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<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	ICOS No:
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IN HIS MAJESTY’S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

Between:

DD

Appellant:

and

TT

Respondent:

The Appellant appeared as a Litigant in Person
Ian Skelt KC and Michael Potter (instructed by BSO) for the Respondent

Before: McCloskey LJ, McAlinden J and Kinney J

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

Anonymity

[1] The appellant secured an anonymity order from the Industrial Tribunal (“the Tribunal”) at a belated stage, namely following promulgation of its decision dismissing her claims and its subsequent decision dismissing her application for reconsideration. The effect of this is that both parties are anonymised, being described by the ciphers “DD” and “TT” respectively. While there was no express application to this court for a similar order, we have nonetheless determined to repeat the anonymity order of the Tribunal. There shall therefore be no publication by any person or agency of either party’s true identity or of anything which could reasonably disclose same. We would add that it will not be practicable to compose an intelligible judgment which does not describe the respondent as a Health Trust. Both parties were alerted to this circumstance in advance.

The claim

[2] The appellant was employed by the respondent as a hospital housekeeper between June 2014 and November 2022. Her resignation from this employment took effect on 24 November 2022.

[3] The appellant thereafter initiated proceedings in the Industrial Tribunal, advancing several claims. While at first instance there were certain issues and some uncertainty relating to the precise scope of these claims, it is unnecessary for this court to delve into this procedural issue. It suffices to note that, ultimately, the appellant's case proceeded on an agreed basis which entailed the following claims:

- (i) Alleged associative discrimination with regard to her son contrary to section 3A of the Disability Discrimination Act 1995 ("DDA 1995").
- (ii) Breach of the Flexible Working Regulations (NI) 2015 (the "FWR") and/or Article 112F/G of the Employment Rights Order (NI) 1996 (the "1996 Order").
- (iii) Discrimination by victimisation contrary to section 55 of DDA 1995.
- (iv) Constructive unfair dismissal.
- (v) Breach of contract.

[4] The parties were further agreed that there was a time limitation issue to be determined by the Tribunal. In addition, by late amendment, the appellant added the further claim that she had been the subject of direct disability discrimination, contrary to DDA 1995. All of the appellant's claims were dismissed. Her appeal to this court followed. The grounds of appeal, in substance, resolve to unfair hearing, sundry errors of law, failure to consider, properly or at all, certain evidence and apparent bias.

The Tribunal's decision

[5] The structure of the Tribunal's decision is the following:

- (a) Background: paras 1-16.
- (b) Procedure: paras 17-31.
- (c) Relevant findings of fact: paras 32-92.
- (d) Relevant law: paras 93-122.
- (e) Decision on amendment application: paras 123-128.
- (f) Decision on FWR claim: paras 129-144.

- (g) Decision on constructive unfair dismissal: paras 145–151.
- (h) Decision on associative disability discrimination: paras 152–155.
- (i) Decision on victimisation: paras 156–158.
- (j) Decision on (direct) disability discrimination: paras 159–167.
- (k) Decision on breach of contract: para 168.

As the above index demonstrates, all of the appellant's claims were addressed in the judgment of the Tribunal.

[6] As multiple previous decisions of this court illustrate, in appeals of this kind the first instance tribunal's findings of fact are of critical importance. In every case where a claim is dismissed with a resulting appeal, this court will scrutinise scrupulously the findings of fact discernible in the tribunal's decision in the exercise of determining whether any of the grounds of appeal is sustainable. In this context it is appropriate to add that in a large number of appeals from the Industrial Tribunal there has been a recurring phenomenon, namely a failure in the tribunal's decision to properly distinguish between recitations of evidence and mere assertions (on the one hand) and material findings of fact (on the other).

