Neutral Citation No: [2025] NICA 32 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* *ICOS No:* *Delivered:*	**McC12806** **19/06/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE INDUSTRIAL TRIBUNAL AND FAIR EMPLOYMENT TRIBUNAL

Between:

ALAN LUCAS

Appellant:

and

EUROCOACH (NI) LIMITED

Respondent:

The appellant is self-representing, assisted by his brother Robert Lucas *qua* McKenzie Friend
Patrick Lyttle KC and Seamus McElroy (instructed by McCann and McCann Solicitors) for the Respondent

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Before: McCloskey LJ, McAlinden J and Kinney J

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

Introduction

[1] Alan Lucas (the "appellant") appeals against the decision of an Employment Tribunal (the "Tribunal") dismissing his claim for a remedy against Eurocoach (NI) Limited (the "respondent"). The appellant was employed by the respondent as a bus/coach driver from 15 October 2015. In his Claim Form (ET1) he asserted that the respondent had been aware from December 2015 that he suffers from a disability. This was the subject of discussions between the parties in December 2020, arising wherefrom the appellant's working hours were reduced. Thereafter, he pursued a disciplinary and grievance complaint, without satisfaction.

[2] The claim form is dated 6 October 2021. The essence of the appellant's claim is captured in the following short paragraph:

> "I contend that my contract of employment was unilaterally varied without my consent and thus breached. I have been subject to a resulting series of unlawful deduction of wages from January 2021. These unlawful deductions are ongoing; therefore, it is my position that pursuant to Article 55 of the Employment Rights (NI) Order 1996 I have not been treated fairly by Eurocoach."

The claim form further asserted that the appellant had suffered disability discrimination on the basis that whereas the respondent had facilitated 35 hours minimum training for drivers for the acquisition of a CPC ("Certificate of Professional Competence") this facility was not provided to him. The appellant claimed loss of earnings and other payments totally £6,000 approximately, coupled with other sundry losses and damages for injury to feelings. He further claimed damages for victimization and harassment.

[3] The appellant's claims were dismissed by the Tribunal in their entirety by its judgment delivered on 3 October 2024. The appeal to this court, by notice dated 14 November 2024, follows.

The decision of the Tribunal

[4] The gist of the Tribunal's decision is discernible from the following passage in the final paragraph:

> "…in respect of the broad range of issues raised by the claimant for adjudication…the Tribunal by unanimous decision does not determine that any aspects or dimensions to the Claimant's claim, taken together and individually, are indeed well-founded. Some, leaving aside the individual merits, were also determined to be out of time and constituted matters where the Tribunal had no statutory jurisdiction on that account."

What claims were pursued and dismissed? The Tribunal's characterisation of the claims pursued, per para [5] of its judgment was "…unlawful discrimination, victimization, harassment and unlawful wages deductions…" At para [7] the Tribunal added "…failure to make reasonable adjustments…"

[5] The Tribunal considered that the governing statutory provisions were all contained in the Disability Discrimination Act 1995 ("DDA 1995") and at para [10] reproduced sections 1, 3A, 3B, 4A, 17A, 18B and 55 of this statute, together with certain provisions of Schedule 1. The judgment then states that "Certain aspects of the applicable law and relevant authorities and principles of law" would be "…set out towards the end of the judgment." This is presumably a reference to paras [29]–[41], which are arranged under the heading "The General Principles of Law." Immediately

preceding this some three pages are devoted to listing the decided cases cited by the parties, being 50 in total. These two discrete sections of the judgment, totaling 14 paragraphs, are followed by the Tribunal's "Conclusion", being a single paragraph comprising half a page.

[6] The Tribunal's rehearsal of the relevant statutory provisions and the further sections of its judgment just noted are separated by the most voluminous part of the judgment, namely para [11], which consists of 38 subparagraphs and 37 pages. These are compiled under the following heading:

> "The evidence and facts and the arguments and resolution of issues."

