



Neutral Citation Number: [2020] EWCA Civ 638

Case No: A2/2019/1311/A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL

Mr Justice Lavender
UKEAT/0208/18/BA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15th May 2020

Before:

LORD JUSTICE UNDERHILL
VICE PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION)

and

LORD JUSTICE LEWISON

Between :

ROSE MORTON

Appellant

- and -

EASTLEIGH CITIZENS' ADVICE BUREAU

Respondent

Matthew Curtis (instructed by **Direct Access**) for the **Appellant**
Gary Self (instructed by **DC Commercial Solicitors**) for the **Respondent**

Hearing date: 5 May 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Friday 15th May 2020.

Lord Justice Lewison:

1. The issue on this appeal is whether the Southampton Employment Tribunal (EJ Kolanko) made an error of law in refusing to adjourn a preliminary hearing on 30 October 2017. Both parties were represented by counsel acting *pro bono*, for which the court is very grateful.
2. Ms Morton was employed by the Eastleigh Citizens Advice Bureau (“the CAB”) until her dismissal on 22 November 2016. She is pursuing claims against them for unfair dismissal, wrongful dismissal and disability discrimination. We are concerned only with the disability discrimination claim.
3. Ms Morton filed her ET 1 form on 28 April 2017. Although it is not entirely clear from that form, the disabilities on which Ms Morton relied are an eating disorder, depression, anxiety and agoraphobia. In their ET 3 form filed on 16 June 2017 the CAB put the question of her disability in issue. That form made extensive reference to an occupational health report prepared by Dr Shand. The first directions in the case were given by EJ Reed on 21 June 2017. He directed Ms Morton to forward to the CAB “copies of any medical evidence in her possession or power” relating to the conditions relied on, together with an impact statement. At a preliminary hearing on 14 July 2017, EJ Harper gave directions to lead up to a hearing one purpose of which was to determine whether or not Ms Morton was disabled. Because Ms Morton had not complied with EJ Reed’s directions, he directed her to produce by 28 July 2017 “the medical evidence” on which she relied together with a statement of the impact on her ability to carry out normal day to day activities. As Mr Self pointed out on behalf of the CAB, there were no limitations on the kind of evidence permitted by that direction. By 4 August the CAB were to notify Ms Morton and the tribunal whether they continued to dispute that Ms Morton was a disabled person and, if so, on what basis. The directions continued:

“By the 11th August 2017 if the respondent does not concede that the claimant is a disabled person, the parties agree on the identity of, and a joint letter of instruction to, a medical expert to report on the claimant’s condition whose fee will be paid jointly by the parties.”
4. The expert was to report by 15 September.
5. The final paragraph of the order stated:

“An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.”
6. On 29 July 2017 the parties were notified that the hearing had been listed for 30 October (nearly three months away). The notification stated:

“Unless there are exceptional circumstances, no application for a postponement will be granted.”
7. On 2 August 2017 the CAB complained that Ms Morton had not disclosed all the medical evidence on which she relied; but nevertheless commented on what had been

produced. The thrust of the comments was that although the binge eating disorder had been mentioned in various documents, there was no mention of work-related stress or anxiety associated with that. Ms Morton personally prepared a detailed 4-page point by point rebuttal of the CAB's position, which was served by the solicitors then acting for her. She also disclosed further medical evidence by the end of that month.

8. The case came back before EJ Reed on 19 September. He asked the CAB to indicate its position on disability. On the same day the CAB acknowledged that Ms Morton had a binge eating disorder and that it amounted to a disability. It therefore conceded that she was a disabled person. But the concession did not extend to the other conditions upon which she relied. On 20 September Ms Morton e-mailed to say that as the CAB had only conceded partly, the joint medical report still had to go ahead. The CAB disagreed. Since EJ Harper had directed a medical report if the CAB did not concede that Ms Morton was "a disabled person", and they had so conceded, they took the view that a medical report was no longer needed. Ms Morton therefore applied to the ET for an order that the joint medical report should still go ahead. In response, on 2 October 2017 the ET wrote at the direction of EJ Harper:

"EJ Harper therefore directs you to confirm by 9 October 2017 whether you rely on the other alleged disabilities – in which case an independent expert would need to be instructed on a joint instruction on a jointly funded basis. If, however, you rely only on the "binge eating disorder" as your disability there is no need to have such further expert evidence."