[7] For the reasons explained, paras 32–92 of the Tribunal's decision are of singular importance and, unavoidably, must be scrutinised with some intensity by this court. In our examination of those passages we have identified the following key findings of fact. The period of the appellant's employment was 30 June 2014 to 24 November 2022; she was one of a three person team of house keepers providing a seven day on site service in the Emergency Department of a major hospital; the main duties of this post (which the Tribunal details) are inextricably linked with the physical work environment; house keepers had a crucial role in the emergency department of the hospital; this required their physical presence on site, with very limited exceptions; the respondent Trust consistently recognised that the appellant was the primary carer for her son who has a range of complex disabilities; directly related to this, the respondent made a series of accommodations (detailed in the judgment) for the appellant, relating mainly to working hours and home working; this had consequential implications for the working arrangements of the other two team members; it also consequentially affected adversely the provision of important services to the Emergency Department.

[8] The Tribunal's findings of fact were that in her interaction with her superiors the appellant made no claim that she was disabled; an offer of redeployment to a different post which would have entailed the appellant working entirely from home was rejected by her; the possibility of a four months career break was rejected by the appellant; for a specified period of some five months the respondent was able to

reallocate the appellant to a different post in a different hospital entailing home working; during specified periods of authorised home working in her regular post the appellant performed “minimal work”; from 15 June 2021 the appellant’s hours were reduced from 22.5 to 16 hours per week by agreement between the parties; the appellant did not respond to the respondent’s offer to assist her in exploring other employment posts more suitable to her circumstances; each of the multiple meetings with the appellant was conducted “properly”; the successive arrangements made for the appellant did not entail any detriment to her; and, finally, the appellant’s resignation on 24 October 2022 was the culmination of her final period of sick leave, commencing on 6 October 2021.

[9] The appellant signified her resignation by letter. This letter contained no reasons for her resignation. In particular it did not allege disability discrimination of any kind. Prior to resigning the appellant had on 12 October 2022 been interviewed by a new prospective employer, giving rise to an offer of alternative employment.

[10] This discrete chapter (paras 32–92) of the Tribunal’s decision ends with three further material findings of fact. First, the appellant’s assertion that her comparator, a clinical nurse in the Emergency Department, had been permitted to work from home was rejected. Second, any home working on the part of either of the appellant’s two colleagues in the house keeping team was “... absolutely minimal and occurred where a housekeeper had worked outside normal hours (at night) and then needed to follow up on an order during working hours the next day with the relevant supplier.” Third:

“The claimant appeared interested only in working as a housekeeper in the Emergency Department, but only on her own terms and without any consideration of the effect on the provision of vital services and on her colleagues.”

The grounds of appeal determined

[11] We shall address firstly, and *seriatim*, those grounds of appeal canvassing sundry errors of law on the part of the Tribunal.

- (i) **The FWR Regulations claim.** The Tribunal, having highlighted the opacity of the appellant’s claim, observed that it appeared to resolve to the contention that “... home working should have been allowed in circumstances where that would have been impracticable.” The Tribunal dismissed this claim on a primary and an alternative basis. The primary basis was that the several requests addressed by the appellant to the respondent, which were a mixture of the oral and the written, were significantly non-compliant with the requirements of the legislation in that they failed to specify the changes sought, the proposed date of implementation and the assessed impact on the employer and the workplace. Furthermore, two of the appellant’s three written requests infringed the statutory requirement that a further application of this kind is prohibited during the ensuing 12 months. The Tribunal’s alternative basis for

dismissing this claim was that it was out of time in any event. Neither this aspect of the Tribunal's determination nor the relevant legislation features in the grounds of appeal. We are satisfied that the Tribunal's decision on this issue is unassailable in any event. The relevant ground of appeal makes the bare, unparticularised assertions that the respondent did not "properly consider" the appellant's application for flexible working and the Tribunal "disregarded the written documentary evidence entirely" and is incurably impoverished in consequence. The Tribunal's treatment, and dismissal, of this discrete claim cannot be faulted.

