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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **10/05/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

BETWEEN:

JENNIFER ANDREWS

Appellant:

-and-

BRYSON CHARITABLE GROUP

Respondent:

The appellant appeared as a Litigant in Person
Mr Sean Gerard Doherty (instructed by Kennedys Solicitor) for the respondent

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Before: McCloskey LJ and Scoffield J

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

The Tribunal Claims

[1] Jennifer Andrews ("the appellant"), who has at all times been an unrepresented litigant, was formerly employed by Bryson Charitable Group ("the respondent"). Her period of employment was 2 October 2017 to 29 June 2018. She was employed for the purpose of providing maternity leave cover and had a fixed term contract to this end. Any dispute about her precise designations and duties during her employment is not for this court to resolve and is of peripheral importance at best.

[2] Following the termination of her employment the appellant pursued two tribunal claims. The first of these, a wages claim, gave rise to a hearing on 6 March 2019 and a dismissal decision of the Industrial Tribunal (the "*Tribunal*") dated April 2019.

[3] This court is concerned only with the second of the appellant's tribunal claims, which was initiated on 26 March 2019. The substance of this claim can be

ascertained from the appellant's witness statement deployed in the tribunal proceedings. This includes the following material passages:

> "I joined Bryson in September 2017 via Agency as a Senior HR Officer and was contracted to the HR Business Partner … and in addition appointed Interim Assistant Director of HR from 9 October 2017 …
>
> This appointment to Interim Assistant Director was in conjunction with and did not replace the HR Business Partner role …
>
> From day 2 of my posting as Assistant Director I experienced behaviours and decisions of Senior Managers which caused me concern, which showed amongst other issues of financial probity and disrespect for governance within Bryson including the various Boards …"

The out-workings of this headline allegation follow, in some detail. The following passage is illuminating:

> "I had many staff who disclosed alleged wrongdoing by Senior managers to me, however, were too afraid for their employment to progress their complaints. I quickly began to see patterns in behaviour and operations across the Group and when directly asked by the Company Officers reported same. However despite invoking the Whistle Blower Policy and Procedure I was not protected or fairly treated either during the course of my employment or following through the **Managing Grievance Process** …"
> [emphasis added]

The Tribunal's Decision

[4] The decision of the Tribunal which the appellant seeks to challenge in this court records that the focus of her second claim was the grievance which she had pursued with the respondent, unsuccessfully. The Tribunal identified that this gave rise to the central complaint in the proceedings that the dismissal of the grievance was vitiated by unlawful detriment and/or less favourable treatment. The Tribunal decided that the appellant had failed to establish a *prima facie* or arguable case of the detriment or less favourable treatment asserted, with the result that the respondent had no onus to provide an explanation. The Tribunal observed that having considered the appellant's evidence during a period of some two days her case (in substance) resolved to bare, unsupported assertion. The Tribunal was particularly impressed by the fact that the respondent, though under no legal obligation to do so, had voluntarily subjected the grievance of the appellant, a former employee, to a full

blown investigation. Finally, the Tribunal found, in emphatic terms, that the procedure applied by the respondent in the investigation, processing and determination of the appellant's grievance had been fair.

The Appeal

[5] The appellant seeks to challenge the Tribunal's decision in her appeal to this court. The central complaint formulated in her Notice of Appeal is that she did not receive a fair hearing at first instance. The particulars of this headline complaint are that the Tribunal refused her request to be accompanied by a McKenzie Friend; the hearing was "made a spectator event" for the benefit of certain law students in attendance; the appellant could not represent herself adequately since, inter alia, she suffered two panic attacks during the hearing; there was unfairness in the way in which the provision of hearing bundles to the appellant was handled; the appellant was not permitted to question the respondent's witness (or witnesses); and:

> "There was an inequitable and unbalanced proportion of representation and spectators within the Tribunal weighing favourably on the Respondent's side. This was grossly intimidating and directly impacted upon my ability to deliver my key arguments …"

[6] Paras [6]–[15] of the interlocutory judgment of this court delivered on 7 October 2022 – see [2022] NICA 58 – record the progress of this appeal. Certain further delays ensued. During this period the appellant provided some further information about her health (see para [11], interlocutory judgment). Communicating with the appellant was consistently difficult. Furthermore it appeared to the court that there was a real doubt about whether the appellant would be able to attend court to prosecute her appeal or could do so satisfactorily and fairly by the remote hearing mechanism.

[7] Given the foregoing factors the court canvassed with both parties the possibility of determining the appeal without a further *inter-partes* listing. Both parties assented. The court also invited the parties to provide further written submissions, which were duly received. Having regard to the totality of the written material provided, all of the foregoing matters, the issues to be addressed and each party's right to a fair adjudication the court concluded that adjudication on the papers would be both fair and appropriate.