9. On 5 October Ms Morton confirmed that she relied on all her health problems that that therefore a medical report was needed. At the same time she asked that the CAB be directed to give the reasons why they considered that her other health problems did not meet the criteria for disability.
10. Her letter was referred to EJ Reed (who had already been involved in the management of the case). He gave a direction in the following terms:

"I would assume that the issue of disability, in respect of all the conditions in question, can be satisfactorily addressed on the basis of the existing medical evidence and the Claimant's testimony (including oral testimony). I therefore propose that the matter may be listed for a half day Preliminary Hearing to address disability and the other matters referred to in the case management summary. If either party objects it should let us know within 7 days."

11. Ms Morton did object in her e-mail of 23 October. She referred to EJ Harper's direction of 2 October; and said that as she relied on all her conditions, a joint medical report would still be required. She continued:

"However, instead the decision of Judge Harper was reversed. There has been no change in circumstances so it seems unfair for Judge Harper's decision to be overridden in this way."

12. She concluded by asking that the preliminary hearing scheduled for 30 October be postponed, to allow time for a medical report. She said that even if the ET decided not to direct a joint medical report she wished to obtain her own. The CAB on the other hand, in its e-mail of 24 October agreed that the matter should proceed on the basis of the existing medical evidence. They also took issue with Ms Morton's interpretation of EJ Harper's original direction of 4 July. In the same letter the CAB set out at some length its detailed reasons for disputing that the other conditions on which Ms Morton relied amounted to a disability.
13. On 27 October 2017 Ms Morton repeated her request for an adjournment of the hearing fixed for 30 October. She said that she had only just received the CAB's reasons for disputing disability and the list of documents for the hearing. She also said that she suffered from mental health issues, including agoraphobia and anxiety; that she needed time to prepare not just her arguments but also mentally. She went on to say that she would not be able to attend the hearing on Monday. In response the CAB said that the bundle contained documents provided by Ms Morton herself and that she had seen all the documents in the past. They ended by saying that Ms Morton had "had months to prepare" and that the hearing should go ahead.
14. Because Ms Morton had asked for her application to go to a regional employment judge, the correspondence was placed before EJ Pirani on 27 October. He referred to the e-mails of 23 October and 27 October; but refused the requested adjournment on the ground that Ms Morton had had adequate notice of and time to prepare for the hearing.
15. Thus the hearing convened on 30 October before EJ Kolanko. Ms Morton again applied for an adjournment. EJ Kolanko refused it. Although the ultimate decision of the ET records the application and the refusal, it is very brief in its reasoning. But that is because EJ Kolanko gave a more extended extempore oral ruling on the application, of which we have a note. After the application was outlined EJ Kolanko retired for 10 minutes to read the documents. There were then submissions from both sides which occupied the best part of an hour; following which EJ Kolanko retired for 20 minutes to consider his decision. He noted that the application for the adjournment was put on the basis that Ms Morton had not had enough time to prepare; and the lack of a medical report. The essence of the reasoning was that EJ Pirani would have had sight of EJ Reed's earlier view and that he (EJ Kolanko) had been faced with two conflicting views. There was no basis in EJ Harper's e-mail that the hearing would ever be postponed. A further medical report would not assist at this stage. The documents flowed from Ms Morton and she was familiar with them. There was therefore no reason to depart from EJ Pirani's decision.
16. The final decision dealt with the adjournment application as follows:

"At the outset of this hearing, the claimant sought a postponement in order to obtain a joint medical report on this issue. It is correct that there was reference in an earlier case management [decision] to the possibility of a joint expert report being obtained, in the event of the respondent not accepting that the claimant was disabled. Subsequent correspondence from the tribunal indicated that Employment Judge Reed on 19 October 2017 wrote to the parties expressing the view that the remaining issues of disability could satisfactorily be addressed on the basis

of the existing medical evidence and the claimant's testimony, and proposed this preliminary hearing address that issue. The parties were invited to express their views on the matter. The claimant repeated her view that a joint report should be obtained, and in the interim the preliminary hearing should be postponed, and the Respondent proposed that Judge Reed's suggestion should be adopted. The matter came before Employment Judge Pirani, who having considered the documentation, refused the application on the basis that the claimant had adequate notice, and time to prepare for this hearing. Having heard representations from the parties I saw no reason to interfere with Judge Pirani's determination."

