Appeal No. UKEAT/0128/19/BA (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 July 2020
Judgment handed down 24 March 2021

Before

THE HONOURABLE MR JUSTICE LAVENDER

MR H SINGH

MISS S M WILSON CBE

NANCY MUKORO — APPELLANT

(1) INDEPENDENT WORKERS' UNION OF GREAT BRITAIN
(2) JASON MOYER-LEE
(3) CATHERINE MORRISSEY
(4) MARITZA CALISTO CALLE — RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	David E Grant (of Counsel) instructed directly via Advocate
For the Respondents	Nathaniel Caiden (of Counsel) instructed by IWGB

SUMMARY

Practice and Procedure

1. The Claimant, who had been assisted by her daughter at earlier hearings, required emergency dental treatment on the day and at the time fixed for the hearing of the Respondents' application for an order striking out her claims on the basis that a fair hearing was no longer possible.

2. The Employment Tribunal erred in failing to take account of the information provided to it that the Claimant had developed an excruciatingly painful abscess and had had to seek immediate medical attention and that the Claimant and her daughter would be attending an emergency dental appointment starting at 10.30 am.

3. The adjournment should have been granted, since to do otherwise would be a denial of justice.

4. Since the adjournment should have been granted, the order striking out the claims was set aside. It was noted that, as part of its reasons for making that order, the Employment Tribunal stated, in effect, that it was in the Claimant's best interests to strike out the claims. However, that is not a ground for striking out a claim and it is not relevant to the question whether a fair hearing is possible.

THE HONOURABLE MR JUSTICE LAVENDER

(1) Introduction

1. The Claimant appeals against the judgment of an Employment Tribunal consisting of Employment Judge Snelson sitting alone on 26 September 2018 at London Central, Victory House, 30-34 Kingsway, London WC2B 6EX. The Employment Tribunal refused the Claimant's request for an adjournment of the hearing because of an emergency dental appointment and struck out the entirety of her claim on the basis that a fair hearing was no longer possible.

(2) The Proceedings

2. On 6 November 2016 the Claimant, who is acknowledged to be disabled by anxiety, depression and panic attacks, was dismissed by the First Respondent from her employment as Legal Department Co-ordinator, having been employed in that role since 15 July 2015.

3. By an ET1 claim form presented on 4 April 2017, the Claimant brought complaints against the First Respondent and six individuals of discrimination on the grounds of race, disability and sex, victimisation, disability-related harassment, unfair dismissal and wrongful dismissal and a claim for arrears of pay. It is relevant to note that she gave her address as being in Barnes, SW13.

(2)(a) The Provision of Particulars

4. The Claimant said in her claim form that she was unable to provide full details of her claim at that stage, as she was medically ill and unable to "outline some very traumatising and in-depth facts". On 8 June 2017 Employment Judge Potter wrote to the Claimant requesting by

29 June 2017 either an indication of when further particulars could be provided or medical evidence of the Claimant's unfitness to provide such further particulars

5. The Claimant then provided a letter from her GP, Dr Bailey, dated 29 June 2017. In summary, the letter stated that the Claimant was suffering from depression and anxiety and that she was unable at that time to manage or participate in legal proceedings. Dr Bailey wrote:

> **"This lady has a long history of depression. She has been receiving medical treatment through us for the last 13 months due to an exacerbation of her anxiety and depression, predominantly triggered by her recent issues at work. …**
>
> **She appears to be in a very vulnerable mental and emotional state and is therefore unable at this time to manage or participate in any stressful processes including legal proceedings. In particular, her issues with impaired concentration and memory, and high anxiety levels which are all symptoms of her mental health condition, mean that she finds she is unable to accurately recall and document events and in fact doing so severely exacerbates her depression and anxiety and triggers panic attacks."**

6. The Claimant produced a further letter from Dr Gibson dated 4 July 2017, which dealt with the history of her anxiety and depression.

7. By their response of 5 July 2017 the Respondents denied the claims in their entirety.

8. A case management preliminary hearing fixed for 25 August 2017 was postponed until 9 October 2017 because of the recommendation by the Claimant's GP and the unavailability of the Respondents' representative.

9. The Claimant did not attend the postponed hearing on 9 October 2017 before Employment Judge Grewal. Her daughter, Ms Romany Mukoro, attended on her behalf. She said that the Claimant had not attended an appointment with the Richmond Wellbeing Service on 9 August 2017, nor any other session with that service, and that the Claimant was engaged in substance abuse and was currently not well enough to give particulars of her complaints.

10. Employment Judge Grewal ordered the Claimant to provide up-to-date medical evidence in order to decide whether the proceedings should be stayed.

11. The Claimant submitted a letter dated 30 October 2017 from Dr Gibson, who stated:

> **"With reference to the capacity of the claimant to progress her case personally, I am not in a position to confidently confirm this will be the case. The extremely protracted nature of this case [reflects], in part, the intense anxiety she has experienced since it started and which has contributed to her limited engagement in the process. There is little evidence to date that the work she has done with [Richmond Wellbeing Service], or the medication she has taken, has equipped her to deal with it any more effectively. The recent recourse to alcohol is likely to reflect further anxious/avoidant behaviour. … Furthermore, having spoken with Ms Mukoro on 24/10 she now feels she**
>
> - **can now look at the paper work documenting the events without overwhelming and all consuming emotion**
> - **feels she is now less anxious in remembering the facts of her case**
> - **will be able, in 2-3 weeks, to clearly outline the facts to a very complex case for the Tribunal**
> - **will be able, in 2-3 weeks, to clearly tell the Tribunal the ways in which she claims the Respondents subjected her to various acts of discrimination, amongst other unlawful & degrading acts and therefore**
> - **will start the process to engage and to be able to progress her claim**
>
> **In relation to the immediate position with the tribunal hearing, she feels**
>
> - **unable at this very moment in time, due to the impairment outlined above, to withstand a full hearing**
> - **however, she feels this will change and is only because of needing 'the time to mentally heal' from her trauma and to**
> - **address the substance abuse with the support of RIRS, hand in hand with specific counselling, to help her deal with the nature of her specific experience in order to regain her strength of mind**
> - **she feels that with the continuing support of her very close family, friends and well-wishers, she will be able to withstand the mental and emotional rigours of Tribunal and be able to represent herself from January 2018 onwards.**
>
> **With regard to prognosis, my view is, as I have indicated in the past, that there may well not be any significant improvement in Ms Mukoro's psychological health until this legal case is resolved. I would also be guarded about the prognosis thereafter, given her premorbid psychological health and because it has been such a protracted confrontational process. Her experience of the process and her psychological inability to handle it may have a longer term impact on her psychological health."**

12. On 1 December 2017 Employment Judge Grewal ordered the Claimant to provide further particulars of her discrimination claims by 18 December 2017. On 28 December 2017 this deadline was extended to 8 January 2018. The particulars were delivered on 8 January 2018.

