the note that the door was left open to the possibility that the plan to commence the claimant's evidence after the lunch break might be revisited. The employment judge said, in reference to reconvening at 2pm, “let's see if we can make a start with some evidence then”.

41. If it were the case that during the time the tribunal took to read the claimant was in a state of collapse by reason of the adjustment not being provided, she felt that she was being prevented from having time to acclimatise to the tribunal and could not face the prospect of her evidence not being concluded in the afternoon, there was an opportunity for this to be raised by her Counsel at the outset of the reconvened hearing. The employment judge stated that the statements and documents had been read and that the Tribunal was in a position to start the evidence but then said “Is there anything before we start”. Both counsel stated that there were no other matters to raise. Had the claimant been in a state of collapse as is now alleged, that was the opportunity to state so, and to advance the contention that a break to the next day was an adjustment of such importance that, without it, there could not be a fair trial.

42. The claimant's contention in this appeal, that the failure to allow her to commence her evidence the next morning meant that she was unable to give her best evidence, which resulted in the failure of her claim, is not supported by the evidence. While the claimant has sought to introduce evidence that suggests that she collapsed on hearing that her claim had failed, there has been no attempt to introduce any evidence that suggests that the failure to grant a postponement to the next morning prevented her giving her evidence to the best of her abilities. While it is correct that the claimant clearly had difficulty giving her evidence in the afternoon of the first day, breaks were granted and, eventually, the judge concluded that there should be an early

adjournment. We do not accept that the fact that the judge referred to the impracticability of taking a break every five minutes, suggests that he was insensitive to the position of the claimant. It is clear that the tribunal saw the claimant as a vulnerable witness and sought to put in place adjustments that would assist her, including when she continued to struggle in giving evidence on the second day. The claimant's contention, that this was an attempt at shutting the gate after the horse had bolted, is founded on the assertion that it was the requirement to commence evidence on the first day that caused the claimant's difficulties in giving evidence, which is unsupported by any material evidence.

43. The claimant could not reasonably have assumed that the request that her evidence start on the second day would necessarily be acceded to. The request was made too late in the day for it to be determined before the commencement of the hearing. When considering whether to agree with the proposal, even when not challenged by the respondents, the employment tribunal was entitled to have regard to the necessity of dealing with claims in an efficient manner, to ensure they are completed within their allotted time, including giving the tribunal time to deliberate and reach its decision, and ensuring that other parties have a fair opportunity for their claims to be heard.

44. In circumstances in which the suggestion, that it would be better for the claimant to give her evidence in one day, was not supported by any medical evidence, the tribunal was entitled to take into account the possibility that giving evidence with scope for breaks between relatively short sessions might be beneficial to the claimant. If she strongly disagreed with that view, and wished to assert her right for her voice to be heard on that matter, she could have instructed her Counsel to make submissions to that effect.

45. Although the tribunal judgement at paragraph 7, in dealing with adjustments, did not specifically mention the request that the claimant's evidence start on the second day, that may be because the tribunal considered it of little significance when it was put forward in such a tentative manner at the hearing. In any event, HHJ Barklem considered it appropriate to ask questions of the employment judge, who has provided the reasons. The reasoning is Meek compliant.

46. We conclude that the hearing was not substantively unfair. The employment tribunal did not err in law in failing to adjust the proceedings by allowing the claimant to commence giving her evidence on the second day. The determination made by the employment tribunal does not come close to having been perverse, as suggested by the claimant in her final alternative argument.