- (ii) **Constructive unfair dismissal.** The Tribunal's self-direction was that this claim could succeed only if it was established that (a) there had been a fundamental breach by the respondent of the appellant's contract of employment, (b) such breach had entitled the appellant to resign (on 24 October 2022) and (c) she had resigned as a result of the breach and did not delay in doing so. The Tribunal's dismissal of this claim was on the primary basis that no breach of contract, fundamental or otherwise, on the part of the respondent had been established. Quite the contrary: the respondent "... made significant and repeated efforts to accommodate the claimant and put in place several adjustments to enable the claimant to provide care to her disabled son while remaining in employment ... [and] had repeatedly asked the claimant to consider other areas of employment which would have permitted working from home ... [and] ... the claimant had repeatedly refused to do so." The effect of this conclusion was that this discrete claim had to fail. However, the Tribunal went further, noting also that the appellant had been off sick for a year prior to her resignation and finding specifically that the reason for her resignation was the further employment obtained by her. Finally, and independently (the Tribunal reasoned), if and insofar as a Zoom meeting between the parties could be considered the impetus for the appellant's resignation, these two events were separated by the significant delay of six months. This aspect of the Tribunal's decision does not feature in the grounds of appeal, with the possible exception of the statement that the respondent "... breached the employment contract several times between 2020 and 2022, which the Tribunal did not properly address." This is bare, unsubstantiated assertion. There is no identifiable error of law in the Tribunal's self-direction, findings of fact or conclusion. We are satisfied that this aspect of the Tribunal's decision is unimpeachable.

- (iii) **Associative disability discrimination.** The Tribunal identified the two comparators upon which the appellant's discrimination claim rested. It made specific factual findings about each comparator which rendered this claim unsustainable. The Tribunal decided that, fundamentally, the appellant had failed to establish any less favourable treatment on the ground of her son's disability or for a reason related to his disability – or at all. Rejecting further the appellant's complaint that her home working requests had not been "properly considered", the Tribunal specifically found that "... the respondent

had made significant efforts to assist the claimant in coping with her personal circumstances and that it had gone far beyond what could reasonably have been expected of any employer.” The ground of appeal challenging this aspect of the Tribunal’s decision resolves to unparticularized, unsubstantiated and bare assertion. There is no identifiable error of law in the Tribunal’s self-direction, findings of fact or conclusion. It follows that this aspect of the Tribunal’s decision is unassailable.

- (iv) **Victimisation.** In dismissing this element of the appellant’s claims the Tribunal made two specific factual findings. First, contrary to the appellant’s assertion, the reduction of her working period to 16 hours daily had been agreed between the parties and, furthermore, had not been stimulated by the appellant’s complaints. Further, it had been quickly reversed on request. This was followed by the Tribunal’s assessment that the monitoring of the appellant’s working hours during her “final trial period” had been entirely reasonable and did not constitute an act of unlawful discrimination; ditto the options afforded to the appellant of seeking alternative employment within the organisation. The relevant ground of appeal states “After raising concerns about discrimination and harassment, the claimant faced retaliation from the manager, which the Tribunal did not appropriately consider.” This is unparticularised and unsubstantiated assertion, manifestly insufficient to establish this ground of appeal. There is no identifiable error of law in the Tribunal’s self-direction, findings of fact or conclusion. This ground is dismissed accordingly.
- (v) **Disability discrimination.** In dismissing this discrete claim, the Tribunal made two material inter-related factual findings. First, the only disability which featured in the appellant’s multiple interactions with the respondent was that of her son. Second, nothing would have alerted the respondent to any disability suffered by the appellant. Furthermore, the medical records submitted by the appellant to the respondent identified stress only and no physical or mental condition. Thus, the appellant had failed to discharge her onus of establishing that she had been suffering from a disability as defined in DDA 1995. Finally, and in any event, the Tribunal had already rejected the appellant’s comparators, had found no less favourable treatment and had found no detriment. The relevant ground of appeal in substance simply documents the appellant’s disagreement with this aspect of the Tribunal’s decision and does not engage at all with the Tribunal’s findings of no comparator, no less favourable treatment and no detriment. It is devoid of substance and merit in consequence.
- (vi) **Breach of contract.** The Tribunal noted that this discrete claim had arisen by amendment and dismissed it on the ground that the appellant had failed to establish any breach by the respondent of any term of her employment contract. The relevant ground of appeal suffers from all of the infirmities identified in

the immediately preceding subparagraph and must be dismissed in consequence.

