Appeal No UKEAT/0266/18/DA
UKEAT/0187/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6, 7, 8 November 2019
Judgment handed down on 27th February 2020

Before

THE HONOURABLE MR. JUSTICE SWIFT

(SITTING ALONE)

ROYAL BANK OF SCOTLAND PLC APPELLANT

AB RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Mr Gerard McDermott (One of Her Majesty's Counsel) and Mr William Young of Counsel Instructed by Sternberg Reed Solicitors
For the Respondent	Mr Bruce Carr (One of Her Majesty's Counsel) and Mr Colin Mendoza and Ms Alice Carse of Counsel Instructed by Brodies LLP

SUMMARY

PRACTICE AND PROCEDURE

DISABILITY DISCRIMINATION

This was an appeal against the decision at a remedies hearing, following the conclusion that the employee had suffered discrimination on grounds of disability. The employee contended she had suffered a serious psychiatric injury as a result of the unlawful discrimination which prevented her from working for the foreseeable future and which required round the clock care. The Employment Tribunal awarded compensation of £4,670,535 (which the parties are agreed should be altered to £4,724,801 to reflect interest accruing prior to the date of the Employment Tribunal's Judgment). The employer appealed.

The issues in the appeal concerned the Tribunal's decisions on (a) whether it was necessary to assess the employee's capacity to conduct the litigation at the time of the remedies hearing; (b) whether (and to what extent) the psychiatric injury was caused by the discrimination; (c) whether the employee had exaggerated her condition; and (d) the sufficiency of the Tribunal's reasons for preferring the evidence of one expert witness over another.

The appeal was dismissed, save in respect of one ground of appeal which concerned the Employment Tribunal's conclusion that no assessment of the employee's capacity to conduct litigation had been required. The Employment Appeal Tribunal concluded that there was no need to remit the question of assessment to the Employment Tribunal. The failure to assess had not rendered the Employment Tribunal proceedings void, and did not constitute unfairness to the employer in the conduct of the proceedings amounting to an error of law.

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THE HONOURABLE MR. JUSTICE SWIFT

A. Introduction

1. In a Judgment sent to the parties on 12 February 2016 the Employment Tribunal upheld AB's complaint of unfair dismissal against her former employer, the Royal Bank of Scotland plc ('RBS'). The Tribunal further concluded that RBS had unlawfully discriminated against AB on grounds of disability.

2. AB worked for RBS from October 2008 until her resignation in May 2014. She was originally employed as a Customer Services Officer at one of RBS's NatWest branches in Croydon, but in the course of her employment she worked at various NatWest branches including, from October 2011, the branch in Stratford where she was a Customer Services Officer.

3. In August 2008, on her way to work on the day due to be her first day of employment, AB was knocked down by a car. She suffered significant injuries, including a broken leg, damage to her knee ligaments, and nerve damage. When she was able to start work, two months later, her left leg was in a brace, her left foot in a splint, and she needed to use crutches. Throughout her employment she continued to wear the foot splint and walked with a slight limp. The Tribunal heard evidence that these injuries continued to cause AB pain throughout the period of her employment, and that this pain affected her ability to work and to be at work. Her continuing disabilities were such that from November 2008 she was paid Disability Living

Allowance, including the mobility element of that benefit. RBS did not dispute that AB's physical condition amounted to a disability for the purposes of the **Equality Act 2010**.

4. Further, either the Tribunal concluded or it was common ground that, during the course of her employment AB came to suffer from a mental illness that amounted to a disability. During the course of her employment AB had two significant periods of sick leave: in July and August 2013 when she was absent from work because of "low mood and physical pain"; and then from the end of December 2013 until her resignation at the beginning of May 2014 when she was absent from work by reason of stress. However, the Tribunal further concluded that RBS could not have reasonably been expected to know that by reason of these matters AB suffered from a disability for the purposes of the **Equality Act 2010**.

5. In its liability Judgment the Employment Tribunal concluded that AB had been constructively dismissed, and that the dismissal was unfair. The Employment Tribunal found that RBS had acted in breach of the obligation to maintain the necessary relationship of trust and confidence, and in breach of an implied obligation to provide a safe working environment. So far as concerns the disability discrimination claim, the Tribunal concluded that discrimination had taken place: first by reason of a failure to make reasonable adjustments relating to AB's work station and requiring AB to work on the till in the branch; second by reason of comments made either to or about AB on five occasions; and thirdly by reason of a failure to permit AB to transfer from the Stratford Branch either to the Clapham Branch or the Balham Branch.

6. This appeal concerns the Employment Tribunal's conclusions on remedies. The first remedies hearing commenced on 24 July 2017. That hearing took place between 24 – 28 July, on 7 September 2017, and between 2-3 November 2017. The Tribunal sat in chambers on 6-8 and 27 November 2017, and on 21 December 2017. The Tribunal's decision was sent to the parties 6 March 2018. The issues at the remedies hearing were very significant. AB's contention was that in consequence of the discrimination that had occurred she suffered from severe depression. Her case was supported by medical reports from a consultant psychiatrist, Dr Jonathan Ornstein. In his first report, dated 22 July 2016, he diagnosed AB to be suffering from a severe depressive disorder with psychosis. Given the longevity and severity of AB's symptoms he considered that her prognosis, at least for the foreseeable future, was very poor. His opinion was that AB was severely depressed and unable to work, and that he could not foresee whether AB would ever be able to return to work. His conclusion was that the discrimination she had suffered at work was the cause of AB's condition. Dr Ornstein provided six further reports for the remedies proceedings, each report reviewing further information that had been obtained as preparation for the hearing progressed. In his report dated 28 April 2017 he stated conclusions: (a) that AB showed *"severe signs and symptoms of multiple psychiatric disorders, namely severe depression, anxiety and conversion disorders as well as psychosis"*; and (b) the "*Tribunal and discrimination are the primary causes of the current presentation"*. In a report dated 4 May 2017 Dr Ornstein agreed with the conclusion stated in a care report completed on 30 September 2016, that AB required on-going, 24-hour care.

7. In opposition to those conclusions, RBS relied on evidence prepared by another consultant psychiatrist Dr Jennifer Stein. She disagreed with many parts of Dr Ornstein's opinion and in particular she disagreed as to the cause of AB's psychiatric injury, and as to the

extent of that injury. Thus, it was left to the Tribunal: (a) to decide whether AB's psychiatric condition was the consequence of the acts of discrimination that had occurred at work, or whether it had been caused by matters pre-dating those events (in particular the road accident that had taken place in August 2008); and (b) to resolve the disputes of evidence as to the extent of the psychiatric injury from which AB suffered.