These are followed by 17 separate paragraphs (to which we shall return) addressing (a) "Time limitation matters" (paras 12–16); (b) 9 specific "Issues"; and (c) The "Harassment claim."

The heart of the Tribunal's judgment

[7] At para 11.3 the Tribunal set itself the following task:

> "…to set out a timeline incorporating certain determined facts available from the evidence…[and] certain assertions made by the parties to the case and arguments advanced by both sides …"

This was repeated:

> "The Tribunal determines that the best approach shall be also to incorporate certain assertions and submissions of the respective parties into what now follows and also to provide details concerning how certain of these matters were resolved by the Tribunal in terms of fact finding and assessment of the weight and merit in respect of the submissions of the parties."

Followed by:

> "First, it is appropriate to mention, in summary form only, certain of the Claimant's assertions, in addition to those of direct discrimination on grounds of disability which will be further addressed."

[8] Next the Tribunal listed six separate issues raised by the appellant with reference to the "PCP" duty imposed on the respondent by section 4A of DDA 1995 ("PCP" denoting 'provision. criterion or practice'– the statutory language). The

judgment then notes that the "Harassment Issues" pursued by the appellant were essentially a duplication, with the exception of two specific assertions noted in para 11.5. While these are characterised "arguments", their true character is that of factual assertion. The same observation applies to the next segment of the judgment, entitled "Victimisation Issues" which lists nine factual issues raised by the appellant.

[9] This is followed by:

> "The Tribunal now proceeds with the timeline and certain arguments advanced and how certain of these matters were resolved by the Tribunal in terms of fact-finding and assessment of the weight and merit in respect of the submissions of the parties."

There follows an acknowledgement of a concession by the respondent, namely that the appellant was suffering from the twin disabilities of sciatica and depressive illness. In the 30 pages which follow the judgment addresses 19 specific issues.

[10] Within these passages the following mix of findings of fact and evaluative judgements/conclusions are identifiable:

(i) The appellant did not inform the respondent of any "back issues" in October/December 2015: para 11.9.

(ii) The appellant was not denied an annual bonus payment in respect of the year 2015: para 11.10.

(iii) The amount of holiday pay received by the appellant between 2015 and 2022 was less than his contractual entitlement (some £2,000) and arose due to an innocent administrative error which the respondent corrected circa April/May 2022: para 11.11.

(iv) The appellant's absences from work during the period January to March 2018 were not work related.

(v) On 23 March 2018 the respondent became aware that the appellant was suffering from a painful right foot [this is linked to (iv) above].

(vi) The respondent did not communicate any information about the appellant's health to the Education Authority: para 11.15.

(vii) The appellant did not work between 18 and 25 May 2018; this was not on account of any medical reason; the respondent was not aware of the appellant's asserted depressive illness until very much later; one of the respondent's company directors described the appellant as a "time bomb" in conversation

with him on 25 May 2018; and this was unrelated to any disability, mental or otherwise, of the appellant; para 11.17.

(viii) The appellant's depressive illness was first recorded in his General Practitioner's notes on 1 February 2019; no work-related symptoms or problems were reported by the appellant to this doctor; on 27 March 2019 his doctor recorded that the appellant enjoyed his job; and no objective clinical abnormalities were found on medical examination; paras 11.17 – 18.

[The above all are all findings of fact. There follows a series of evaluative judgments and conclusions, coupled with two further findings of fact – (xvi) and (xix)]

(ix) The treatment of the appellant in the matter of work hours, in compliance with a fellow employee, was not discriminatory of the appellant and did not entail either harassment or victimisation of him; para 11.19.

(x) The conduct of the respondent around April 2019 in initiating steps to obtain a medical report to inform the question of whether any "reasonable adjustments" for the appellant were appropriate was bona fide; and there was nothing inappropriate in the respondent's communications and interaction with the occupational health physician; paras 11.20–25.