(2)(b) The Dismissal of the Sex and Race Discrimination Claims

13. On 16 January 2018 notice was given of a preliminary hearing to take place on 26 February 2018. On the Respondents' application, because of the unavailability of their representative, the hearing was postponed to 16 March 2018.

14. On 16 March 2018 a case management preliminary hearing took place before Employment Judge Grewal. The Claimant attended, the issues were identified and a timetable was set for a final hearing over five days between 20 and 26 September 2018. Employment Judge Grewal also struck out the claims against three of the individual respondents, on the basis that the particulars provided did not identify any allegation of discrimination against any of them. Finally, Employment Judge Grewal made a deposit order relating to the sex discrimination claim. The Claimant failed to pay the deposit ordered and the sex discrimination claim was struck out in July 2018.

15. On 2 May 2018 the Respondents applied for either an order striking out the Claimant's racial discrimination and harassment claims or a deposit order in respect of those claims. On 12 July 2018 an open preliminary hearing took place before Employment Judge Snelson to consider the Respondents' application of 2 May 2018. The Claimant attended, with her daughter in support. The Claimant spoke, but indicated that she was unable to participate that day and requested an adjournment on the grounds of ill health. In the event, it was agreed that she should have the ability to respond in writing to the Respondents' application and Employment Judge Snelson ordered the Claimant to do that by 27 July 2018.

16. On 26 July 2018 Romany Mukoro emailed the Employment Tribunal to explain that the Claimant was unable to meet the timescale for filing her written submissions due to ill health and requested an extension. She stated both that, "I act on behalf of my Mother" and that her mother

was "disabled and unrepresented". The Respondents opposed an extension of time. On 27 July 2018 Romany Mukoro emailed again, particularly requesting that the Tribunal take into account the Claimant's disabilities and referring to the Equal Treatment Bench Book.

17. On 30 July 2018 the Claimant submitted a letter from Dr Gibson dated 27 July 2018. Dr Gibson said:

> **"I wrote a report on 22/10/17 and was due to see Nancy yesterday but she felt unable to attend because of her high anxiety so I saw and spoke with her daughter Romany on her behalf. Romany explained that Nancy is struggling to meet the court imposed deadlines for submission of substantial documentation and asked if I could write to reiterate that her mental health difficulties impact on this and to request leeway in this regard. I understand Nancy is representing herself in proceedings.**
>
> **As I have previously indicated, I have little expectation that Nancy's mental health is going to improve or stay stable during the litigation process. Legal proceedings are gruelling on anyone and more so on someone with an existing mental disability … Nancy's mental health issues [mean] that she finds adapting to new situations asked of her difficult. All I can do in this situation is keep reiterating my opinion that Nancy's cognitive functioning is impaired and will remain so. …"**
>
> **"In relation to reasonable adjustments to be made, I would expect this would need to involve Nancy, as she is best equipped to tell you specifically what she needs and what will trigger or alleviate her own symptoms. Romany mentioned that Nancy's former employer sent significant written data in an electronic format that presented as inaccessible to Nancy. Without a mental disability it is challenging reading significant data on screen. I would say it would be a reasonable adjustment to print such data, if it helps Nancy in the process. From a medical viewpoint, when mental cognition is impaired the thought process is slowed down. A mentally impaired patient needs time to process and deliver what is being asked of them. If enough time is not allocated or something is presented in a format that is challenging, to that patient it may well trigger looped anxiety, making them possibly prone to panic attacks resulting in a lack of focus or feeling overwhelmed at the task at hand. Therefore, aiding disabilities via reasonable adjustments aids and quickens any process."**

18. On 2 August 2018 the Respondents emailed the Tribunal and asked that Employment Judge Snelson issue a judgment on the application dated 2 May 2018. Romany Mukoro sent an email to the Tribunal on the same date setting out various observations in relation to the application. She invited the Employment Tribunal to make reasonable adjustments and stated, among other things, that "it should not be an argument that a self-represented person with a disability should be disallowed from bringing a claim before the Tribunal because of that impact".

19. On 7 September 2018 there was a telephone hearing before Employment Judge Snelson. The Claimant was represented by Romany Mukoro (who was described as a "lay representative").

A The Claimant was allowed until 10 September 2018 to submit written representations. The final hearing was vacated, although 26 September 2018 was retained for a preliminary hearing.

B 20. On 10 September 2018 the Claimant delivered her written representations. The Respondents sent a reply to those representations on 17 September 2018 and also applied for the remaining claims to be struck out, contending that a fair trial was no longer possible.

C 21. On 19 September 2018 Employment Judge Snelson promulgated a judgment in relation to the hearing on 12 July 2018, dismissing the race-based detriment claims and ordering a deposit to be paid in respect of the race-based dismissal claim.

D ***(2)(c) The Hearing on 26 September 2018***

E 22. A preliminary hearing took place before Employment Judge Snelson on 26 September 2018 to consider the Respondents' application for an order striking out the remaining claims and any subsequent case management issues. The hearing was listed to commence at 10 am.