8. The damages claimed by AB were significant. The value of the claim was summarised at paragraphs 12 and 87 of the Tribunal's First Remedies Judgment and was in excess of £10.5 million. By far the largest single element was the claim for the cost of future care and assistance which was put at £9.9 million. In its First Remedies Judgment the Employment Tribunal set out its conclusions on the issues of principle, namely causation, whether AB had exaggerated her psychiatric symptoms, the level of the award of damages to be made for pain suffering and loss of amenity, and the amount of damages to be awarded in respect of the cost of future care (on the assumption that the conclusion on causation permitted such damages to be recovered at all). The Employment Tribunal then left it to the parties to seek to agree the sum payable based on the conclusions it had set out. In case of default of such agreement, the Tribunal listed a further hearing for 27 and 28 March 2018. As it turned out, the parties were not able to agree all matters and the hearing listed in March 2018 did take place. This resulted in a Second Remedies Judgment which was sent to the parties on 9 April 2018. The overall outcome of the remedies proceedings was an order that RBS pay AB damages in the amount of £4,670,535. The parties are agreed that pre-judgment interest in the amount of £54,266.20 should be added to the figure provided in the Tribunal's order. I am told that the Tribunal has been informed of this but has not yet issued a revised order. When that order is issued, the parties agree that it should record the amount payable as £4,724,801.

A

9. Each of the Remedies Judgments was the subject of a Notice of Appeal. Taken together the grounds of appeal contained in the Notices were as follows:

B

First Remedies Judgment

C

Ground 1. The Employment Tribunal erred by failing to adjourn the hearing for formal assessment of AB's capacity to conduct the litigation, and to give evidence.

D

Ground 2. Having concluded that no assessment of AB's capacity to conduct litigation was required, the Employment Tribunal should have concluded that AB's failure to give evidence at the remedy hearing indicated that she had exaggerated her psychiatric ill-health.

E

Ground 3. The Employment Tribunal had wrongly failed to reconsider its decision not to adjourn pending assessment of AB's capacity to litigate.

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Ground 4. The Employment Tribunal should have reduced the amount payable to AB to take account of the possibility that her psychiatric condition would have occurred in any event by reason of her pre-existing vulnerability and other psycho-social stressors.

G

Ground 5. The Employment Tribunal failed to give sufficient reasons to explain why it preferred the evidence of Dr Ornstein to the evidence of Dr Stein.

H

Ground 6. The Employment Tribunal was wrong to calculate the award it made for the cost of past care on the basis of the aggregate rate.

Second Remedies Judgment

Ground 1. That the Employment Tribunal had misapplied the provisions of the Social Security (Recovery of Benefits) Act 1997, with the consequence that the damages awarded to AB for past loss of earnings and future loss of earnings had included an element of double recovery.

10. At the beginning of the hearing of the appeal Mr Carr QC stated that RBS no longer intended to pursue the single ground of appeal against the Second Remedies Judgment. In the course of the hearing RBS abandoned Ground of Appeal 6 of the appeal against the First Remedies Judgment. (At the hearing before me, RBS was represented by Mr Carr QC Mr Mendoza and Miss Carse. At the Employment Tribunal hearing RBS was represented only by Mr Mendoza and Miss Carse.)

B. Decision

(1) Grounds of Appeal 1 and 3

11. These grounds of appeal are directed to the Employment Tribunal's conclusion that it was not necessary to assess whether AB had capacity to conduct the litigation as at the time of the remedies hearing.

12. AB was due to give evidence on 24 July 2017, at the beginning of the remedies hearing, but did not do so. The Employment Tribunal was told she was not able to give evidence that day as she was not able at that time to give instructions. AB's counsel Gerard McDermott QC told the Tribunal that he needed to speak to AB further to determine whether she would be able to give evidence. That being so, the remedies hearing started with the evidence of Dr Ornstein, which lasted until lunch the next day, 25 July 2017. After lunch on 25 July, AB came into the hearing room. In its Judgment, the Employment Tribunal records that when AB was asked questions by Mr McDermott.

> **"… her response was unintelligible. She did not appear to recognise Mr. McDermott. Her responses to the very simple questions he put to her were sounds and grunts, not words. Her presentation was similar to that described by Dr. Valentine and shown in the recording he had taken of a part of his interview with [AB] and which was watched in the course of this remedy hearing"**

Dr Valentine is a Consultant in pain medicine. He had provided a report for the proceedings dated 27 May 2017. In that report he set out how AB had acted when she was examined by him on 5 April 2017.

> **"[AB] presented with her back to me. She was observed to perform a variety of movements throughout the assessment, for example, she was observed to slap herself, scratch herself, and rock to and from. She communicated broken/stuttering speech accompanied by other non-verbal vocalisations."**

Mr McDermott QC and Mr. Young, who acted for AB in the Employment Tribunal proceedings and act for her in this appeal, accepted Mr Carr's description that AB's presentation at the Employment Tribunal was *"shocking"*. The Employment Tribunal explains in its Judgment that Mr McDermott then informed it that he would not be calling AB to give evidence.

13. The first and third grounds of appeal arise out of the decisions taken by the Employment Tribunal in the face of this state of affairs. RBS applied to the Employment Tribunal for an order requiring an assessment of whether AB had capacity to conduct the Tribunal proceedings. If the result of that assessment had been that AB did not have capacity, it would have been necessary for a litigation friend to have been appointed to conduct the proceedings on her behalf. The Employment Tribunal heard submissions on this application from RBS during the afternoon of 25 July 2017, and submissions from Mr McDermott on behalf of AB the following morning. Later the same morning (26 July 2017) the Employment Tribunal refused RBS's application. The Tribunal stated the reasons for its decision, orally. The written reasons for the decision are at paragraphs 17 - 26 of the First Remedies Judgment. The Employment Tribunal referred to the presumption at section 1(2) of the **Mental Capacity Act 2005** that a person is to be assumed to have capacity *"unless it is established that he lacks capacity"*, and also to sections 2 and 3 of the **2005 Act**. At paragraph 26 of the Judgment the Employment Tribunal said as follows as to why an assessment of AB's capacity to conduct the litigation was not necessary.