(xi) The respondent's approach to Driver Certificate of Professional Competence ("CPC") training for certain drivers in March and April 2019, when the appellant was on sick absence from work, was entirely reasonable; and the appellant's assertion that the respondent was seeking a means of dismissing him was unfounded: para 11.25.

(xii) It was "eminently reasonable" for the respondent to decide that the appellant could not be permitted the reasonable adjustment of driving with one shoe removed: para 11.26.

(xiii) The respondent was not guilty of any failure to provide reasonable adjustments to the appellant: paras 11.26–11.27.

(xiv) The respondent's treatment of the appellant in the matter of furlough payments was reasonable and in good faith and, specifically, was not discriminatory or in breach of any reasonable adjustment duty: para 11.28.

(xv) The respondent's handing of its application to the Driver and Vehicle Agency ("DVA") for the appellant's renewed driving licence was not discriminatory of him and did not entail any victimisation of harassment of him: para 11.29.

(xvi) There was no recommendation from the occupational health physician who compiled a report dated 16 May 2021 that the respondent prepare a "stress management plan" for the appellant as a reasonable adjustment.

(xvii) The respondent's conduct during and in respect of the process initiated by the appellant's grievance was appropriate and, more specifically, was not discriminatory of the appellant and did not entail any victimization or harassment.

(xviii) The respondent took reasonable steps to ensure that the appellant was not disadvantaged by the PCP of requiring drivers to be fit enough to carry out their driving duties, giving rise to the possibility of dismissal on the grounds of medical capability. Furthermore, this was a purely theoretical possibility as the appellant had not been dismissed: para 11.33.

(xix) The appellant was not tricked or misled by the respondent into agreeing to "top up" his pay with his remaining annual leave in March 2021 rather than carry this over into the next ensuing 12-month period; no discrimination or victimisation or harassment was established: para 11.34.

(xx) The "protected act" asserted by the appellant in support of his victimisation claim lacked the essential element of less favorable treatment and was unsustainable in consequence: para 11.36.

(xxi) The appellant's harassment claim, properly analysed, had no separate existence as all of its particulars duplicated the individual allegations and complaints of the appellant considered in the foregoing paragraphs and rejected *seriatim*: paras 11.37–37.

Paragraph 11 of the judgment terminates at this point.

[11] At paras 12–26 the judgment addresses "Time Limitation Issues." While there is no mention anywhere in this chapter of any applicable statutory provision, in para 10 of the judgment paragraph 3 of Schedule 3 to DDA 1995 is reproduced. There are three basic legal rules. First, a complaint under section 17A or 25X of the statute must be presented "…before the end of the period of three months beginning when the act complained of was done." Second, a Tribunal may consider an out of time complaint where it assesses that it would be "just and equitable to do so" in all the circumstances of the case. Third, the time limit may be extended to facilitate conciliation prior to the commencement of proceedings.

[12] Following a self-direction section, the judgment records the fact that early conciliation involving the Labour Relations Agency ("LRA") took place from 16 June to 16 September 2021. In technical terms, this entailed an application by the appellant to the LRA for a "EC Certificate" and the ensuing grant thereof: the two dates in this respect were 16 June and 16 September 2021. The Tribunal's self-direction was that

the first of these two events had to have occurred prior to the expiry of the three months statutory limitation period. The Tribunal assessed 15 March 2021 as the date upon which this three-month period began. Thus, any act or default crystallising prior to this date was "…on the face of it, out of time unless deemed to be part of a continuing act and, of course, prior to…the possible exercise of any discretion to extend time …": para 16.

[13] Applying this methodology, the judgment then re-examines, from the time perspective, *seriatim*, seven of the specific factual issues already addressed in section 11. The Tribunal made a twofold conclusion in respect of the first six of these issues, namely that (a) each was out of time and (b) it would not be just and equitable to extend time. Next, for the reasons given, the Tribunal considered that neither the "Access NI/Driving Licence" nor the "Furlough pay" issue was out of time, proceeding to repeat its earlier conclusions that neither of these discrete complaints was well founded (paras 25 and 26).