[12] There is a freestanding ground of appeal formulated as “failure to properly consider reasonable adjustments.” The Tribunal reasoned, correctly, that an employer’s duty under section 4A(3) of DDA 1995 to make reasonable adjustments arises only where the employer knows, or should reasonably know, that the employee is disabled. This qualifying condition manifestly was not satisfied. This element of the appellant’s claims was correctly dismissed accordingly.

[13] There is a separate ground of appeal under the rubric of “**harassment.**” In its decision the Tribunal, exhaustively, addressed the claims and issues which had to be determined and noted the lengthy list which had been agreed between the parties. Harassment did not feature anywhere. This ground of appeal is entirely vacuous in consequence.

[14] This court has taken cognisance of the following further grounds of appeal, namely (a) the Tribunal failed to act in furtherance of the overriding objective, (b) “misinterpretation or misapplication of evidence” and (c) “misapplication of laws.” Absent appropriate elaboration and particulars and lacking any discernible substance these grounds of appeal are meaningless.

Unfair hearing?

[15] The final ground of appeal formulated by the appellant is “failure to provide a fair hearing.” Within the miscellaneous formulations of the appellant’s case, it is possible to identify the following core particulars:

- (i) The respondent “reorganised” the hearing bundles at a late stage.
- (ii) The Tribunal “... failed to properly handle the cross-examination process by stopping the claimant from seeking clarity from a witness ... [which] ... led to a crucial change in evidence by the witness being overlooked by the Tribunal entirely.”
- (iii) “On numerous occasions the Tribunal/Employment Judge interrupted the claimant when she attempted to give oral evidence and ordered it to be included in written submissions, without giving due consideration to the claimant’s care giving responsibilities and the need for additional time, which had been previously highlighted and requested regularly during the interlocutory process.”
- (iv) On the first day of the hearing the Employment Judge incorrectly stated that the appellant “... had become **entrenched** in pursuing what she wanted and would not consider anything else.”

- (v) “The Employment Judge made a comment ‘Let’s not keep our NHS back any longer than necessary’ or ‘any longer than we need to’, which could be seen as favouring the respondent ...”
- (vi) “The Employment Judge gave condolences to the respondent’s barrister and thanked him for attending the hearing. This is perceived as bias towards the respondent.”

[16] During the case management phase of this appeal this court received the appellant’s communications with the Tribunal, which included the following protestations about the underlying hearing:

“... interruptions and dismissive remarks ... specific dismissive comments by the Employment Judge regarding the claimant/appellant’s potential neurodiverse symptoms were humiliating and failed to accommodate her condition ...

Comparing [the appellant’s] speech pattern, especially when it results from distress or anxiety, to a machine gun could be seen as belittling and dismissing of their emotional state ... increased pressure, interruptions and emotional distress during the hearing ...

The claimant/appellant’s attempts to explain the impact of the interruptions were dismissed by the judge ...

The claimant raised concerns throughout the hearing due to ongoing difficulty and interference in her ability to hear the tribunal, the respondent and the representatives clearly and coherently. The Employment Judge dismissed the concern ...

The transcript should provide evidence of instances where the claimant/appellant appeared visibly upset, agitated and confused ...

The transcript should also capture moments when the claimant/appellant gives up trying to present her argument due to interruptions and the resulting lack of concentration. This affected her ability to fully articulate her case, further demonstrating the lack of procedural fairness and accommodation for her neurodiverse symptoms.”

[17] Exhaustive and intensive case management steps and orders on the part of this court followed. The upshot was that both parties were enabled to address this issue fairly and fully. These had the consequence that the final determination of this appeal was delayed by some six months.