> **"26. After giving consideration to the representatives' helpful submissions the Tribunal concluded that the presumption [of] capacity had not been displaced and refused the Respondent's application for the case to be stayed in order for a formal assessment to be made including for the following reasons:**
>
> **26.1 The Claimant's legal team were satisfied that they could obtain the necessary instructions from their client and continue with these proceedings.**
>
> **26.2 This is a case where the Claimant has a QC that has been recently instructed. She has a junior, Mr. Young, who has been representing the Claimant over a long liability hearing and numerous Preliminary Hearings.**
>
> **26.3 The Claimant has had solicitors who have been representing her for years.**
>
> **26.4 The instructions that the Claimant's lawyers take from the Claimant are privileged. They are satisfied that they are able to continue to act for the Claimant.**
>
> **26.5 Dr Ornstein has given a recent assessment of the Claimant's capacity, based on meeting her April 2017, in which he has given his view that the claimant has the necessary capacity.**
>
> **26.6 Neither of the psychiatric experts present in this Tribunal had notified the Tribunal that their professional opinion is that the Claimant does not have capacity.**

26.7 The presumption of section 1 of the Mental Capacity Act, that an individual has capacity to act has not, therefore, been displaced and the application was refused."

14. The Order recording the Employment Tribunal's decision that it was not necessary to assess AB's capacity to litigate was sent to the parties the next day, 27 July 2017. Paragraph 1 of that Order states that *"the Respondent's application for these proceedings to be stayed is refused"*. That may not properly reflect the substance either of the application made to the Tribunal or the Tribunal's decision. However, it is common ground before me that this paragraph of the Order records the Employment Tribunal's decision that no assessment of AB's capacity to litigate was necessary.

15. Late in the afternoon on 27 July (the fourth day of the hearing), RBS asked the Employment Tribunal to reconsider whether an assessment of AB's capacity to litigate was required. Submissions in support of this application were made on the morning of 28 July 2017. RBS described the application either as an application to reconsider the decision given on 26 July 2017, or as a new application for assessment of AB's capacity to litigate. RBS contended that new information was available in the form of a note prepared by Dr Stein dated 27 July 2017. In that note, Dr Stein set out observations on AB's presentation at the Employment Tribunal hearing on the afternoon of 25 July 2017. The essence of the note was that if the way AB presented was accepted at face value, it gave rise to grounds for doubting her decision-making capacity.

16. The Tribunal rejected the application. It gave oral reasons for its decision, which were subsequently set out at paragraphs 40 – 52 of the First Remedies Judgment. The Employment Tribunal's starting point was that it should only revisit its decision on capacity if there had been

a material change of circumstances. It concluded that the contents of Dr Stein's note did not reveal any such change in circumstances. At paragraph 49 the Tribunal stated as follows.

> **"The evidence of Dr Stein was the confirmation or elaboration of some of the evidence she, as the Respondent's expert witness, had given. Nor at any point had she given any opinion that the Claimant does not have capacity, even although it was something Mr McDermott had specifically asked her to do when drafting an additional statement before she gave evidence."**

17. The Employment Tribunal then went on to point out that the matters set out in Dr Stein's note either could have been made earlier in support of the application made on 25 July 2017, or alternatively that the earlier application should have been delayed and not made until the note was available. The Employment Tribunal concluded as follows, at paragraph 52.

> **"In short, the application to have the Tribunal's Case Management Order set aside appears to have no merit and to be illustrative of having a confrontational approach to the litigation. The Tribunal's original reasons in the decision it made held good, there had been no material change in the circumstances, finality in litigation is important, and the impression given was the Respondent's representatives did not like the Tribunal's decision, were piqued by it and wanted to try to bully the Tribunal into making another decision to its liking."**

18. What is said in this paragraph of the Judgment is striking. In this regard, it is notable that the first 82 paragraphs of the First Remedies Judgment comprised rulings on interlocutory applications. Read at the remove of an appeal hearing conducted a little over two years later, paragraph 52 of the Judgment suggests a fractious situation in which the usual bonds of mutual respect between the parties and the Tribunal – essential to the conduct of litigation – were under strain. Managing claims that are out of the ordinary can be difficult. This case was in that class because of the very significant consequences, as alleged by AB, of the discrimination she had suffered. Even when as in this case parties are professionally represented, the way in which complex and difficult cases are conducted can cross the line between hard-fought and unnecessarily confrontational. It is plain from any reading of the First Remedies Judgment that the Employment Tribunal considered that line had been crossed, in particular by RBS. Yet in

A expressing itself in the way that it did at paragraph 52 of its Judgment, the Tribunal also crossed a line that ought not have been crossed. All involved in litigation, including and in particular the Tribunal, must do their upmost to create and maintain a constructive environment in which applications can be raised, considered, and determined without exasperation. If a Tribunal concludes that applications made to it are repetitious and for that reason without merit, it should say so, and say it clearly. But the Tribunal's statement that it was being "bullied" suggests it had lost sight that it was its responsibility alone to control the proceedings. The notion that a tribunal or court is being "bullied" by litigants is a misuse of language. The observations made by the Tribunal at the end of paragraph 52 are regrettable and ought not to have formed part of the Judgment. Be that as it may, those observations do not go to any point of substance in this appeal. I will now address the grounds of appeal.

19. Ground of Appeal 1 is that the Employment Tribunal should have required an assessment of AB's capacity to conduct the litigation to have been undertaken. This is directed to the decision given orally on 26 July 2017 and contained in the Order sent to the parties on 27 July 2017. Ground of Appeal 3 is directed to the decision announced on 28 July 2017 not to revisit the earlier decision that there was no need to assess AB's capacity to conduct the litigation. AB opposes both these grounds of appeal on their merits. In addition, she submits that Ground of Appeal 1 is time barred. The time point is as follows: the Order containing the 26 July 2017 ruling on the need for a capacity assessment was sent to the parties on 27 July 2017; by Rule 3(3)(b) of the Employment Appeal Tribunal Rules 1993 any appeal against an order of an Employment Tribunal is to be served on the Employment Appeal Tribunal 42 days from the date of the Order; in this case the 42 day period ran to 5 September 2017; but the Notice of Appeal was not received by the Employment Appeal Tribunal until 24 April 2018.

No corresponding time point arises in respect of the Employment Tribunal's decision on 28 July 2017 since that was not the subject of a separate Order. So far as concerns that decision, time to appeal started to run on 6 March 2018 when the First Remedies Judgment was sent to the parties. I will consider the time point after considering the substantive merits of the first and third grounds of appeal.