17. EJ Kolanko also recorded that during her closing submissions Ms Morton indicated that she could not continue and that it was agreed that she would have an opportunity to make additional submissions in writing within 14 days. That she duly did.
18. In view of the lack of detailed reasoning in the final decision, HHJ Eady QC in the EAT asked a number of questions of EJ Kolanko under what is known as the *Burns/Barke* procedure (see *Barke v Seetec Business Technology Centre Ltd* [2005] EWCA Civ 578, [2005] ICR 1373). Those answers were:
 - i) In making her application Ms Morton did not state that she was doing so on the grounds of ill-health.
 - ii) She complained about the late receipt of documentation from the CAB but EJ Kolanko did not understand her to be saying that she was prejudiced by that. He was satisfied that Ms Morton was aware of the issues to be determined at the hearing and was familiar with the documents in the bundle which had been disclosed by her.
 - iii) She complained that she was prejudiced by the late receipt of the CAB's explanation for disputing disability in respect of the conditions other than the eating disorder; but EJ Kolanko agreed with the earlier views of EJ Reed and EJ Pirani and saw no need to interfere with their rulings.
 - iv) She did not raise the possibility of calling her own medical expert if a joint report was not to be obtained.
19. HHJ Eady QC permitted the appeal to the EAT against the ruling of EJ Kolanko to go forward to a full hearing. There was no appeal against the orders of EJ Reed or EJ Pirani. In its careful and comprehensive decision of 5 April 2019 the EAT (Lavender J) dismissed the appeal.
20. Ms Morton applied to this court for permission to appeal. In a detailed ruling Simler LJ granted her permission to appeal on some (but not all) of her grounds of appeal. In her ruling she said:

"The Claimant contends that the ET erred in refusing to adjourn the hearing on 30 October 2017 by failing to take into account materially relevant information and circumstances. In particular

she contends that the ET failed to take into account materially relevant information and circumstances. In particular she contends that the ET failed to take into account the earlier orders of EJ Harper, the changed approach of EJ Reed, and the limited time that she had to prepare for the hearing as a consequence, or to obtain medical or other evidence.”

21. She went onto say that that composite ground was broadly reflected by certain of the EAT grounds, which I summarise as follows:
- i) Ms Morton had not seen the bundle prepared by the CAB until the hearing.
 - ii) No list of issues had been prepared for the hearing.
 - iii) Ms Morton’s request for an order that the CAB explain their reasons for disputing her disabilities had never been dealt with.
 - iv) She had not seen the bundle or any of the evidence or witness statements presented by the CAB within the minimum period of 7 days.
 - v) The failure to provide that information meant that there was not sufficient time for her to prepare and submit a witness statement, skeleton argument or chronology.
 - vi) The lack of notice of the CAB’s evidence, witness statement and bundle meant that she did not have sufficient time to obtain evidence from witnesses or additional medical evidence.
22. *Case management orders.* The ET’s power to make case management orders is governed by rule 29 of the Employment Tribunal Rules of Procedure 2013. It provides:
- “The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30A(2) and (3) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.”
23. A decision by a tribunal to refuse an adjournment is a case management decision. A decision of that kind often involves an attempt to find the least worst solution where parties have diametrically opposed interests. In the case of an adjournment application the grant of an adjournment will cause delay in resolving the dispute, will give rise to abortive and irrecoverable costs, will lose hearing time in the ET to the inconvenience of other users. All these are factors which the ET routinely has in mind when considering such applications. On the other hand, it must take into consideration the need for a fair process (fair to both sides, that is); and consider any prejudice that the applicant will suffer if the application is refused.