[18] The case management steps noted above left this court with the unenviable task of assimilating some 3,000 pages of materials. In addition, this court's protracted endeavours to receive an agreed account/schedule from the parties of the factual procedural unfairness ingredients, incorporating their differences and disagreements, met with limited success only. In the resulting exercise the court has made a reasonable allowance for the appellant's self-representing status, while consistently mindful of our inalienable duty of impartiality.

[19] This court's task in determining this ground of appeal involves two main questions. The first is whether any of the appellant's complaints of procedural unfairness has been established. The second main question is this: if any of the appellant's complaints under this banner is established to the satisfaction of this court, does this warrant the conclusion that the hearing at first instance was procedurally unfair? On both counts, the onus rests on the appellant. The first question is one of fact, entailing the civil balance of probabilities standard. The second is a question of law.

[20] We have in paras [15]-[16] above distilled what we consider to be the main particulars of this ground of appeal. Bearing in mind what is stated in para [18], in an endeavor to bring maximum coherence and clarity we shall at this juncture outline the riposte of the respondent.

[21] In their submissions on behalf of the respondent, Mr Skelt KC and Mr Potter, of counsel, have analysed the main particulars of the appellant's case in promoting this ground of appeal. Attention is drawn to various features of the processing of the appellant's claims and the Tribunal's judgment. In particular, much care and effort were invested in case management; amendments of the appellant's claims were permitted; during the hearing the appellant was given additional time to prepare her questioning of the respondent's first witness; the Tribunal permitted the recall of one of the respondent's witnesses to facilitate further cross-examination; the oral hearings had a duration of three days; on each day the timetabling was specifically arranged to convenience the appellant; the Tribunal specifically enquired of the appellant whether she was requesting any "Galo" (or kindred) adjustments to facilitate her participation in the hearing, eliciting a negative response; she was permitted "... frequent breaks on request and on each occasion when she appeared to the Tribunal to require a break"; the appellant was allowed to call an additional witness; all of the respondent's witnesses had made written statements in advance which were shared with the appellant; each of these witnesses was cross-examined by the appellant; while unrepresented at the hearing, the appellant had received "detailed legal advice" from the Law Centre; she had also received "... some legal training and [was] currently employed as an independent advocate for individuals with learning disabilities"; and

the appellant had the facility of advancing both oral and written submissions at the conclusion of the hearing.

[22] Pausing at this juncture, this court can identify nothing in the Tribunal's processing/case management of the appellant's claims generating any reservations about the fairness of the underlying proceedings. The resolution of this ground of appeal turns on how the Tribunal conducted the substantive hearing.

[23] The court has undertaken careful examination of the schedule noted in para [18] above. A brief preface is appropriate. Both before this court and in further interaction with the Tribunal the appellant pursued vigorously the issue of the record of the substantive hearing at first instance and that of two case management hearings. The recordings were made available to both parties, who proceeded to consider them. The respondent, liaising with the appellant, prepared transcripts of those parts of the recordings considered relevant. The parties were also required by this court to make available their contemporaneous notes of the first instance hearing. The aforementioned schedule materialised in consequence.

[24] The schedule contains, firstly, 117 separate complaints of procedural unfairness/lack of impartiality formulated by the appellant. Many of these are accompanied by direct quotations from the above-mentioned transcripts. Each of these complaints is dated. At the request of this court, the respondent has indicated in a separate column that 40 of these particulars are not in dispute. These relate mainly to things said, in comment or questioning, by the presiding judge and counsel for the respondent. Thirdly, in a separate column, the respondent's reply to the remaining particulars formulated by the appellant is provided. Fourthly, accompanying the schedule there are extracts from the hearing transcripts corresponding to virtually all of the 117 particulars.