20. Where a person lacks capacity to conduct litigation in the High Court, the court may appoint a litigation friend to conduct the litigation on the person's behalf: see CPR Part 21. This power is distinct from the power of the Court of Protection under section 16 of the **Mental Capacity Act 2015** to appoint a Deputy to take decisions on behalf of any person who lacks capacity. If appointed, and subject always to the extent of the terms of appointment, a Deputy may conduct litigation on behalf of the person who lacks capacity.

21. The events of this Tribunal hearing on 25 to 26 July 2017 came before the judgment of the Employment Appeal Tribunal in **Jhuti v Royal Mail Group Ltd** [2018] ICR 1077 was handed down, on 31 July 2017. In **Jhuti,** the Employment Appeal Tribunal concluded that an Employment Tribunal did have power, under Rule 29 of the Employment Tribunals Rules of Procedure 2013, to appoint a litigation friend. In reaching this conclusion the Employment Appeal Tribunal departed from its earlier judgment in **Johnson v Edwardian International Hotels Ltd** (2 May 2008 – the decision then being that an Employment Tribunal did not have the power appoint a litigation friend). Recognition of an Employment Tribunal's power to appoint a litigation friend is not a matter that was critical to the Employment Tribunal's decision in this case. The only question for the Tribunal raised by the application made by RBS on 25 July 2017 was whether the Employment Tribunal needed to pause its proceedings to

permit assessment of AB's capacity to conduct litigation to take place. Prior to the judgment in **Jhuti** any such assessment and any orders consequent upon it, would have been for another court, mostly likely the Court of Protection. I mention the judgment in **Jhuti** and the earlier judgment in **Edwardian International Hotels** only to indicate that, as at the time of the decision of the Employment Tribunal in this case, the position, in Employment Tribunal proceedings, of litigants who lacked capacity to litigate, was not entirely straightforward.

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

23. The way AB presented to the Employment Tribunal on the afternoon of 25 July 2017 did provide reason to suspect that she might not have had capacity to conduct the litigation. She did not appear to recognise her counsel; and she appeared unable to respond to simple questions. Although it is true that the presumption of capacity at section 1(2) of the 2005 Act can only be displaced by evidence that establishes a lack of capacity, the issue for the

A Employment Tribunal on 25 - 26 July 2017 was not to decide whether AB lacked capacity but whether there was good reason for concern that AB might lack capacity such that an assessment was required.

B

24. In reaching its decision that no such assessment was required, the Employment Tribunal relied on four matters: (a) the view of AB's lawyers that they were satisfied they were able to continue to act for AB; (b) the views of Dr Ornstein in a report dated 21 July 2017; (c) the fact

C that neither Dr Ornstein or Dr Stein had notified the Employment Tribunal that their opinion was that AB lacked capacity; and (d) and the presumption at Section 1 (2) of the 2005 Act.

D 25. Reasons (a) and (c) do not withstand scrutiny. Dr Ornstein's capacity report dated 21 July 2017, even though written a matter of days before the remedies hearing commenced (on 24 July 2017), was written only on the basis of Dr. Ornstein's prior engagement with AB. The last

E time he had examined AB was on 28 April 2017. More importantly Dr Ornstein had not been present at the Tribunal on the afternoon of 25 July 2017. Next, the Tribunal's reliance on the absence of a report from either Dr Ornstein or Dr Stein stating an opinion that AB lacked litigation capacity was illogical. As the Tribunal ought to have realised, neither Dr Ornstein nor

F Dr Stein had had the chance to examine AB or express an opinion in light of events of the afternoon of 25 July 2017. Moreover, this part of the Tribunal's reasoning indicates that it was failing to address the right question. The question at this stage was not whether AB lacked

G capacity to litigate but whether there was a permissible basis for enquiries to be made as to whether she lacked that capacity. Taken together, these points entirely undermine the Tribunal's reliance on the views expressed by AB's lawyers that they were *"able to continue to act for*

H *AB"*. Given the way that AB had presented at the Tribunal hearing, and the obvious concern

her lawyers had previously had in respect of capacity, which had led them to obtain Dr Ornstein's capacity report of 21 July 2017, and the lack of an up to date expert opinion, the Tribunal placed more weight on the assertions of AB's lawyers than those assertions could rationally bear.

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

27. In this case, the Tribunal's reliance on section 1(2) of the 2005 Act was in error. The Tribunal relied on the section 1(2) presumption to create Catch-22: a conclusion that an assessment of AB's capacity to litigate would only be appropriate if there was already expert evidence that she lacked capacity to litigate. That was a misapplication of section 1(2) of the **2005 Act**. Section 1(2) does require any lack of capacity to be *"established"*; but it does not require a lack of capacity to be established before a court can require an assessment of capacity. That proposition only has to be stated to be recognised as self-defeating. In the present case, the only issue for the Tribunal raised by RBS's application was whether there was good cause for concern that AB might lack capacity to conduct the litigation. In this case good cause for concern plainly did exist. The Tribunal ought to have concluded that an assessment of AB's capacity to conduct the litigation should have been undertaken.

28. I now turn to Ground of Appeal 3, the challenge to the Tribunal's decision on 28 July 2017 not to revisit its decision that there was no need for assessment of AB's capacity to conduct the litigation. There was some debate before me as to whether the application that led to the decision of 28 July 2017 was reconsideration of a "judgment" under Rule 70 of the Employment Tribunal Rules, or reconsideration of a "case management order" under Rule 29 of the Employment Tribunal Rules. I am satisfied that the relevant power exercised by the Tribunal was the power under Rule 29.

29. Rule 1(3) of the Employment Tribunal rules defines "case management order" and "judgment" as follows:

> **"(3) An Order or other decision of the Tribunal is either –**
>
> **(a) a "case management order", being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment; or**

> **(b) a "judgment", being a decision made at any stage of the proceedings (but not including a decision under Rule 13 or 19), which finally determines –**
>
> > **(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs);**
> >
> > **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue);**
> >
> > **(iii) the imposition of a financial penalty under Section 12A of the Employment Tribunals Act."**

30. Rule 70 applies only in respect of "judgments". It is clear that the Tribunal's decision of 26 July 2017, evidenced by the Order sent to the parties on 27 July 2017, was not a decision finally determining a claim or part of a claim. Nor was it a decision on an issue that was capable of finally disposing of a claim. RBS submitted that had its application succeeded it would have bought the proceedings to an end. That submission is wrong. Had the Employment Tribunal allowed RBS's application, the proceedings would have been held in abeyance for a short period pending determination of AB's capacity, and if necessary, the appointment of a litigation friend. That is all. The purpose of an assessment of capacity to litigate is to determine the conditions in which litigation may proceed, not to bring it to an end.