F 23. By email sent at 8.18 am on 26 September 2018 Romany Mukoro wrote to the Employment Tribunal and said:

> **"This is for the urgent and immediate attention of EJ Snelson who is due to hear a preliminary hearing scheduled for today at 10 a.m.**
>
> **My Mother has had to seek an emergency appointment with her Dentist due to developing an excruciatingly painful abscess. Therefore, due to unforeseen and unavoidable medical circumstances, the Claimant asks for an adjournment of today's hearing as she is in pain and too unwell to attend and has had to prioritise self-care and seek immediate medical attention."**

G

H 24. The Claimant has since produced a screen shot of Romany Mukoro's telephone, which indicates that she called the Employment Tribunal at 8.48, 9.05 and 9.07 am and that these calls lasted for 10 seconds, for 2 minutes and 21 seconds and for 4 minutes and 17 seconds respectively. Romany Mukoro described herself in an email dated 2 October 2018 as:

> **"… contacting the Tribunal via telephone and speaking to a female Tribunal clerk, urgently requesting that a message be passed on, making myself available for you and/or Judge Snelson to speak to me directly via telephone, at approx. 9.00 am until my Mother's emergency appointment at 10.30 am, …"**

25. Romany Mukoro also stated in that email of 2 October 2018 that:

> **"Unfortunately, medical evidence was unable to be administered or produced prior to seeing the Dentist for the unforeseen "emergency" medical treatment."**

26. The email of 8.18 am was provided to the Employment Judge and to the Respondents' representatives. Counsel for the Respondents strongly opposed the application for an adjournemnt. He highlighted the lack of medical evidence and argued that the procedural history meant that the Employment Tribunal could regard the application with suspicion.

27. The Employment Tribunal put the hearing back to midday. An email was sent by the Employment Tribunal to Romany Mukoro at 11.05 am, which read (with the sentences numbered for ease of reference):

> **"(1) The case was called on 10:08 this morning. (2) Counsel attended with Ms Corriero of the Respondents. (3) No one appeared for the Claimant. (4) You were due to be representing the Claimant and your own absence is unexplained. (5) EJ Snelson has put the hearing back to 12.00 today to enable you to attend to seek to make out a good ground for adjourning the matter to a fresh date. (6) At the moment the application to adjourn is unsupported by evidence. (7) The Tribunal will not grant an adjournment on mere assertion. (8) If it is not practicable to produce medical evidence, your own evidence could at least be offered. (9) You must be taken to have first-hand knowledge of your mother's present condition and any treatment she is undergoing. (10) Such evidence might persuade the judge that it [is] in the interests of justice and in keeping with the overriding objective to grant the application. ((11) It would, of course, be open to the Respondents to test your evidence in cross-examination.)**
>
> **(12) If no sustainable ground for adjourning to a fresh date is shown, the hearing will proceed."**

28. The Employment Tribunal was to record in its judgment that the Tribunal's clerk called Romany Mukoro, who did not answer the telephone, so the clerk left a voicemail message. Mr Grant, on behalf of the Claimant, submitted that the screenshot from Romany Mukoro's telephone does not record such a call.

29. Neither the Claimant nor Romany Mukoro replied to the email by noon or attended the hearing. Employment Judge Snelson continued the hearing at noon and decided to refuse the application for an adjournment and to strike out the remaining claims. His judgment was promulgated on 28 September 2018.

(2)(d) Subsequent Events

30. The Claimant's dentist wrote a letter on 26 September 2018 confirming that he had seen the Claimant on that day, that she was in "severe dental pain" and that she had two dental abscesses. Romany Mukoro sent a copy of this letter by email to the Employment Tribunal on 1 October 2018 and sent another email on the following day, from which we have already quoted, enclosing a copy of the Claimant's prescription for an antibiotic.

31. Then on 12 October 2018 the Claimant applied for the reconsideration of the Employment Tribunal's decision. Romany Mukoro sent the application to the Employment Tribunal as an attachment to her email of 12 October 2018. It included the following account of her conversation at 9.07 am on 26 September 2018:

> **"Called back. Spoke to same female Clerk. Daughter told Clerk she would be available for Tribunal Clerk/EJ Snelson to call & speak to her by 10.30 am. After she would be in the Dental Surgery with myself. Daughter explained medical condition and said medical evidence was to follow. Clerk assured daughter she would immediately inform Tribunal Clerk. Clerk thanked Daughter for informing Tribunal."**

32. Employment Judge Snelson refused the reconsideration application on 24 October 2018 and this appeal was commenced on 9 November 2018. On 27 January 2019 the Claimant was informed of HHJ Auerbach's decision pursuant to rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended) that the Notice of Appeal (which had been drafted by the Claimant herself) disclosed no reasonable grounds for bringing the appeal. The Claimant expressed dissatisfaction with the reasons given by HHJ Aurerbach for his decision and a hearing took place

on 19 April 2019 before HHJ Eady QC pursuant to rule 3(10) of the Employment Appeal Tribunal Rules 1993 (as amended). The Claimant was represented at that hearing by Mr Grant, who had drafted amended grounds of appeal. HHJ Eady QC directed that the appeal be set down for hearing on the amended grounds of appeal. Her reasons included the following:

> **"On the postponement point, I was persuaded by Mr Grant of counsel (acting under ELAAS) that arguable questions arose as set out in the amended grounds under this head. I had initially been of the view that, in particular given the history of this matter, this was a permissible exercise of case management discretion on the part of the ET. If, however, the explanation provided for seeking the postponement was accepted (and I note that: (i) the ET did not say that it did not accept this; (ii) some corroboration was subsequently provided from the Appellant's dentist, as was forwarded to the ET with the application for reconsideration), then the points made by Mr Grant seemed to me to have some merit."**

33. The appeal was originally listed for hearing on 8 January 2020. Mr Grant filed a skeleton argument dated 23 December 2019 in support of the appeal which, in the event, was not heard until 14 July 2020.

(3) The Law: Late Applications for Adjournments on Medical Grounds

34. Applications for adjournments fall within the Employment Tribunal's powers to make general case management orders under Rule 29 and, under Rule 30, they may be made at a hearing or in writing. They are governed specifically by Rule 30A, which provides (so far as is relevant) as follows:

> **"(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.**
>
> **(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—**
>
> **…**
>
> **(c) there are exceptional circumstances.**
>
> **…**
>
> **(4) For the purposes of this rule—**
>
> **(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;**

> **(b) "exceptional circumstances" may include ill health relating to an existing long-term health condition or disability.**

35. The Presidential Guidance on Postponements provides (at paragraph 1.1) that applications should ordinarily be made in writing, but recognises that this may not always be possible. In such cases, it provides at paragraph 4 that the application "will not ordinarily be considered unless there are exceptional circumstances", adding that an explanation should be given as to what the exceptional circumstances are and why they have prevented the applicant from complying.