[25] This court has considered all of the 117 particulars noted above. We have juxtaposed each of these with the corresponding passage in the transcript. This has enabled the court to contextualise each one. It is unnecessary to interrogate all 117 particulars seriatim. We would, however, highlight the following: there are several parts of the transcript demonstrating that the Tribunal positively assisted the appellant in the written submissions it wished to receive from her and the kind of supporting evidence which it might expect to be adduced; the Tribunal's repeated statement that it was "bending over backwards" to assist the appellant in the presentation of her case has a notable ring of truth; so too the Tribunal's repeated statement that it was "immensely sympathetic" with the appellant's family circumstances; on the first day of the hearing there was a lengthy intervention from the Tribunal hinting strongly at a possible compromise to be considered seriously by the respondent; this was repeated on the second day of hearing; on several occasions the Tribunal brought to the appellant's attention evident gaps in the evidence, particularly regarding the issue of her asserted personal disability; and in the appellant's multiple exchanges with the panel, the appellant was not slow to both challenge and disagree with the presiding judge.

[26] Our analysis continues: the appellant coped commendably well with “questions” from respondent’s counsel which took the form of lengthy statements and/or comments and/or a combination of both; there were also numerous interventions by the presiding judge effectively translating “questions” from respondent’s counsel; the judge reminded respondent’s counsel that given the appellant’s unrepresented status the Tribunal had particular expectations of him; the Tribunal also reproached counsel for answering a question addressed to one of the respondent’s witnesses; there are multiple instances of the presiding judge explaining procedural issues to the appellant; the presiding judge specifically encouraged the appellant to inform the panel if she was experiencing stress to enable breaks in the hearing to be facilitated; and the appellant was expressly reminded of the need to provide evidence of any financial loss (such as loss of pension) claimed by her.

[27] Our analysis continues further: the shortcomings in the appellant’s medical evidence were specifically brought to her attention; the presiding judge’s lengthy exchanges with the appellant about the possible recall of one of the respondent’s witnesses were entirely favourable to her; there was one particular exchange of some length between the appellant and respondent’s counsel in which the appellant, with some vigor, consistently refused to modify her position on a particular factual issue of some importance; the judge accepted the appellant’s representation that she may not have completed fully her written submission and provided a facility for doing so (which the appellant did not in the event activate); and finally, the judge went to some lengths in exploring with the appellant the possibility of further documentary evidence being presented by her at the conclusion of the hearing.

The unfair hearing ground determined

[28] Unfair hearing issues are raised with some frequency in this court in appeals against the decisions of tribunals. Complaints of this kind invariably belong to an intensely fact sensitive and context sensitive setting. It follows that there is no all encompassing template to be applied by this court in their resolution. The duty owed by every first instance court and tribunal is one of ensuring that each party has a fair and reasonable opportunity of presenting their case in full and challenging their adversary’s case in full. This duty must be performed with absolute impartiality. The duty is procedural in nature. All of the other principles, norms and standards which have evolved in this sphere are to be viewed as offshoots of this overarching duty.

[29] This appellate court acknowledges that every first instance court or tribunal enjoys a measure of latitude, or discretion, in the conduct of the proceedings, from initial case management to final determination. This is properly to be viewed as an analytical tool which this court, on appeal, may properly apply where appropriate. However, this latitude can never justify a failure by the court or tribunal concerned to discharge the aforementioned duty. Precisely the same proposition applies to legitimate concerns at first instance about cost, efficiency and expedition. While these factors will in certain instances provide a sustainable answer to or explanation of an

appellant's complaints about procedural fairness, in other instances they will be of no avail to the court or tribunal concerned.

[30] There is another phenomenon which not infrequently arises in appeals of this kind, namely that of the unrepresented litigant doing battle with a legally represented adversary. In such cases, the overarching duty of the court or tribunal, owed to both parties, is one of absolute and unqualified impartiality. However, this duty must be balanced with the overarching duty analysed in the preceding paragraphs. The discharge of the overarching duty may require of the court or tribunal the adoption and implementation of certain measures and adjustments designed to ensure that there is equality of arms between the two parties and, ultimately, that the unrepresented party receives a fair hearing. This may properly be viewed as a calibration, to be contrasted with a dilution, of the judicial duty of impartiality. In this discrete context we would draw attention to paras [25]–[27] above. These contain paradigm illustrations of how these duties should properly be discharged.