31. For these reasons, Rule 29 was the relevant provision in the Employment Tribunal Rules for the purposes of the decision made by the Tribunal on 26 July 2017. Under Rule 29 a Tribunal may vary a case management order *"where it is necessary in the interest of justice"*. Ordinarily, this Appeal Tribunal will exercise caution when considering appeals against decisions taken under Rule 29, and will intervene only if the Employment Tribunal has erred in principle or has reached a conclusion beyond the limits of mere reasonable disagreement.

32. In this instance the Tribunal's decision on 28 July 2017 under Rule 29 was outside the generous ambit of discretion properly to be afforded to it. Part of the reasons for the Tribunal's

decision on 26 July 2017 refusing RBS's application that AB's capacity to litigate be assessed was that neither Dr Ornstein nor Dr Stein *"had notified the Tribunal that their professional opinion is that [AB] does not have capacity"*. The logical inference from that was that the Tribunal would consider the need for assessment further, on the basis of appropriate further evidence. Yet in the circumstances of this case that possibility created the risk of anomaly in that it was unlikely that either Dr Ornstein or Dr Stein could properly opine on AB's capacity to litigate without the opportunity to examine her. RBS's application for reconsideration was supported by the note from Dr Stein dated 27 July 2017. As I have already said, that note contained Dr Stein's observations on the events of the afternoon 25 July 2017. One point made was that any formal assessment of capacity would need to be based on more than her observations of AB that afternoon. That, it seems to me, was an entirely appropriate point to make. Thus, although Dr Stein's note of 27 July 2017 was not the *"the professional opinion"* on a lack of capacity the Tribunal had referred to, it did explain that any such opinion could only be formed on the basis of further assessment. The Tribunal's reasoning, at paragraphs 48-52 of the Judgment, does not engage with this at all. Rather, the Tribunal, refused the Rule 29 application describing it as *"without merit"* on the basis that, among other matters, Dr Stein had not *"given an opinion that [AB] does not have capacity"*. This reasoning only serves to perpetuate the Catch-22 I have described earlier: the Tribunal was not prepared to revisit its earlier decision that the assessment of AB's litigation capacity was not necessary because it did not already have expert evidence that would (or at least might) conclusively show that AB lacked capacity to litigate. This approach was irrational. Any Tribunal properly applying its mind to the situation ought to have realised that the opinion it regarded as a precondition for assessment could only arise from the process of assessment itself.

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33. I now consider AB's submission that Ground of Appeal 1 is time-barred. My conclusion is that this ground of appeal is time-barred. Ground of Appeal 1 is directed to the Order of the Tribunal sent to the parties on 27 July 2017. That was when the 42-day period for instituting an appeal commenced. The appeal against the 27 July 2017 Order was not commenced in time. RBS, relies on Rule 37 of the Employment Appeal Tribunal Rules 1993 and on the judgment in **United Arab Emirates v Abdelghafar** [1995] ICR 65, and submits that time for instituting the appeal should be extended.

B

C

34. The material part of Mummery P's judgment in **Abdelghafar** is at pages 70A to 72C. In summary this is to the following effect. *First*, whether or not to grant an extension of time is a matter of judicial discretion, the exercise of which must take account of all relevant matters. *Second*, where the extension of time is sought in order to institute an appeal, the relevant considerations include the public interest in certainty and finality of legal proceedings, with the consequence that the need to comply with a time limit is more important and an application to extend time may be refused even though the applicant's default has not caused prejudice to the other parties to the proceedings. *Third*, any party seeking an extension of time must provide a *"full, honest and acceptable explanation of the reasons for the delay".* The grant of an extension of time to institute an appeal is an exceptional step. What amounts to good excuse is to be assessed in that context. *Fourth*, if good excuse for the delay does exist that should be considered together with any other relevant matters to access whether the extension of time sought is justified.

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35. Mr Carr submitted that RBS decided to wait to receive the written reasons for the decision given orally on 26 July 2017, before launching its appeal. He explained that when the

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Tribunal gave its reasons orally, written reasons were requested, and the Tribunal informed the parties that written reasons would be provided in due course, at the same time as the reasons for the Tribunal's decision on remedies. I do not consider this provides any sufficient explanation why the appeal against the 27 July 2017 Order was not commenced within the period prescribed by the Employment Appeal Tribunal Rules. When an appeal is against an order of the Employment Tribunal, rather than a judgment, there is no requirement that the Tribunal's reasons are provided with the Notice of Appeal. Thus, the absence of reasons neither prevents institution of such an appeal, nor is sufficient to explain any period of delay in commencing an appeal. In the course of his submissions Mr Carr hinted at the possible scope for embarrassment or even prejudice for a party that launches an appeal while proceedings before an Employment Tribunal remain in progress. It was not clear to me whether that reason informed any part of RBS's decision in this case to await the Tribunal's written reasons before commencing its appeal. However even if that were all or part of the reason for the delay, it would not be a sufficient reason. Since RBS's concerns went to AB's capacity to conduct the litigation, one course (and to my mind the clearly preferable course) of action was to pursue any appeal promptly, so that it could, if possible, be determined before the conclusion of the Employment Tribunal proceedings. Even if RBS did not wish to pursue the appeal for so long as the Employment Tribunal proceedings were in progress, it should still have commenced the appeal within time and then requested the appeal be held in abeyance pending conclusion of the Employment Tribunal proceedings. In any event, the conclusion that follows from what happened in this case is clear. RBS has failed to provide any sufficient reason for the delay in commencing its appeal against 27 July 2017 Order.

36. RBS next submits that notwithstanding the lack of appropriate explanation, there are exceptional circumstances in this case which mean that the appeal against the 27 July 2017 Order should be determined on its merits. In **Abdelghafar** this Tribunal concluded that the need to give proper effect to the provisions of the State Immunity Act 1978 (relied on the employer in that case) provided exceptional circumstances which warranted the appeal being heard. In this case RBS submits the need to resolve whether AB had capacity to conduct the proceedings has a similar effect. I do not agree that is an exceptional circumstance. For reasons I will explain later, the significance of the Tribunal's error and its approach to whether it was necessary to assess AB's ability to conduct litigation does not go either to the validity of the proceedings or the substantive outcome of the proceedings. The consequence is that while Ground of Appeal 3 succeeds, Ground of Appeal 1 fails because the appeal was commenced out of time.