36. The Guidance further offers examples of exceptional circumstances, including (at paragraph 1, under "Examples") the following:

> **"When a party or witness is unable for medical reasons to attend a hearing. All medical certificates and supporting medical evidence should be provided in addition to an explanation of the nature of the health condition concerned. Where medical evidence is supplied it should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of affairs may cease."**

37. It then describes how an Employment Judge should respond to an application:

> **"1. Where the appropriate information has been supplied then the Employment Judge will deal with the matter as soon as applicable. If the information has not been supplied any application may become the subject of further enquiry from the Employment Judge for relevant information which will have the effect of delaying the consideration of the application.**
>
> **5. Once all the relevant information is available to the Employment Judge he/she will take into account all matters and information now available to them and consider whether to grant or refuse the postponement. The decision however remains in the discretion of the Employment Judge concerned."**

38. In *Teinaz v London Borough of Wandsworth* [2002] ICR 1471, Peter Gibson LJ said as follows (in paragraphs 20 to 22 of his judgment):

> **"20. Before I consider these points in turn, I would make some general observations on adjournments. Every tribunal or court has a discretion to grant an adjournment, and the exercise of such a discretion, going as it does to the management of a case, is one with which an appellate body is slow to interfere and can only interfere on limited grounds, as has repeatedly been recognised. But one recognised ground for interference is where the tribunal or court exercising the discretion takes into account some matter which it ought not to have taken into account: see, for example, *Bastick v James Lane Ltd* [1979] ICR 778 at 782 in the judgment of Arnold J giving the judgment of the EAT (approved as it was in *Carter v Credit Change Ltd* [1980] 1 All ER 252 and page 257 per Lord Justice Stephenson, with whom Cumming-Bruce and Bridge LJJ**

agreed). The appellate body, in concluding whether the exercise of discretion is thus vitiated, inevitably has to make a judgment on whether that matter should have been taken into account. That is not to usurp the function of the lower tribunal or court: that is a necessary part of the function of the reviewing body. Were it otherwise, no appellate body could find that a discretion was wrongly exercised through the tribunal or court taking into account a consideration which it should not have taken into account or, by the like token, through failing to take into account a matter which it should have taken into account. Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. As was said by Atkin LJ in *Maxwell v Keun* [1928] 1 KB 645 at page 653 on adjournments in ordinary civil actions:

> **"I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."**

21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.

22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily takes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."

39. Arden LJ said as follows in paragraph 43 of her judgment:

> **"43. I agree with Peter Gibson LJ that applications for adjournment may raise difficult problems requiring practical solution. While any tribunal will naturally want to be satisfied as to the basis of any last minute application for an adjournment and will be anxious not to waste costs and scarce tribunal time or to cause inconvenience to the parties and their witnesses, it may be that in future cases like this a tribunal or advocates for either party could suggest the making of further inquiries and a very short adjournment for this purpose. I am not, of course, saying that that course would necessarily have assisted in this case, but it may be helpful to advocates and tribunals to bear this point in mind in a future case."**

40. A decision by an Employment Tribunal on an application for the adjournment of a hearing is a case management decision, as to which the Employment Tribunal has a discretion. This Tribunal will not interfere with such a decision unless it is shown that the Employment Tribunal took account of an irrelevant factor, failed to take account of a relevant factor or reached a conclusion which no reasonable Employment Tribunal would reach: see *Andreou v Lord Chancellor's Department* [2002] IRLR, at paragraphs 33 and 35.

41. Mr Grant submitted, relying on paragraph 45 of this Tribunal's judgment in *Shui v Manchester University* [2018] ICR 77, that our task was to make up our own mind about the fairness of the proceedings before the Employment Tribunal, rather than reviewing the decision of the Employment Tribunal. However, that submission is contrary to the outcome of the careful analysis of the authorities by this Tribunal in *Leeks v Norfolk & Norwich University Hospital NHS Foundation Trust* [2018] ICR 1257 (although we note that *Shui* was not cited in argument or referred to in the judgment in *Leeks*).

(4) The Law: Striking Out Claims where a Fair Hearing is No Longer Possible

42. Rule 37 of the Employment Tribunals Rules of Procedure provides as follows:

> **"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
>
> **…**
>
> **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**
>
> **(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."**

43. Lord Steyn said as follows in paragraph 24 of his speech in *Anyanwu v South Bank Student Union* [2001] 1 W.L.R. 638:

> **"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."**

44. Lord Steyn was speaking of striking out on the grounds of abuse of process, but what he said applies to the striking out of discrimination claims on other grounds as well. It is also relevant to note what Sedley LJ said in paragraph 21 of his judgment in *Blockbuster Entertainment Ltd v James* [2006] IRLR 630:

> **"It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see *Re Jokai Tea Holdings* [1992] 1 WLR 1196, especially at 1202E−H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike−out power exists. … Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."**

45. In the case of a litigant who suffers from a disability, the Employment Tribunal will have to consider the nature and effect of any reasonable adjustments which might be made to accommodate that disability when assessing whether a fair hearing is possible. The Employment Appeal Tribunal has also emphasised, in paragraphs 50 and 59 of its judgment in *Rackham v NHS Professionals Ltd* (2015) UKEAT/0110/15/LA, the need to respect the autonomy of a disabled litigant:

> **"50. The point made by Mummery LJ in *O'Cathail* deserves repetition. Here, when we examine the history, we would emphasise the importance for those who have disabilities that they be given proper respect for their autonomy as human beings. In many cases, if not most, a person suffering from a disability will be the person best able to describe to a court or to others the effects of that disability on them and what might be done in a particular situation to alleviate it. This may not apply, of course, to those who are challenged in such a way that they may lack capacity or perhaps be very close to lacking it."**
>
> **"59. Second, we think that a considerable value should be placed upon the integrity and autonomy of the individual. It is precisely that which the extracts from Article 13 and Article 1 of the Convention emphasise. If a person entitled to make a decision affecting the conduct of their case makes that decision, it is not in general for any court to second-guess their decision and to make it in a manner which patronises that person. As we have said earlier in this Judgment, there may be exceptions to that, though they may be rare. Generally, we would wish to emphasise the very**

> **considerable importance of recognising that those who have disabilities are fully entitled to have their voice listened to, whatever it is they may be saying."**

46. It is also relevant to consider what it was that the absent party was going to bring to the hearing: see *Ejiofor (t/a Mitchell & Co Solicitors) v Sullivan* (2014) UKEAT/0110/14/SM, at paragraph 25; and *Leeks v Norfolk & Norwich University Hospital NHS Foundation Trust* [2018] ICR 1257, at paragraph 50(d).