[14] In the next paragraph of the judgment, entitled "The Harassment Claim", while mention is made of "jurisdiction and time limitation matters", there is no clearly identifiable determination by the Tribunal. Rather, in substance the Tribunal relies upon its earlier dismissal of every aspect of the appellant's complaints which could be considered to attract the label of harassment: para 27.

[15] At para [4] above we have already summarised the final passages of the judgment of the Tribunal. Stated succinctly, the Tribunal resolved all of the contentious factual issues in the respondent's favour. The effect of this, it concluded, was that every aspect of the appellant's claims was devoid of merit. Finally, the Tribunal further concluded that some specific aspects of the appellant's claims were statute barred.

Reconsideration

[16] On 16 October 2024 the appellant exercised his right to apply for reconsideration of the Tribunal's judgment. This application was determined by a different Employment Judge, acting without a panel. The application was dismissed. The central theme of the dismissal decision was that of the appellant simply being dissatisfied with the initial decision and seeking to relitigate the issues, the assessment being that there was no reasonable prospect of any aspect of the decision "being varied or revoked."

Grounds of appeal

[17] There are 24 grounds of appeal. There are multiple bare assertions that the Tribunal applied wrong legal tests and misinterpreted and/or misapplied specified provisions of DDA 1995. These account for the majority of the grounds. In addition, there are isolated assertions that the Tribunal "ignored" specified pieces of evidence, namely a General Practitioner's report dated 19 May 2019 and see further paras [20]

and [31] *infra.* Finally, there are three complaints arranged under the heading "Procedural Fairness." The grounds of appeal, uniformly, are diffuse, opaque and, in large part, lacking in coherence and essential particularity.

[18] In his extensive written submissions (spanning over 200 pages) to this court, the appellant has purported to elaborate on his notice of appeal. The structure of these written submissions is to reproduce each of the grounds of appeal and, in each instance, rehearse something supporting. This court has considered all of this material, together with such elucidation and/or augmentation as the appellant chose to provide at the substantive *inter-partes* hearing.

[19] This court has grouped together the grounds of appeal under the headings of:

(i) Errors of law.

(ii) Disregard of certain evidence.

(iii) Procedural unfairness.

Asserted errors of law

[20] Almost one quarter of the appellant's written submissions is devoted to the "CPC training issue": see paras [2] and [10](xi) above. These 33 paragraphs suffer from the following infirmities: they fail to identify any misinterpretation by the Tribunal of any material statutory provision; they fail to engage with the tribunal's factual findings; they contain new factual assertions; they contain no material engagement with the issue of substantial disadvantage; they in essence make the manifestly unsustainable case that the respondent could lawfully provide CPC training only when/if all members of the workforce were medically fit and attending work; they embody the complaint that the respondent unlawfully failed to provide a reasonable adjustment without any specification of the adjustment allegedly omitted; they contain assertions of factual error by the Tribunal without elaboration or particularization or engagement with the legal test to be applied by this court; they incorporate a new complaint of bias on the part of the Tribunal; they contain a new allegation that the Tribunal disregarded certain evidence (a letter dated 15 March 2019); they seek to impugn the credibility of the respondent's evidence on an unspecified issue and without any engagement with the material findings of the Tribunal; and they fail to address the appellant's continuing ability to work during certain subsequent periods.

[21] The aforementioned infirmities and other features combine to confound the first and second grounds of appeal. We have rehearsed them at a little length as there are comparable defects infecting the remaining grounds of appeal.