(2) Ground of Appeal 2

37. RBS contends that the Tribunal erred in law in its conclusion that AB had not exaggerated the symptoms of her psychiatric illness. The material part of the Tribunal's Judgment is paragraphs 174 -184. In its written submissions RBS contends that having concluded that AB had capacity to litigate, it was not open to the Tribunal to go on to conclude that AB was unable rather than unwilling to give evidence. RBS then contends that if AB was unwilling to give evidence, the Tribunal had no option but to draw an inference that AB had exaggerated her symptoms. RBS's written submissions also place significant emphasis on a failure on the part of the Employment Tribunal to make adjustments that might have permitted AB to give evidence. It appears that at the liability hearing, when AB did give evidence, a number of measures were put in place to help her cope with the stress of being a witness. The

written submissions on the failure to make adjustments at the remedies hearing were not mentioned at the hearing before me. Nor does it appear either from the Employment Tribunal's Judgment, or so far as I can make out from the written submissions made by RBS to the Employment Tribunal, that before that Tribunal RBS contended that with reasonable adjustment, AB could have given evidence at the remedies hearing. In light of what I have been told about how AB presented on the second day of the remedies hearing this is perhaps, not at all surprising. In any event, since those matters were not addressed at the Employment Tribunal hearing they cannot assist RBS in this appeal. That being so, this ground of appeal comes to a single point: was the necessary consequence of the Tribunal's conclusion that AB had capacity to litigate that when she did not give evidence at the hearing the Tribunal had to conclude that AB was unwilling to give evidence for risk of being shown to have exaggerated her symptoms?

38. The premise of RBS's submission is the existence of a straight-line relationship between the conclusion on capacity to litigate and a conclusion that AB was unwilling to give evidence. Thus, contends RBS, the answer to one question determines the answer to the other: if AB had capacity to conduct the litigation, she must have been unwilling rather than unable to give evidence. I do not agree that any such simple relationship exists. In this case, the position is rendered less clear still by the conclusion I have stated above that the Tribunal was wrong not to require assessment of AB's capacity to litigate. Yet even if this point is put to one side, determining whether or not AB was exaggerating her symptoms did not depend only on her conduct at the remedies hearing. The Employment Tribunal also had the benefit of evidence from the expert witnesses, in particular Dr Ornstein and Dr Stein, setting out their assessments of AB's credibility based on their examinations of her and consideration of her medical records.

There was also the evidence of Dr Valentine that I have referred to above, at paragraph 12. It is apparent from the Employment Tribunal's reasons that a number of matters led it to the conclusion that AB had not exaggerated her symptoms. The Tribunal relied on the evidence of Dr Ornstein; the Tribunal considered that some of the evidence given by Dr Stein was consistent with the conclusion that AB had not exaggerated her condition. The Tribunal took into account that AB had given evidence at the liability hearing; and also took into account the lack of any positive evidence (such as surveillance evidence) to support a submission of exaggeration. Finally, the Tribunal accepted that AB's presentation on the afternoon of 25 July 2017 was genuine. All these matters, taken together, provide a sufficient basis for the Employment Tribunal's conclusion that AB had not exaggerated her symptoms. The fact that the Tribunal erred in failing to conclude that AB's actions at the hearing on 25 July 2017 ought to have caused it to investigate further whether she had capacity to litigate, does not invalidate its conclusion that the way AB acted on that afternoon was genuine, and demonstrated that she was not in a fit state to give evidence. The Tribunal had not, in reaching its conclusion on the capacity issue, concluded that no assessment was necessary because AB's actions were fake. Rather, it had concluded (in my view incorrectly) that the statutory presumption of capacity ruled out the need for further assessment. The Tribunal did not assess the evidence inconsistently. It simply reached an incorrect conclusion as to the significance of the evidence when addressing the capacity to litigate point. For these reasons Ground of Appeal 2 fails.

(4) Ground of Appeal 4

39. RBS submits that the Tribunal was wrong not to reduce compensation payable to AB on account of the possibility that her psychiatric condition would have developed even absent the

unlawful discrimination. This submission is directed to paragraphs 283 – 292 of the Tribunal's Judgment.

40. The context for this submission is the judgment of Hale LJ in **Hatton v Sutherland** [2002] ICR 1613. In that case Hale LJ summarised 16 *"practical propositions"* relevant to claims for damages for psychiatric injury caused by stress arising from employment. Propositions 15 and 16 were as follows

> **"15. Where the harm suffered has more than one cause, the employer should only pay for that proportion of the harm suffered which is attributable to his wrong doing, unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment …**
>
> **16. The assessment of damages will take account of any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress-related disorder in any event …"**

As is apparent, the purpose of each proposition is to prevent over compensation of claimants. Whether either or both is applicable in any particular case would depend on the evidence in that case. This much is clear from the judgment of Underhill LJ in **BAE Systems (Operations) Ltd v Konczak** [2018] ICR 1 at paragraph 62 where he stated as follows

> **"62. The distinction between propositions 15 and 16 needs to be appreciated. Proposition 15 is applicable to cases where the injury in question is regarded as having multiple causes, one or more of which are, or are attributable to, the wrongful acts of the employer but one or more of which are not. Proposition 16 applies where the claimant has a pre-existing vulnerability which is not treated as a cause in itself but which might have led to a similar injury (for which the employer would not have been responsible) even if the wrong had not been committed. At the level of deep theory, the distinction between pre-existing vulnerability and concurrent cause may be debatable, and even if it is legitimate it may be difficult to apply in particular cases. There may also be cases where both propositions are in play. It may in many or most cases not be necessary for a court or tribunal to worry too much about where exactly to draw the line. Both propositions are tools which enable a tribunal to avoid over-compensation in these difficult cases. Nevertheless, they are clearly treated as conceptually distinct."**

41. In this case, applying Proposition 15, the Employment Tribunal apportioned the cause of the harm suffered by AB, concluding it was 75% attributable to the unlawful discrimination and

25% attributable to the road accident that happened in 2008. Between paragraphs 283 – 292 of the Judgment the Tribunal stated two conclusions relevant to Proposition 16. The first (between paragraphs 283 and 288) was that reliance on Proposition 16 had not formed part of RBS's case. The second conclusion, at paragraph 292, was that the effect of Dr Stein's evidence was as follows