47. *Riley v Crown Prosecution Service* [2013] IRLR 966 is an example of a case in which the Claimant's depression, which prevented her from attending to her claim and which was of indefinite duration, meant that it was no longer possible to have a fair hearing. Longmore LJ said as follows in paragraphs 27 and 28 of his judgment:

> **"27. It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable time". That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of Peter Gibson LJ in *Andreou v The Lord Chancellors Department* which are as relevant today as they were 11 years ago:—**
>
> > **"The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights , having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened Employment Tribunals are these days."**
>
> **28. It would, in my judgment, be wrong to expect Tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a Tribunal. Like Wilkie J I can see no error of law and would dismiss this appeal."**

(5) The Employment Tribunal's Judgment

48. In its judgment promulgated on 28 September 2018 the Employment Tribunal dealt first with the adjournment application. It referred to Rules 2, 30A and 47 of the Employment Tribunals Rules of Procedure and the Presidential Guidance. It quoted from *Teinaz v London Borough of Wandsworth*. Then it gave its reasons for refusing the adjournment application in paragraph 28 of his judgment (in which we have numbered the sentences for ease of reference):

> **"(1) I concluded that the Claimant had failed to make out a good reason to further adjourn or postpone the hearing. (2) She had had the opportunity to seek to obtain supporting medical evidence but none had been supplied. (3) In addition, her daughter, now experienced in representing her interests, had had, but not taken, the opportunity to attend the Tribunal (if only to present and attempt to make good the postponement application) or to respond in any other way to the Tribunal's email and telephone message. (4) Postponement would result in significant prejudice to the Respondents, leaving them with the burden of facing already stale litigation for a significant further period (the Tribunal would not be able to re-list a preliminary hearing for some months and no final hearing would be possible before summer 2019 at the earliest – well over three years after the earliest matters complained of and more than two-and-a-half years since the last). (5) The union is not large and its membership consists mostly of people on modest incomes. (6) I considered it safe to assume that postponement of the preliminary hearing would result in exposure to costs in terms of money and management time which it could ill-afford. (7) And, perhaps more importantly, three flesh and blood individuals would be put to the stress and anxiety of facing serious allegations of discrimination, stalled and with no progress made, for months to come. (8) Delay is the enemy of justice. (9) It prejudices not only the immediate litigants but also other service users. (10) If any case is postponed or adjourned, the inevitable consequence is that access to justice for those behind them in the (ever-lengthening) queue is also delayed. (11) In all the circumstances, I was quite satisfied that it was in keeping with the overriding application to refuse the application."**

49. In relation to the strike-out application, the Employment Tribunal quoted from Dr Bailey's letter of 29 June 2017 and Dr Gibson's letters of 30 October 2017 and 27 July 2018. It set out Rule 37(1)(e) and referred to *Anyanwu v South Bank Students' Union* [2001] ICR 391, HL. Then it said as follows in paragraph 33 of its judgment (in which we have numbered the sentences for ease of reference):

> **"(1) My conclusion was that this was one of a small class of cases in which the exceptional measure of striking-out was appropriate and in accordance with the overriding objective. (2) I have already referred to the delay which has occurred to date and the fact that, if listed now, a final hearing would not be scheduled to start until more than three years after the earliest of the matters complained of. (3) That by itself is not conclusive but it is a material factor. (4) What seals the matter for me is the medical evidence, which is written by practitioners who know the Claimant and have her interests at heart. (5) That evidence is compelling and persuades me**

> **to a high standard that there is no realistic prospect of this matter being brought to an effective final hearing within a reasonable period. (6) It also persuades me that, the longer this litigation continues, the greater becomes the likely damage to the Claimant's own wellbeing. (7) Of course, the Tribunal has a duty to her to make reasonable adjustments but such adjustments do not include taking steps to prolong the destructive effects of this litigation upon her. (8) On top of these considerations is the self-evident fact that I owe an obligation to do justice by all parties to this dispute. (9) The Respondents, who face serious allegations, are entitled to see an end to their jeopardy. (10) The observations in the *Riley* case are entirely in point. For all of these reasons, I held that all surviving claims must be struck out."**

50. The Employment Tribunal gave the following brief reasons for its decision not to reconsider its judgment:

> **"Pursuant to the Employment Tribunals Rules of Procedure 2013, r72. The application for reconsideration is refused because the judge is satisfied that, for the reasons given with the judgment, there is no reasonable prospect of the judgment being varied or revoked."**

51. It will be noted that the Employment Tribunal did not specifically address either the letter from the Claimant's dentist or what Romany Mukoro claimed to have told the clerk to whom she spoke when she telephoned the Employment Tribunal.

(6) The Grounds of Appeal and the Parties' Submissions

(6)(a) The Decision not to Adjourn the Hearing

52. There are five grounds of appeal in relation to the Employment Judge's decision not to adjourn the hearing. They are as follows:

> **"The ET's finding at §28 that the Appellant had failed to make out a good reason to postpone the hearing and its rejection of the application to postpone were unreasonable in that:**
>
> **a. the ET took into account an irrelevant consideration in treating the Appellant's daughter as if she were a professional representative;**
> **b. the ET wrongly decided not to postpone on account of the failure of the Appellant's daughter to attend;**
> **c. the ET wrongly proceeded on the basis that giving the Appellant's daughter less than one hour's notice to attend was sufficient notwithstanding:**
> **i. the Appellant's stated medical position;**
> **ii. the fact that the Appellant's daughter was with her;**
> **iii. the function of distance (the Appellant's home address was in Barnes, SW13);**
> **d. the ET criticised lack of corroborative evidence (medical or otherwise) – see §18 – without considering what, if anything, could have been produced in the circumstances;**

e. the ET took into account an irrelevant consideration, namely the prejudice to the (professionally-represented) Respondents."