24. As Mummery LJ explained in *O’Cathail v Transport for London* [2013] EWCA Civ 21, [2013] ICR 614 at [44]:
- “In relation to case management the employment tribunal has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The tribunal’s decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the Employment Appeal Tribunal should continue to adopt...”
25. Rule 29 is subject to rule 30A (2). Rule 30A (2) provides:
- “(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—
- (a) all other parties consent to the postponement and—
 - (i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
 - (ii) it is otherwise in accordance with the overriding objective;
 - (b) the application was necessitated by an act or omission of another party or the Tribunal; or
 - (c) there are exceptional circumstances.”
26. A postponement of a hearing includes an adjournment: rule 30A (4)(a); and exceptional circumstances may include ill health relating to an existing long term health condition or disability: rule 30A (4)(b). Rule 30A came into force in 2016, so it post-dates *O’Cathail*. Clearly this rule is intended to discourage late adjournments.
27. This is plainly not a case which falls within rule 30A (4) (a) because the CAB did not consent to the adjournment. I understood it to be common ground between counsel that this was not a case that fell within rule 30A (4) (b) either. So the question is whether it was an error of law for EJ Kolanko to rule that there were no “exceptional” circumstances.
28. *The bundle*. EJ Kolanko clearly considered the late arrival of the bundle. He noted that it consisted of documents that had flowed from Ms Morton; and in his supplementary answers said that he did *not* understand her to be saying that she was prejudiced by that. He also considered that Ms Morton was familiar with the documents in the bundle which had been disclosed by her.
29. *List of issues*. The issue was clear. The sole issue to be considered at the hearing was whether the conditions on which Ms Morton relied (apart from the binge eating

disorder) amounted to disabilities. EJ Kolanko was satisfied that Ms Morton was aware of the issue to be determined.

30. *Explanation of reasons for disputing disability.* The CAB's form ET3 had given some reasons for disputing disability by reference to Dr Shand's report. They had also given some further reasons for disputing that the conditions (other than binge eating disorder) amounted to disabilities in early August. Its more detailed reasons came on 24 October. In response to the CAB's statement in August, Ms Morton had prepared a detailed rebuttal. Ms Morton knew the case that she had to meet.
31. *Witness statements.* The CAB called no evidence at the hearing, so the only possible witness statement would have been that of Ms Morton herself. As to that, she had already been directed to file an impact statement by 28 July, which was treated as her evidence in chief. Had she wished to amplify that statement, she had had three months in which to do so. As noted, there was no limitation in the direction of 14 July 2017 on the kind of medical evidence upon which Ms Morton was entitled to rely. Had she wished to put forward a statement from her GP she had had time in which to do so.
32. *Lack of preparation time.* Mr Curtis, appearing for Ms Morton, stressed the shortness of the "window" between EJ Reed's decision on 19 October 2017 to proceed without a medical report and the hearing fixed for 30 October. He submitted that the nature of the preparation that Ms Morton would have required would have changed very significantly. EJ Pirani's decision that she had had enough time to prepare (and EJ Kolanko's agreement with that decision) were both perverse. On the other hand, Ms Morton had known from the outset that disability was in issue; she had a very good grasp of the facts and issues (shown by her detailed rebuttal of the CAB's position); the medical evidence on which the case turned was evidence which she had supplied and with which she was familiar. Since the CAB was calling no evidence, the preparation required was the drawing of relevant material to the attention of the ET and the amplification (if need be) of her own witness statement. Two experienced employment judges, well used to dealing with unrepresented litigants, both reached the conclusion that she had had enough time to prepare. I do not feel able to characterise their decisions as perverse.
33. *Additional witnesses and medical report.* As far as additional witnesses were concerned, this does not appear to have been any part of the application for an adjournment. Nor, according to EJ Kolanko's answers, did Ms Morton suggest that she wished to obtain a medical report of her own. The thrust of Ms Morton's application was that the direction for a joint medical report ought not to have been changed. It was common ground between counsel that in cases of this kind (especially where mental health issues are involved) the tribunal will base its decision on medical materials, but that commissioning a formal report was not invariable. Mr Curtis accepted that the majority of cases of this kind are decided on the basis of contemporaneous medical material and the claimant's own evidence. In this case the ET had available Ms Morton's own health records and a contemporaneous report from Dr Shand whose field was occupational health. It follows from this that a decision that a formal medical report would not assist cannot, in my judgment, be characterised as perverse.
34. *Skeleton argument.* Although Ms Morton did not put in a skeleton argument at the hearing itself, she was given 14 days after the hearing to make submissions in writing.