[31] In *TF v Northern Ireland Public Services Ombudsman* [2022] NICA 17, this court considered the appellant's procedural unfairness ground of appeal at paras [76]–[116]. Given the contours of the same ground of appeal in the present case, it is appropriate to draw attention to the following passages, at paras [88]–[90]:

“[88] It is also appropriate to reiterate unequivocally that in any case where procedural unfairness at first instance is canvassed as a ground of appeal, it is the function and duty of the appellate court to decide this issue for itself. This court must identify all material facts and considerations bearing on the issue of procedural unfairness and having done so, ask itself whether this ground of appeal has been established. There are no limiting mechanisms such as a margin of appreciation or a discretionary area of judgment with regard to the first instance court or tribunal. In this discrete respect the role of an appellate court equates fully with that of a judicial review court determining a complaint of procedural unfairness on the part of the decision maker.

[89] The immediately foregoing analysis also serves to highlight the improper intrusion of the principle of *Wednesbury* irrationality in cases where an appellate court is required to determine a ground of appeal complaining that the first instance decision is vitiated by reason of an adjournment refusal determination. That is not to say that irrationality or kindred touchstones such as taking into account immaterial facts or factors or failing to have regard to material facts or factors have no role to play in appeals to this court. Quite the contrary: the *Edwards v Bairstow*

principles are as relevant today as they were when first enunciated almost 70 years ago, as the decision of this court in *Nesbitt v The Pallet Centre*, wherefrom substantial excerpts are reproduced at [43]-[44] above, demonstrates. However, the important consideration is that these principles belong to the exercise of determining whether a first instance decision is vitiated by an error of law of a kind other than procedural unfairness.

[90] It is also timely to re-emphasise paragraphs [47] and [48] of *Nesbitt* in this context. Within these passages there is a recognition that where the denial of a fair hearing, in particular denying a litigant or the subject of an administrative decision an adequate opportunity to put his case, is established, the enquiry for the appellate court or court of review will not invariably terminate at this point. That is because the central issue to be determined is whether the process as a whole deprives the person concerned of their right to a fair hearing. This conclusion will not necessarily follow in every case. However, as emphasised memorably by Bingham LJ, cases of this genre are likely to be “of great rarity” for the reasons articulated by the Lord Justice. Furthermore, as stressed by this court in *Nesbitt* at [48], the test at this judicial level is “... whether the avoidance of the vitiating factor/s concerned **could have** resulted in a different outcome.”

[32] The following passage in TF applies fully to the task of this court in determining this ground of appeal:

“[113] The question for this court is whether the appellant was unfairly deprived of her common law right to a fair hearing. This is an inalienable and fundamental right. This court is the arbiter of whether a violation of this right has occurred. The determination of this issue requires the court to view the proceedings at first instance panoramically, identifying all material facts and considerations bearing thereon.”

In performing this task, this court will always be mindful that it is not possible, at this level, to recreate the setting, atmosphere and circumstances of first instance hearings. Transcripts and other aids serve to temper and alleviate, but not cure, this reality. Bare print has its limitations. This is a reflection of another entrenched principle, namely this appellate court does not conduct a rehearing on the merits in appeals of this kind.

The fair hearing ground resolved

[33] We apply the preceding principles to the instant context in the following way. Having examined and evaluated this ground of appeal as generously as is possible consistent with this court's absolute duty of impartiality, we find it impossible to diagnose any complaint of substance or merit. The reasons for this conclusion appear in our analysis paras [25]–[27] above. All of the evidential sources available to this court point inexorably to the assessment that there was no denial of the appellant's right to a fair hearing in the Tribunal proceedings, at any stage.

[34] None of the grounds of appeal has been made out. The appeal, therefore, is dismissed and the impugned decision of the Tribunal is affirmed in its totality.