53. The Claimant submitted that:

(1) The Claimant was on the record as a litigant in person and had represented herself at the hearings on 16 March and 12 July 2018. No indication had been given to the Employment Tribunal that Romany Mukoro would be speaking for the Claimant at the hearing on 26 September 2018.

(2) Romany Mukoro had not wilfully refused to attend the hearing, but had assisted her mother in a medical crisis. The Employment Tribunal was wrong to treat her non-attendance as, in effect, a conscious decision on her part not to attend.

(3) The Employment Tribunal's email was sent after 10.30am, when the Employment Tribunal had been told that she would be unavailable. The Employment Tribunal had no basis for its assumption that she could have responded to an email sent at 11.05 am by appearing in front of the Employment Tribunal at noon, especially as the ET1 claim form gave the Claimant's address as Barnes, London SW13.

(4) This was an emergency. Medical evidence could not reasonably be expected in the timescale set by the Employment Tribunal.

(5) In the narrow context of an unforeseen medical emergency, the prejudice caused to the Respondents by an adjournment was irrelevant. Alternatively, it was outweighed by the prejudice caused to the Claimant by refusing an adjournment, which was that an application for an order striking out her claims went unanswered and was successful.

54. Against that, the Respondents submitted, in general terms, that: this was a case management decision, in respect of which this Tribunal should be slow to interfere; there is no challenge to the Employment Tribunal's directions on the law; the Claimant's attendance would have made no difference to the outcome; and unreasonableness will not suffice, only perversity will support an appeal.

55. As to the particular grounds of appeal, the Respondents submitted that:

(1) The Employment Tribunal did not treat the Claimant's daughter as a professional representative, but merely noted that she was experienced in representing her mother's interests.

(2) It was relevant for the Employment Tribunal to refer to the potential attendance of the Claimant's daughter as something which might have assisted the Claimant, but did not.

(3) There was nothing to suggest that the Claimant or her daughter could not have answered the email sent to her. The Employment Tribunal was given no information as to Romany Mukoro's location.

(4) The Claimant could have provided something from her dentist, or at least a statement setting out the onset of her difficulties, when she first made any consultation and so on.

(5) It was appropriate for the Employment Tribunal to have regard to the prejudice to the Respondents: see *Andreou* at [46] and *Riley v CPS* at [25].

A

(6)(b) The Strike-Out

56. There are three grounds of appeal in relation to the Employment Tribunal's decision to strike out the Claimant's claims. They are as follows:

B

> **"In assenting to what was, in the circumstances, an unopposed application to strike out, the ET acted unreasonably in that:**
>
> **a. the ET determined what was in the Appellant's best interests - §33 – when this was not a decision for the ET but for the Appellant;**
> **b. the ET failed to have any or any proper regard for the requirement of the ET to make accommodations for the Appellant's (admitted) disability despite frequent references on behalf of the Appellant in correspondence (including to the Equal Treatment Bench Book;**
> **c. the ET failed to have proper regard for the importance that discrimination claims be heard. That importance weighs against striking out claims even when the merits might appear less that compelling. It must weight *a fortiori* in the case where the issue is not a perceived lack of strength to the case but concern arising from a party's characteristic (here disability)."**

C

D

57. The Claimant's submissions in relation to these grounds were, in summary, as follows:

(6) The Employment Judge wrongly took account of the question whether the continuation of the proceedings would be harmful for the Claimant's health, when this was not relevant to the question whether there could be a fair hearing and he should have respected her ability to speak to her own condition: see *Rackham v NHS Professionals Ltd (UKEAT/0110/15/LA)*.

E

F

(7) The medical evidence indicated that the claim could proceed, with reasonable adjustments, as recommended by Dr Gibson in his letter of 27 July 2018, which would have permitted the Claimant to present her case.

G

(8) Any Tribunal should be slow to strike out a discrimination claim: see *Anyanwu v South Bank Student Union* [2001] ICR 391. It was not proportionate to strike out the Claimant's discrimination claim in response to a one-off medical emergency.

H

58. The Respondents' submissions were, in summary:

(6) The Employment Tribunal did not determine what was in the Claimant's best interests.

(7) The Employment Tribunal specifically referred to the duty to make reasonable adjustments, but no adjustments were identified which would have allowed a fair hearing to take place.

(8) The Employment Tribunal directed itself as to the need for caution when striking out discrimination cases.

(6)(c) The Reconsideration Decision

55. There was no appeal against the reconsideration decision. It would have been better from a procedural point of view if there had been an appeal against the reconsideration decision, since that would have resolved the issue about fresh evidence to which we now turn.

(7) Fresh Evidence

56. In relation, in particular, to the appeal against the refusal to adjourn the hearing, the Claimant sought to rely on what was, in effect, fresh evidence, namely the dentist's letter of 26 September 2018, the screenshot from Romany Mukoro's telephone and the statements made in Romany Mukoro's email of 2 October 2018 and in the application attached to her email of 12 October 2018 that she told the Employment Tribunal clerk when she telephoned at about 9 am that she would be available to speak until 10.30 am and, after that, would be in the emergency dental appointment with the Claimant. These statements were not made in a formal witness

statement, but they were submitted to the Employment Tribunal shortly after the hearing and, making allowance for the fact that the Claimant is a litigant in person, we do not consider it appropriate to exclude them merely for want of formality.