By that time, all the evidence had been called and she would have heard the submissions made on behalf of the CAB.

35. *A new argument.* Mr Curtis relied on the decision of the EAT in *Serco Ltd v Wells* UKEAT/330/15, [2016] ICR 768. In that case an employment judge directed a preliminary hearing to decide whether the claimant had sufficient length of service to bring a claim. A different employment judge revoked that order on the ground that the preliminary hearing would resolve only a few of the issues that needed to be decided. The EAT (HH Judge Hand QC) held that the revocation of the first order was not necessary in the interests of justice; and hence was outside the scope of rule 29. It is particularly to be noted that the appeal was an appeal directly from the second of the two orders. Judge Hand reviewed a number of authorities before stating his conclusions. First, he held that a challenge to an order is usually directed to a tribunal of superior jurisdiction and that seeking a judge of the same jurisdiction to look again at an order is discouraged, save in carefully defined circumstances. Second, he held that:

“... before a judge can interfere with an earlier order made by a judge of equivalent jurisdiction there must be either a material change of circumstances or a material omission or misstatement or some other substantial reason, which ... it is not possible to describe with greater precision.”

36. Third, he held that rule 29 should be interpreted in this way. Thus:

“...variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law, although that sounds much more like the occasion for an appeal) or an omission to state relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although ...these will be “rare” and “out of the ordinary”.”

37. Based on that case, Mr Curtis argued that EJ Kolanko ought to have considered whether EJ Reed’s order could properly have been made. Had he done so, he would have concluded that it was not properly made, with the consequence that EJ Kolanko ought not to have followed it. In effect, therefore, EJ Kolanko ought to have ignored the earlier order of EJ Reed.
38. This argument does not appear to have been advanced before the EAT; and does not form one of the grounds of appeal for which permission was given. Nor has there been any application to amend the grounds of appeal. These are factors which may lead this court to refuse even to entertain this argument: see *Gover v Propertycare Ltd* [2006] EWCA Civ 286, [2006] ICR 1073.
39. But in any event, in my judgment this argument suffers from a fatal flaw. Although Ms Morton objected to EJ Reed’s order, she did not appeal against it. If (as Mr Curtis argues) EJ Reed ought not to have interfered with EJ Harper’s direction of 2 October 2017, by what right could EJ Kolanko interfere with EJ Reed’s order? This is the very thing that HHJ Hand QC warned against. In his answers EJ Kolanko said both that he

saw no reason to interfere with EJ Reed's decision; and also that he agreed with it. There is also some force in Mr Self's argument that there was a significant change in circumstances following the CAB's concession that Ms Morton was a disabled person. EJ Harper's second direction of 2 October 2017 (after that change of circumstance) was made without having given the parties the opportunity to make full representations about the need for and scope of any medical report; and that the indication that there would be a joint report was incomplete because further directions (e.g. about timetabling and the issues to which any report would be directed) had yet to be considered and made. Thus EJ Reed's decision was not the same as a departure from a fully considered and finalised case management decision. Fuller submissions on the need for (and utility of) a formal medical report were made to EJ Pirani who, given the two conflicting decisions, ruled in favour of EJ Reed.

40. In addition, what is directly in issue on this appeal is EJ Kolanko's refusal of an adjournment. Yet that very application had already been made to the ET and refused by EJ Pirani. Ms Morton was thus doing exactly what HHJ Hand QC said should not be done: namely asking a second judge of the ET to reverse a previous decision of the same tribunal. It is not acceptable, having failed in an application before one employment judge, to make an identical application to a second employment judge in order to provide a peg on which to hang what is essentially an appeal against the decision of the first employment judge.
41. For these reasons, I do not consider that EJ Kolanko's refusal of the requested adjournment was vitiated by an error of law. I would dismiss the appeal.