> **"292. The Tribunal also agrees with Mr McDermott's submissions that Dr Stein was not presenting an alternative opinion that the Claimant's psychiatric injury would have inevitably or possibly occurred at a later date because of her pre-existing vulnerability. Her opinion, as was the Respondent's case, was that the injury that had occurred was entirely attributable to other factors than the discrimination committed by the Respondent to the Claimant, particularly her childhood sexual trauma and her road traffic accident."**

That conclusion had the effect of rendering redundant the Tribunals' earlier conclusion as to the substance of RBS's case. RBS submits that the Tribunal's conclusion at paragraph 292 was not on the basis of Dr Stein's evidence, one that was reasonably open to it. The material part of Dr Stein's evidence is paragraph 31 of her report dated 17 July 2017 (an addendum to her original report) where she stated this

> **"Finally, while psychiatric work primarily in the service in assisting a patient to receive help, and to treat disorders, it becomes much more complex when the possibility arises of other extraneous factors being present. In this case, it would appear that the demand to have her psychiatric state believed, has escalated following the initial Tribunal decision. At that time the sums of money involved in any further action are potentially very great. This has to be considered as a source of secondary gain for the claimant, and perhaps also for her partner. This might be in addition for her desire for care, which in my opinion originates in what she experienced as failure of care from the police when she was 14, her on-going disappointment with her mother who she feels does not believe her, her absent father, and her disappointments educationally. I am of the opinion on the balance of probability, her mental state has come tumbling out following several years of physical investigations, the remnants of untreatable nerve pain, and her own growing realization that the life she dreamed of for herself was not going to be fulfilled. I am of the opinion that this was a process which was inevitable, and would have occurred without these specific work place problems. I think that the claimant finds social interactions difficult, and that this has been a trait all her life. I am of the opinion that the claimant believes that her physical disability is the reason for her current mental state. Without further psychological work, it may be difficult for her to have insight into the impact of the early sexual trauma, and the impact of RTA psychologically."**

In my view the Employment Tribunal's assessment of that evidence at paragraph 292 of the Judgment, was an assessment reasonably available to it. The conclusion at paragraph 292 does not disclose any error of law. In these circumstances, this ground of appeal fails.

(4) Ground of Appeal 5

42. RBS contends that the Employment Tribunal failed to give sufficient reasons to explain why it preferred the evidence of Dr Ornstein to that of Dr Stein. The differences of opinion between Dr Ornstein and Dr Stein as to the genuineness of AB's symptoms and as to the likely cause of those symptoms were central to the disputes between the parties at the remedies hearing. The Tribunal addressed their respective evidence on these matters at various points in the Judgment, including in the section on causation and apportionment, and in the section on whether or not AB had exaggerated her symptoms. In addition, between paragraphs 183 – 187 of the Judgment the Tribunal explained its assessment of Dr Ornstein and Dr Stein, leading to a general conclusion (at paragraph 187) that it found Dr Ornstein *"to be, on the whole, the more convincing"* of the witnesses. The Tribunal set out specific reasons for that conclusion.

43. In its Skeleton Argument for this hearing RBS had made legion criticisms of this part of the Employment Tribunal's reasoning. RBS contended that in the course of its submissions at the Employment Tribunal hearing it had suggested many reasons why Dr Stein's evidence should be preferred to Dr Ornstein's evidence, but those matters were not mentioned by the Employment Tribunal in the First Remedies Judgment. I considered that submission unsatisfactory because it all but amounted to an invitation to me to evaluate the respective merits of the expert witnesses' evidence for myself, a task that is rarely if ever appropriate in a jurisdiction founded on error of law. In a response to a request from me, Mr Carr re-formulated

his submission to identify the key matters showing that the Employment Tribunal failed properly to explain this part of its decision. If the best points were not sufficient to make good RBS's submission I failed to see how a welter of further detail would assist its cause.

44. The particular matters relied on as matters raised in submissions at the Employment Tribunal hearing were that Dr Ornstein (1) failed to have sufficient regard to AB's medical records (including those created by her GP); (2) placed undue weight on information provided by AB and failed to apply proper scrutiny to that information; (3) failed to respond fairly to some to some of the written questions put to him when he was compiling reports for the Tribunal; and (4) was partisan in that he deliberately mis-stated or ignored evidence that tended to weaken AB's case. RBS's submission was that because none of these matters had been addressed in the Judgment, the Employment Tribunal had failed to give adequate reasons for its decision.

45. The content of the obligation to give reasons is well-known: see **Meek v City of Birmingham District Council** [1987] IRLR 250 per Bingham LJ at paragraphs 9 – 11; and **English v Emery Reimbold and Strick Ltd** [2002] 1 WLR 2409 per Lord Phillips MR at paragraphs 16-19. The essential requirement is that the reasons are sufficient to explain why one party has lost and the other has won. When the issue is why the evidence of one witness has been preferred over that of another, it may be sufficient for the reasons to be given very shortly indeed. Much depends on context. Where the disputed evidence is given by expert witnesses it may be the case that the reasons required may need to be slightly more elaborately stated. Yet where that is necessary it will be the consequence of the complexity of the issues in dispute, not simply because the witnesses are expert witnesses rather than witnesses of fact. In

any event, one simple and overriding point will hold good in all instances. There is no requirement that a Tribunal's reasons must address or refer to every argument put to it. Taking the present case as an example, the written submissions of the parties ran to well over 100 pages. The impression those submissions give is that no stone remained unturned. It would be disproportionate to the extent of absurdity to require the Employment Tribunal's reasons to address every line of argument raised.

46. In this case, as in all others where the adequacy of a Tribunal's reasons is called into question, the submission will not be made good simply by being able to point to an argument that has been made and then being able to show it has not been mentioned in the judgment. In all cases the starting point must be the judgment itself; and the question must be whether or not the reasons that are in the judgment meet the standard required. The answer to the question can be informed by considering arguments not addressed, and by assessing the significance of those arguments in the context of the issues raised in the case in hand, overall. But that is as far as the matter goes. The inquiry should always concern the adequacy of the reasons present in the judgment, not whether the judgment would have been better or better reasoned if additional matters had been included.