[22] The third ground of appeal challenges the Tribunal's assessment that the appellant's claim in respect of the CPC training issue was time barred. This ground is

unsustainable for two reasons. First, it rests exclusively on a decision of the English Employment Appeal Tribunal ("EAT"), *Richman v Knowsley MBC* [UKEAT/0047/13/DM], which (a) is a decision on its peculiar facts, (b) relates to a factual scenario – quite unlike the present case – in which the employer made an initial decision, followed by a process of reconsideration and reaffirmation and (c) without prejudice to its correctness in law, is not binding on this court as a matter of precedent in any event. Furthermore, this ground of appeal fails to engage with the Tribunal's dismissal of this discrete complaint on its merits. Finally, this ground suffers from unparticularized assertions of "…commission and omission errors of law…[and]…bias and/or has the appearance of bias…"

[23] The fourth ground of appeal relates to the Furlough pay issue: see para [10] (iv) above. It is incurably infected by the following infirmities: it contains an unparticularized complaint of less favourable treatment; it asserts an unspecified disadvantage to the appellant; it makes no attempt to engage with relevant Government laws and policies; and it complains of a failure to make some unspecified reasonable adjustment.

[24] In the fifth ground of appeal the appellant attempts to compare himself with other unidentified employees, said to be non-disabled, in support of an assertion that he suffered a substantial disadvantage in the matter of furlough earnings. This challenge, in addition to constituting bare assertion, seeks to invoke certain evidence, fails to engage with the Tribunal's factual findings and invites this court to make an inference favourable to the appellant, in a context of no developed case that the Tribunal erred in law (in some specified way). Finally, as regards the suggestion of "bias and/or the appearance of bias", see para [41] infra. This ground of appeal is without merit for the reasons given. We have considered the fifth and sixth grounds of appeal together in view of their obvious overlap.

[25] The seventh ground of appeal relates to the Tribunal's determination of the "footwear issue": see para [10] (xii) above. The headline contention is "Application of Wrong Legal Test." The cornerstone of this ground is para 25 of the EAT decision in *Environment Agency v Rowan* [2007] UKEAT 0060/07/0111, which, on the particular facts of that case, enshrines the appeal Tribunal's assessment that the employer's failure to make the reasonable adjustment in question was a continuing one, to be contrasted with a "one off act..." As the language employed by the appellant, exemplified by the opaque "auxiliary aid to mitigate the substantial disadvantage", demonstrates, there is a fundamental lack of clarity and specification in this ground. Next, there is the wholly unfounded (frankly absurd) suggestion that non-disabled drivers might possibly remove their footwear when driving. Linked to this, there is a manifest failure to engage with the Tribunal's findings of fact on this issue. This ground of appeal has no merit in consequence.

[26] Linked to this ground of appeal the appellant – in his skeleton argument - raises the issue of the respondent's alleged failure to provide him with "an auxiliary aid such as an individual adjustable lumbar ergonomic seat…" This complaint suffers from

three incurable infirmities. First, it is an entirely new case. Second, it is entirely unevidenced. Third, the suggestion that the relevant device "…could have reduced the pain I was suffering while driving with my right shoe on" constitutes pure assertion and speculation.

[27] Further ingredients of this new complaint include the suggestions that (a) if the respondent had sought medical advice on the issue of an auxiliary aid for the appellant, this might have included advice about the aforementioned device which might have reduced the appellant's pain, (b) the respondent would have been able to supply this device with government funding and (c) the HR advice from Peninsula to the respondent was defective. Being a mixture of bare assertion and unvarnished conjecture, these additional elements of this new complaint avail the appellant nothing.

[28] Finally, the appellant's reliance on *Mallon v Aecom Limited* [UKEAT/0175/20/LA] adds nothing, resolving to a misconceived factual comparison with a manifestly factually different case in which the EAT differed from Employment Tribunal's decision to strike out a disability adjustment claim, reasoning that the claim could not properly be said to have no reasonable prospect of success and remitting the case for fresh hearing.