Lord Justice Underhill:

42. I agree. Because I know that Ms Morton feels strongly that she was not fairly treated by the series of decisions up to and including EJ Kolanko's refusal to adjourn, I will give a short judgment of my own addressing the points on which Mr Curtis particularly focused in his excellent submissions before us.
43. The starting-point must be that Ms Morton's application to EJ Kolanko on 30 October 2017 faced two serious hurdles. First, she was applying for the adjournment of a hearing which was about to begin that morning. That is obviously very undesirable, for all the reasons given by Lewison LJ, and in any event by virtue of rule 30A (2) it could only be granted if there were exceptional circumstances. Secondly, she was asking EJ Kolanko to (in effect) reverse the decisions already made by EJ Reed and EJ Pirani. EJ Reed's decision was avowedly provisional; but EJ Pirani had made a final decision only three days previously, having considered the very full representations made by Ms Morton in her e-mail of 23 October, and there had been no change in the circumstances since then. It is very rare that it will be justified for a judge to go behind a case management decision made by a judge of the same tribunal on the basis of substantially the same material.
44. Of course, as Lewison LJ explains, Mr Curtis relies on that very principle, but as applied to the earlier decisions in the sequence: that was indeed the primary way in which he put the case in his oral submissions. He says that neither EJ Reed nor (more importantly) EJ Pirani should have gone behind the decision of EJ Harper on 2 October that a joint expert report was still required; and that it follows that EJ Kolanko should

have (in effect) reinstated that decision, which would in turn have necessitated an adjournment.

45. As Lewison LJ observes, that particular way of relying on the procedural history does not appear to have been raised in the EAT or in the grounds of appeal on which Simler LJ gave permission. I would not disallow it on that account, but I do not believe that it is well-founded. I agree with Lewison LJ that it is unsafe for us to assume that there was no relevant change of circumstances as between the decision of EJ Harper on the one hand and those of EJ Reed and EJ Pirani on the other. But in any event EJ Kolanko had to make his decision in the situation in which he found himself, where the two judges who had looked at the case most recently had decided that a joint expert report was no longer necessary and that the hearing should proceed. Even if he had been persuaded that they had no sufficient basis for departing from EJ Harper's earlier ruling, he could not himself sit as a court of appeal from EJ Pirani's decision. (And nor can we, because it was not the subject of any appeal to the EAT.) The most that can be said is that EJ Kolanko was obliged to take into account the fact that different judges had reached different conclusions in the fairly recent past about whether a joint expert report remained necessary. However, it is clear that he did take that into account. He could in fact hardly have failed to do so, since it was central to Ms Morton's submissions to him, but in any event he acknowledged in his oral reasons (as noted by the CAB's solicitor) that he was "faced with two conflicting views". He did not simply disregard that fact or rely on the fact that EJ Pirani's decision was the later. Instead, he reached his own conclusion on the essential question and found that the remaining issues could indeed fairly be resolved without a joint expert report. That is clear from his *Burns/Barke* response (given with the benefit of access to his contemporary notes), where he says in terms that he agrees with the view of EJ Reed and EJ Pirani. I can see no error of law in that approach.
46. I accept that that is not necessarily the end of the matter. Even if EJ Kolanko was entitled, as I would hold, to proceed on the basis that a joint expert report was not necessary to resolve the remaining disability issues, Mr Curtis submits that he was nevertheless obliged to adjourn the hearing because the late departure from EJ Harper's direction had put Ms Morton at a real disadvantage. The essential points in that regard are partly that she would have wished to call expert evidence of her own and partly that she needed more time to prepare for issues which she had been entitled to expect would be determined, one way or the other, by the joint report. But, as to the former point, EJ Kolanko's *Burns/Barke* answer shows that Ms Morton did not in fact say to him that she wished to call her own expert evidence. And, as to the latter, there is no basis on which we could second-guess his assessment that she had had sufficient time to prepare. Lewison LJ has addressed the particular ways in which she claims to have been put at a disadvantage, and I agree with what he says.
47. More generally, I would add that employment judges are very familiar with the kinds of issue that arise in disability claims of this kind, and are fully capable of deciding them on the basis of the kind of evidence that was available in this case – that is, the evidence of the claimant, the GP notes and the contemporary evidence of an occupational health doctor – including in cases where the claimant is unrepresented. Ms Morton was familiar with all that evidence and was intelligent and articulate. I can well understand why EJ Kolanko believed that the issues could be fairly resolved without an adjournment (which he was only, as I have said, entitled to grant if there

were exceptional circumstances). I do not believe that there was any injustice in the decision that he reached.