47. In the present case, RBS's criticisms of the Employment Tribunal's reasons are not justified. The reasons at paragraphs 186 – 187 of the First Remedies Judgment are entirely sufficient to explain why the Tribunal preferred Dr Ornstein's evidence to Dr Stein's evidence. The points identified by Mr Carr as his "best points" are expressly referred to at paragraph 183 of the Judgment. It is clear that the Tribunal had these matters well in mind, and the reasons that follow do address these matters sufficiently. What is more important is that the reasons given

at paragraphs 186 -187 provide a coherent and clear explanation of why the Employment Tribunal preferred Dr Ornstein's evidence. Those reasons gain support from the way in which, elsewhere in the Judgment, the Tribunal addresses and resolves the disputes as to whether or not AB had exaggerated her symptoms and as to the effective cause of her psychiatric injury. For these reasons, Ground of Appeal 5 fails.

C. Disposal

48. RBS has succeeded on Ground of Appeal 3 – the challenge to the Tribunal's refusal to reconsider the decision made on 26 July 2017 that assessment of AB's capacity to litigate was not necessary. My conclusion, set out above, is that the Tribunal's refusal to reconsider was irrational. I am satisfied that had there been a reconsideration the Tribunal, directing itself properly, would have decided that assessment of AB's capacity to conduct the proceedings was required. In anticipation of these conclusions Mr Carr submitted that the proceedings should be remitted to the Employment Tribunal to determine whether, as at July 2017, AB had capacity to conduct litigation. He submitted that the failure to undertake that assessment was a serious procedural irregularity amounting to an error of law, which as a matter of fairness required remission back to the Employment Tribunal. He put this submission on two bases: first because the lack of assessment of AB's capacity invalidated the proceedings before the Tribunal; and second that it had been unfair not to assess AB's capacity because the process of assessment might have produced evidence that RBS could have relied on in support of its substantive case that AB was exaggerating her symptoms.

49. For the reasons set out below, I am not persuaded by either of these points. Although RBS's appeal will be allowed on Ground of Appeal 3, there is no need for any matter to be

remitted to the Employment Tribunal for further consideration. The consequence is that, subject to the agreed amendment I have described above at paragraph 8, the Tribunal's Order following the remedies hearings will stand.

50. The submission that the failure to assess AB's capacity to conduct litigation invalidated the proceedings below drew heavily on the provisions of CPR Part 21, and in particular CPR 21.3 which prevents parties to litigation taking any steps in the litigation without the permission of the court if any of the parties to the proceedings lacks capacity to continue to conduct the proceedings. In such instances, any step taken by the parties without permission of the court *"has no effect"*. RBS also relied on the judgment of the Supreme Court in *Dunhill v Burgin (Nos 1 and 2)* [2014] 1 WLR 933. In that case, a claimant compromised her claim for damages for personal injury arising out of a road accident. The compromise was embodied in a consent order that was put before a court, but the judge was not asked to approve the compromise, only to order by consent that judgment be entered in favour of the claimant in the agreed amount. Six years later the claimant sought a declaration that at the time of the compromise she lacked capacity. In those proceedings the High Court determined as a question of fact that as at the date of the compromise the claimant had lacked capacity, and that in consequence the compromise agreement was invalidated by CPR 21.10 because it had not been approved by the court. The Supreme Court upheld that conclusion, and set aside the consent order. Baroness Hale stated (at paragraph 33 of her judgment) that the purpose underlying CPR 21 was that *"... children and protected parties require and deserve protection, not only from themselves but also from their legal advisers"*, hence the role of the court, in that case under CPR 21.10, but similarly too as I see it, under CPR 21.3. As Baroness Hale explained (at paragraph 20 of her judgment), the purpose of CPR 21.10 is to impose an external check on the propriety of any

A settlement. The power of the court to give permission under CPR 21.3 fulfils the same function in respect of steps taken to litigate and in the course of litigation.

B 51. The present case is different in a number of respects from the situation before the Supreme Court in **Dunhill.** First, there has been no conclusion that as at July 2017 AB lacked capacity to conduct litigation. The only relevant conclusion reached to date in this litigation is that in July 2017 an assessment of her capacity ought to have been undertaken. Second, this C appeal is against an order of compensation made by a Tribunal following a contested hearing; the Tribunal did not make its order by consent of the parties nor decide to approve the terms of an agreed settlement, rather the Tribunal has made its own merits determination of the amount D of compensation due to AB. Third, AB (who now acts by a litigation friend) made it clear in the course of the appeal hearing that she will not seek to re-open the Employment Tribunal's decision on grounds that she lacked (or may have lacked) capacity as at the time of the E remedies hearings.

52. The first two of these matters satisfy me that it would not be right to conclude that the error made by the Employment Tribunal was such as to render the proceedings before it void. I F do not consider that the public policy that lies behind CPR Part 21 is such as to require that conclusion given the circumstances I have described. The Tribunal may have erred in its failure to pursue an assessment of AB's capacity to litigate, but it did not fail thereafter either to G scrutinise the merits of the substantive issues before it or to reach permissible conclusions on each of those matters. The third point above – the undertaking provided by AB in the course of the hearing before me – is sufficient to satisfy me that it is not now open to AB to seek to avoid the Employment Tribunal's order consequent on the remedies hearings (on the assumption that H

the effect of the Tribunal's procedural error was to render its proceedings and the order it made voidable). In the premises, this part of RBS's submission does not demonstrate any need as a matter of fairness, to it to remit any issue to the Employment Tribunal.

53. The second part of RBS's submission is that the Tribunal's failure to assess AB's capacity to conduct the litigation goes beyond mere procedural error because the process of assessing AB's capacity could have produced evidence that RBS might have been able to rely on to demonstrate that AB had exaggerated her psychiatric injury. Hence, contends RBS, the hearing was conducted unfairly. I do not accept this submission. Had assessment of AB's capacity to litigate taken place the purpose of that assessment would not have been to aid one party or the other in its substantive case, only to determine the circumstances under which the litigation could or should proceed. To this extent, RBS's submission misunderstands the purpose that such an assessment of capacity is intended to serve. I accept that it would be artificial to rule out the possibility that evidence coming to light during an assessment process might be admissible in the substantive proceedings, but that possibility – and it is no more than a mere possibility – is not sufficient to warrant remission of this case to the Employment Tribunal. RBS has not made good its submission that there has been any want of fairness to it that requires the conclusion reached by the Employment Tribunal as to the compensation payable to AB to be reopened.

54. For these reasons, although RBS's appeal will be allowed (on Ground of Appeal 3 alone), there is no need to remit any matter to the Tribunal for further consideration, and the Tribunal's order for compensation will not be disturbed, save to the extent agreed by the parties, referred to above at paragraph 8.

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