[29] In this context, the appellant has developed written submissions referring to Dr Gardiner (the occupational health physician) relating to the issues of "return to work plan" and "stress management plan." These submissions lack coherence and, in any event, have no conceivable foundation having regard to the unequivocal advice of Dr Gardiner on 13 May 2019 that the appellant remained unfit for work on account of his "ongoing symptoms of pain" and a prognosis could not be offered given the incognito of "…the outcome of investigations and the response to any treatment offered" in a context of possible delays of "months to years" for the requisite investigations.

[30] The appellant's eighth ground of appeal is inextricably linked with the immediately preceding paragraph. Dr Gardiner did not advise the respondent to devise a "return to work plan." The contrary suggestion entails a distortion of the "Follow up" section of the doctor's report and ignores everything else in the report, both preceding and following. The appellant's further submissions in connection with this ground of appeal fail to engage with the relevant factual findings of the Tribunal: see para [10](xvi) above. The Tribunal committed no material error in this respect.

[31] The next succeeding submission advanced by the appellant is a bare assertion that the "above relevant evidence" (unparticularized) was ignored by the Tribunal. Properly analysed, this so-called "relevant evidence" was the purely imaginary "stress management plan" linked to Dr Gardiner which the Tribunal, in unchallengeable terms, found did not exist. The same analysis applies to the appellant's bare assertion that Dr Gardiner communicated to the respondent his willingness to provide advice in relation to this imaginary plan.

[32] The ninth ground of appeal relates to the Tribunal's treatment of the exhaustion of the annual leave issue. The material findings of the Tribunal in this respect are rehearsed at para [10](xix) above. The essence of this ground is that the Tribunal applied the "wrong legal test" under section 4(1) of DDA 1975. This is unsustainable given that no error of law is identified, much less established. Furthermore, and in any event, the Tribunal's findings on this issue are legally unchallengeable.

[33] The single contention enshrined in the tenth ground of appeal is that the Tribunal committed a "misinterpretation" of the decision in *Archibald v Fife Council* [2004] IRLR 651 and, therefore, a "misapplication" of section 4A(1)(a) of DDA 1975. The suggested "misinterpretation" is unparticularised and undeveloped in the appellant's written submissions. This is a purely vacuous ground in consequence. We shall nonetheless elaborate on the *Archibald* case.

[34] At para [32] of its judgment the Tribunal stated:

> "'Provision, criterion or practice' included any arrangements and had been afforded a wide interpretation in *Archibald v Fife Council*...
>
> There is no requirement of a like for like comparison under the DDA and any comparison may be a more general one, for example not necessarily with a non-disabled person doing exactly the same job (see *Archibald v Fife Council*)."

The appellant, without elaboration, links the Tribunal's asserted error of law with paras 11–25 of the report, which contains parts of the judgments of Lord Hope and Lord Rodger.

[35] Paras 11–12 (Lord Hope) are purely factual. Para 13 formulates the central issue. Para 14 is partly factual and, further, illuminates the meaning of the word "transferring" in section 5(3) of DDA 1975. Para 15 explains that the employer's duty under section 6(1) to take reasonable steps (or adjustments) is discharged only when the disabled person in question is no longer at a substantial disadvantage compared with non-disabled fellow employees: it is a duty of result, rather than means. Para 16 rehearses the fact that the employer had effected substantial adjustments for the appellant. It then defines the "crucial question" as whether the step of transferring her to a sedentary job or dispensing with the statutory requirement of competitive interviews should have been undertaken. Para 17 explains the statutory requirement for competitive interviews. Paras 18 and 19 focus on the meaning and effect of section 6(7) of DDA 1995, highlighting that the employer's adjustments may lawfully entail preferential treatment of the disabled employee. Paras 18–21 considered together explain the error of law into which the Employment Tribunal fell.