57. Paragraph 9.1 of the Practice Direction (Employment Appeal Tribunal – Procedure) 2018 provides as follows:

> **"Usually the EAT will not consider evidence which was not placed before the Employment Tribunal unless and until an application has first been made to the Employment Tribunal against whose judgment the appeal is brought for that Tribunal to reconsider its judgment. Where such an application has been made, it is likely that unless a judge of the EAT dismisses the appeal as having no reasonable prospect of success the judge will stay (or sist) any further action on that appeal until the result of the reconsideration is known. The Employment Tribunal as the fact-finding body, which has heard relevant witnesses, is the appropriate forum to consider "fresh evidence" and in particular the extent to which (if at all) it would or might have made a difference to its conclusions. When deciding if an Employment Tribunal erred in law when deciding on an application to reconsider an earlier decision, the EAT will have regard to any evidence placed before the Employment Tribunal in relation to the application to reconsider."**

58. As has already been noted, the Claimant did make an application for reconsideration and the fresh evidence formed part of that application. The Employment Tribunal thus had, but did not take, the opportunity to address that fresh evidence. Pursuant to the final sentence of paragraph 9.1, the fresh evidence would have been admissible on an appeal against the refusal of the reconsideration application, but no such appeal was commenced.

59. Paragraphs 9.2 to 9.5 of the Practice Direction (Employment Appeal Tribunal – Procedure) 2018 provide as follows:

> **"9.2 Subject to paragraph 9.1, where an application is made by a party to an appeal to put in, at the hearing of the appeal, any document which was not before the Employment Tribunal, and which has not been agreed in writing by the other parties, the application and a copy of the document(s) sought to be admitted should be presented to the EAT with the Notice of Appeal or the Respondent's Answer, as appropriate. The application and copy should be served on the other parties. The same principle applies to any oral evidence not given at the Employment Tribunal which is sought to be adduced on the appeal. The application to consider Fresh Evidence must explain what that evidence is, and how it came to light. Generally, a witness statement detailing this should be filed with the EAT and served on the other parties when the application is made.**
>
> **9.3 In exercising its discretion to admit any fresh evidence, the EAT will only admit the evidence (in accordance with the principles set out in *Ladd v Marshall* [1954]**

> **1WLR 1489 and having regard to the overriding objective), if all of the following apply:**
>
> **9.3.1 the evidence could not have been obtained with reasonable diligence for use at the Employment Tribunal hearing; and**
>
> **9.3.2 it is relevant and would probably have had an important influence on the hearing; and**
>
> **9.3.3 it is apparently credible.**
>
> **Accordingly the evidence and representations in support of the application must address these principles.**
>
> **9.4 A party wishing to resist the application must, within 14 days of its being sent, submit any representations in response to the EAT and other parties.**
>
> **9.5 The application will be considered by the Registrar or a judge on the papers (or, if appropriate, at a PH) who may stay (or sist) the appeal in accordance with paragraph 9.1, determine the issue or give directions for a hearing or may seek comments from the employment judge. A copy of any comments received from the employment judge will be sent to all parties.**

60. The Claimant did not make a separate application for permission to rely on this fresh evidence, but she had put it before the Employment Tribunal in support of her application for reconsideration and it is clear that the dentist's letter, at least, was relied on at the rule 3(10) hearing, since HHJ Eady QC referred to it in her reasons and clearly envisaged that it would be relied on at the hearing of the appeal. It was also clear from the Claimant's skeleton argument dated 23 December 2019 that the Claimant intended to rely on the fresh evidence. In all the circumstances, including the fact that the Claimant is a litigant in person, and having regard to the overriding objective, we considered it appropriate to hear argument as to whether the fresh evidence should be admitted.

61. The Respondent contended that the fresh evidence did not meet the test in *Ladd v Marshall* [1954] 1 WLR 1459, but we consider that it did:

(1) The evidence could not have been obtained with reasonable diligence for use at the tribunal hearing. The dentist's letter could not be obtained until after the dentist had seen the Claimant. It was not known until after the hearing that the message had not reached Employment Judge Snelson that Romany Mukoro would be with the Claimant in her emergency dental appointment at 10.30 am.

Reasonable diligence did not require the Claimant or her daughter to provide evidence of what Romany Mukoro had told the clerk to whom she spoke at about 9 am.

(2) The evidence is relevant and would probably have had an important influence on the hearing. The dentist's letter was medical evidence confirming the Claimant's condition. The statements by Romany Mukoro confirmed that the Claimant was receiving treatment at the very time when the hearing was due to be taking place and that Romany Mukoro was with her and that the Employment Tribunal had been told this. This contradicted the statement in the Employment Tribunal's email of 11.05 am that Romany Mukoro's absence from the hearing was unexplained.

(3) The evidence is apparently credible. That is certainly true of the dentist's letter. The screenshot from Romany Mukoro's telephone supports her claim to have called the Employment Tribunal three times. Moreover, the Employment Tribunal had the opportunity to respond to the fresh evidence when dealing with the reconsideration application. We accept that Romany Mukoro told the Employment Tribunal clerk when she telephoned at about 9 am that she would be available to speak until 10.30 am and, after that, would be in the emergency dental appointment with the Claimant.

59. The Respondent also submitted that we should not admit the fresh evidence in the absence of an application, but we consider that it is appropriate to do so in the circumstances, having regard, in particular, to the nature of the fresh evidence and, significantly, the fact that the Employment Tribunal had the opportunity to deal with it as part of the reconsideration application

and HHJ Eady QC clearly envisaged that the dentist's letter, at least, would be relied on at the hearing of the appeal.

(8) Decision: The Refusal to Adjourn the Hearing

60. If the Claimant was unable to attend the hearing through no fault of her own, then this was a case of the kind referred to by Peter Gibson LJ in paragraph 20 of his judgment in *Teinaz v London Borough of Wandsworth*, in which an adjournment had to be granted, since not to do so would amount to a denial of justice. The consequence of the refusal of an adjournment would be that the Claimant would not have the opportunity to resist an application for an order striking out her claims. As Peter Gibson LJ said, where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal must be particularly careful not to cause an injustice to the litigant seeking an adjournment.

61. We do not accept the Respondent's submission that, in effect, the Employment Tribunal could take the view that the Claimant's attendance would make no difference to the hearing. Indeed, we note that the Employment Tribunal did not rely on this as a ground for its decision to refuse an adjournment. A central issue at the hearing was going to be the Claimant's state of mental health and the effect of that on her claims. The Claimant was particularly well-placed to speak to her own health, as this Tribunal recognised in paragraph 50 of its judgment in *Rackham v NHS Professionals Ltd*.

62. The Employment Tribunal addressed the potential prejudice to the Respondents at some length in the fourth to seventh sentences of paragraph 28 of its judgment. We do not go so far as to say that the potential prejudice to the Respondents was an irrelevant consideration, but, if the Employment Tribunal had accepted that the Claimant had been unable to attend the hearing

through no fault of her own, then it is a consideration which would have been outweighed by the need to avoid a denial of justice.

63. As set out in the first sentence of paragraph 28 of its judgment, the basis for the Employment Tribunal's decision was, in effect, that it did not accept that the Claimant had established that she was unable to attend the hearing through no fault of her own. The Employment Tribunal set out in the second and third sentences of paragraph 28 what the Claimant and her daughter had not done, but it did not address what Romany Mukoro had done, namely to inform the Employment Tribunal:

(1) in her email that the Claimant had developed an excruciatingly painful abscess and had had to seek immediate medical attention and an emergency appointment with her dentist, as a result of which she was unable to attend the hearing; and

(2) by telephone, that she would be available to speak until 10.30 am and, after that, would be in the emergency dental appointment with the Claimant.

64. In the second sentence of paragraph 28 of its judgment, the Employment Tribunal noted that the Claimant had not provided medical evidence. However, in the eighth sentence of the email sent at 11.05, the Employment Tribunal had recognised that it might not be practicable for the Claimant to produce medical evidence.

65. In the third sentence of paragraph 28 of its judgment, the Employment Tribunal dealt with the position of Romany Mukoro. The context is that the Employment Tribunal had said in the ninth sentence of its email that Romany Mukoro must be taken to have first-hand knowledge of the Claimant's present condition and any treatment she was undergoing. The Employment Tribunal also stated in the second sentence of its email that Romany Mukoro's absence was

unexplained. That statement was incorrect and was a consequence of the Employment Tribunal not taking account of what Romany Mukoro had told the Employment Tribunal clerk by telephone.

66. Having acknowledged in the email that Romany Mukoro had first-hand knowledge of the Claimant's present condition and any treatment which she was undergoing, and having stated that her evidence at least could be offered, the Employment Tribunal did not address in paragraph 28 of its judgment the information which Romany Mukoro had already provided about her mother's present condition, i.e. that she had an excruciatingly painful abscess, and her mother's treatment, i.e. that she was seeking immediate medical attention and an emergency appointment with her dentist, which was to commence at 10.30 am.

67. The Employment Tribunal did not say, for instance, that it did not believe what Romany Mukoro had said in her email of 8.18 am. The Employment Tribunal said in its email of 11.05 am that it would not grant an adjournment on mere assertion, but Romany Mukoro's email was more than mere assertion. It contained information about the nature of the Claimant's condition from someone whom the Employment Tribunal acknowledged had first-hand knowledge of the Claimant's condition.

68. In the third sentence of paragraph 28 of its judgment, the Employment Tribunal said that Romany Mukoro had had the opportunity to attend the Tribunal or to respond in any other way to the Tribunal's email. In saying this, the Tribunal did not take account of Romany Mukoro's indication that she would be with her mother in the dental appointment at 10.30 am. The statement in the ninth sentence of the Employment Tribunal's email that Romany Mukoro must be taken to have first-hand knowledge of the Claimant's present condition and any treatment she was undergoing was tantamount to an acceptance that Romany Mukoro was with her mother.

The Employment Tribunal had been told that the Claimant was seeking an appointment with her dentist. The address of the dentist's surgery had not been specified, but the Employment Tribunal had no reason to believe that it was significantly closer to the Tribunal than the Claimant's home in London SW13.

69. In these respects, we consider that the Employment Tribunal failed to take account of relevant considerations, namely the contents of Romany Mukoro's email of 8.18 am and what she said on the telephone. The Employment Tribunal having made an error of law, it is appropriate for us to consider whether the hearing should have been adjourned. In all the circumstances, we have come to the view that it should have been, since to do otherwise would be a denial of justice. Accordingly, we allow the appeal.

(8) Decision: The Strike-Out

70. Since we have decided that the hearing should have been adjourned, it follows that the Claimant's claims should not have been struck out at the hearing. In those circumstances, we do not need to address all of the issues which arose on the appeal against the strike-out.

71. We will say this, however. We consider that it was an error of law for the Employment Tribunal to take into account an irrelevant factor, namely its view of what was in the Claimant's best interests. That is, in effect, what the Employment Tribunal did in the sixth and seventh sentences of paragraph 33 of its judgment. Amongst the reasons which it gave for striking out the claims were that:

(1) not doing so would increase the likely damage to the Claimant's well-being; and

(2) the Employment Tribunal did not regard itself as bound to make reasonable adjustments (which, ex hypothesi, would enable the claim to continue) if doing so would prolong the destructive effects of the litigation on the Claimant.

72. Each of these reasons amounted, in effect, to the Employment Tribunal saying that it was in the Claimant's best interests to strike out the claims. However, that is not a ground for striking out a claim and it is not relevant to the question whether a fair hearing is possible. The Employment Tribunal was entitled to look at the medical evidence in order to form a view about whether the Claimant would be able to participate effectively in the proceedings, but it was not appropriate for the Employment Tribunal to use that evidence to form a view about whether it was in the Claimant's best interests to continue with her claims. The Employment Tribunal made no finding that the Claimant lacked capacity to conduct her claims. Unless they lack capacity, litigants are entitled to exercise their own judgment on questions such as whether to continue or to withdraw a claim. As the Employment Appeal Tribunal said in paragraph 59 of its judgment in *Rackham v NHS Professionals Ltd*, they are entitled to respect for their autonomy.

(9) Summary

73. For the reasons stated in this judgment, we allow the appeal against the order of 26 September 2018 striking out the Claimants' claims and direct that there be a fresh hearing of the Respondents' application for an order striking out the Claimant's claims.