[36] We are unable to identify anything in the judgment of the Tribunal which is not harmonious with *Archibald*. Furthermore, the PCP to which this ground of appeal relates was the condition of employment requiring all drivers to be sufficiently fit to cover driving duties, with the risk of dismissal on grounds of medical capability if unfit. The Tribunal found no merit in this aspect of the appellant's claims on the simple ground that this PCP had never been applied to him: he remained in the respondent's employment, no dismissal having been threatened, much less carried out. We are unable to identify any error of law in the Tribunal's reasoning and finding. Furthermore, this ground of appeal fails to engage with Article 130(2)(a) of the Employment Rights (NI) Order 1996, which provides:

> "130.—(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this paragraph if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,…"

[37] The eleventh ground of appeal is the subject of detailed treatment in the appellant's submissions. It is based on the asserted conduct of the respondent in "…denying and delaying ACCESS NI application on the grounds of my disability." The gravamen of this ground is "wrong legal test pursuant to section 3A(5) of [DDA 1975]." This is supported by 17 paragraphs rehearsing numerous aspects of evidence allegedly given during the Tribunal hearing. The appellant's preoccupation with evidence contrasts with his outright failure to engage with the material findings of the Tribunal, which are addressed in para [ ](xv) above. The Tribunal's two key findings, namely that there was no detrimental to the appellant and no valid comparator, are legally unassailable. The asserted error of law is entirely unparticularised. This ground of appeal has no merit in consequence.

[38] The twelfth ground of appeal repeats verbatim the asserted error of law featuring in the eleventh ground. In amplification, the appellant's submissions assert "...bias and/or the appearance of bias with the Tribunal's reasoning and judgment in this matter." Thus, two legal infirmities are canvassed. The irremediable frailty in both is that neither contains any specificity. Furthermore, there is no engagement with

the Tribunal's material findings, rehearsed in para [10](xv) above. Finally, if and insofar as this ground of appeal enshrines the discrete suggestion that the Tribunal erred in law in declining to order the respondent to make discovery of specified records, this is canvassed on the manifestly threadbare basis of the appellant's (mere) disagreement with the respondent's evidence that it did not possess the relevant records – which, given that they were the records of a third party client, is objectively wholly unsurprising.

[39] The thirteenth, fourteenth, sixteenth, seventeenth and eighteenth grounds of appeal are all of the "wrong legal test" and "misapplied the law" variety. Each of these grounds suffers from the incurable infirmities of (a) failing to particularise coherently or at all any of these asserted errors of law, (b) focusing on evidence allegedly given rather than engaging with the Tribunal's material findings of fact, as rehearsed in para [10] above and (c) invoking the bare assertion of "bias and/or appearance of bias." The fifteenth ground of appeal – "omission error of law to the facts" – is unintelligible. This court considers that the Tribunal's material findings of fact bearing on all of these grounds of appeal are legally unchallengeable.

The "Ignoring Evidence" ground

[40] The suggestion that the Tribunal "ignored" certain evidence features intermittently: see in particular paras [17], [20] and [31] above. It resolves to bare, unsubstantiated assertion and has no traction in consequence. Furthermore, it fails to engage with the Tribunal's material findings of fact, rehearsed in para [10] above, which are legally unchallengeable.

The procedural unfairness ground

[41] The appellant's complaints under this banner resolve to bare, unsubstantiated assertion. We would add that having considered the large volume of written material and written submissions assembled by both parties, it appears to this court that the Tribunal made painstaking efforts to accommodate this unrepresented appellant and was scrupulously fair in its conduct of the hearing and assessment of the bulky evidence. To this we would adds that there is not a scintilla of bias, actual or apparent, in the Tribunal's judgment or conduct of the proceedings. The appellant makes no attempt to engage with the governing legal principles in any event:

The time issue

[42] We have addressed the Tribunal's approach to this discrete issue in para [11]-[15] above. Some aspects of this are challenged in the appellant's extensive submissions. This challenge does not extend beyond bare disagreement, failing to identify and develop any suggested error of law on the part of the Tribunal. It has no merit in consequence. Furthermore, the appellant's submissions overlook entirely that, quite separately, the Tribunal identified no legal merit in those aspects of his claim which it considered to be out of time.

General

[43] One of the central themes of the arguments on behalf of the respondent is that while the appellant has, for the most part, purported to formulate the majority of his grounds of appeal under the veneer of error of law, properly exposed this appeal largely entails a challenge to multiple findings of fact and evaluative assessments in the judgment of the Tribunal. We consider that there is merit in this submission. Given the strategy which the appellant has adopted there is, as we have highlighted above, no attempt to engage with the legal principles governing an attempted challenge to the findings of fact of a Tribunal of this kind. These principles are rehearsed in *Nesbitt v The Pallett Centre* [2019] NICA 67 at paras [60]–[61]:

> "[60] A valuable formulation of the governing principles is contained in the judgment of Carswell LCJ in *Chief Constable of the Royal Ulster Constabulary v Sergeant A* [2000] NI 261 at 273:
>
> > "Before we turn to the evidence we wish to make a number of observations about the way in which Tribunals should approach their task of evaluating evidence in the present type of case and how an appellate court treat their conclusions.
> > …
> > 4. The Court of Appeal, which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.
> >
> > 5. A Tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless—
> >
> > (a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the Tribunal (*Fire Brigades Union v Fraser* [1998] IRLR 697 at 699, per Lord Sutherland); or
> >
> > (b) the primary facts do not justify the inference or conclusion drawn but lead

> irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36."

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

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

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

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

> "To paraphrase, reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses."

[44] In several passages above we have described the Tribunal's findings of fact as "legally unchallengeable" in any event. This denotes that while they have not been challenged by reference to the foregoing principles we are satisfied in any event that they are in accordance with them.

Procedural issues

[45] At the case management stage this court dismissed the appellant's application for discovery of documents on the basis that it had no merit and further, failed to engage with the principles governing the adduction of fresh evidence before this court (the *Ladd v Marshall* principles). The court further ruled that if and insofar as the appellant was suggesting that the presiding judge of this court, having declared that

he is a blood relative of the judicial author of the Tribunal's judgment, should be subject to recusal, any such application was manifestly without merit and would be dismissed in consequence. The appellant subsequently purported to renew both applications in materially identical terms, yielding the same result.

Conclusion

[46] The submissions on behalf of the respondent remind this court of the following passage in *Balcetis v Ulster Bus and Translink* [2021] NICA 9, at para [30]:

> "[30] Having conducted the foregoing exercise, the unhesitating conclusion of this court is that the Tribunal's decision is not infected by any material error of law. It comfortably withstands critical analysis applying all of the recognised legal touchstones. In brief compass, the Tribunal took into account all material evidence; it did not leave out of account any material facts or considerations; it did not misinterpret or misunderstand the evidence in any material fashion; there was ample evidence supporting its conclusions; it contains no material legal misdirection or misunderstanding of the law; and there is not the slightest hint of procedural unfairness. The Tribunal's decision was made in the context of a fact sensitive case wherein, as we have observed, the material facts were in large part either undisputed or indisputable. While the Tribunal may not have expressly resolved some of the very few contentious factual issues (noted above), it is clear by implication that it favoured the respondents' case on these matters. Furthermore, and in any event, nothing of particular significance turned on them. We consider that all of the material evidence before the Tribunal, objectively and fairly analysed, provided no support for the appellant's case and pointed irresistibly in the respondents' favour. There was nothing borderline about the Tribunal's decision. It was, rather, in our estimation, the only decision rationally available to it."

We consider this passage tailor made for the present case.

[47] The appellant's written and oral submissions were formulated and advanced with tenacity and no little skill, to no avail. For the reasons given, we have identified no merit in any of the appellant's grounds of appeal. This is a manifestly unmeritorious appeal which must be dismissed in consequence.