[8] The affidavit which the appellant swore at an earlier stage of these appeal proceedings, on 28 February 2022, is of some significance. This affidavit was sworn in response to a case management direction of the court. It contains the appellant's detailed account of certain events during the tribunal hearing, in particular the following:

(a) The appellant's initial request for the facility of an accompanying person in support was communicated by her to the court clerk, who subsequently relayed to her the presiding judge's refusal.

(b) In the presence of all in attendance, the appellant requested (for the second time) that she be granted the facility of an accompanying person in a support role and this was denied by the presiding judge on the ground of the occupation of seats by the students.

(c) The appellant's complaint about the handling of the hearing bundles is set forth in some detail.

(d) She recounts one specific incident during the hearing relating to bundles and involving the respondent's solicitor.

(e) She avers that on 24 November 2021 the hearing had to be halted as she was too upset to proceed.

[10] In two affidavits sworn on behalf of the respondent subsequently there is no engagement with any of these averments.

[11] As appears from Case Management Directions Order No 4 (which appears as a schedule to our interlocutory decision) the respondent's solicitor was directed to respond to the particulars of procedural unfairness asserted by the appellant, as summarised in para [5] above. A third affidavit was subsequently sworn by the respondent's solicitor, Mr Gallagher, who was evidently in attendance throughout the first instance hearing. It is recorded on the face of the tribunal's judgment that the hearing was conducted on three consecutive days in November 2020.

[12] From Mr Gallagher's affidavit evidence one learns that there was no dispute that the appellant had made relevant public interest disclosures. The solicitor avers that the focus of the tribunal hearing was on whether the appellant had been subjected to detrimental treatment on the ground of having made such protected disclosures. There was a particular focus on the grievance process and outcome. The appellant evidently gave evidence, as did the grievance decision maker, Mrs Houston. It is averred that the appellant received several reminders from the presiding judge of the importance of putting to Mrs Houston the particulars of her claim of detrimental treatment. On the third day of hearing the panel retired. Later that day an oral judgment dismissing the appellant's claim was promulgated.

[13] The solicitor further avers that one of the features of the hearing arrangements was the limited number of chairs in the public gallery of the tribunal room by reason of the pandemic restrictions prevailing at that time. He confirms that there were some pupil barristers, shadowing the presiding judge, in attendance. He avers that there was nothing inappropriate or intimidating in the nature of the students' behaviour. He further avers that he does not know whether the appellant had made

any application to the tribunal to be accompanied by a "McKenzie Friend" and further avers, in substance, that no such request was made during the course of the hearing.

[14] From the further averments in the solicitor's affidavit one deduces that two named male persons gave evidence on her behalf. There is no indication of what this evidence was. The deponent confirms that the appellant asked that these persons remain in the hearing room when their evidence had been completed. The presiding judge:

> "… informed the Claimant that it was not possible for the witnesses to remain in the tribunal room after they had finished giving their evidence."

The reason for this evidently was the pandemic limitation on numbers. Finally, the solicitor deposes that the appellant was self-representing upon the hearing of her first tribunal claim on 6 March 2019.

[15] In its interlocutory ruling and associated case management directions order the court formulated a summary of the particulars of the appellant's complaint of unfair hearing. As rehearsed in para [5] above, these included the following:

> "… the appellant could not represent herself adequately since, inter alia, she suffered two panic attacks during the hearing; there was unfairness in the way in which the provision of hearing bundles to the appellant was handled; [and] the appellant was not permitted to question the respondent's witness (or witnesses) …."

The solicitor's main affidavit (above) does not engage with any of these discrete assertions. We consider this to be a matter of some significance in light of the specific direction that the respondent make an evidential response to the appellant's particulars of procedural unfairness. These unchallenged averments represent the first issue of concern to this court.

[16] The second issue of concern relates to the presiding judge's rejection of the appellant's request that her two witnesses remain in the tribunal room upon completion of their evidence. This issue has four identifiable elements. The first is that the witnesses were thereby denied the opportunity to hear the evidence of the respondent's witness. As a result they did not have the facility of providing the appellant with any comments or, indeed, any form of assistance whatsoever, for example by passing a note to her or conferring with her during a recess. The second, although less significant, element is that the possibility of these witnesses being recalled to give further evidence, in the informal setting of a tribunal hearing where rigid procedural rules do not apply, was effectively extinguished. The third element is that in a context of unavoidable imbalance arising out of the appellant's self-

representing status and the representation of the respondent by solicitor and counsel, accompanied by two others on behalf of the respondent (a witness and staff member of the respondent), a simple measure which could have addressed this to a limited extent was not taken. This court readily infers that the appellant's sense of isolation, stress and perception of inferiority can only have been exacerbated in consequence.

[17] The fourth and final aspect of this discrete issue relates to the reason proffered by the presiding judge for refusing the appellant's request. In substance, the convenience of individuals who had nothing whatsoever to do with the parties or the proceedings (even if they had a legitimate interest in observing the hearing) was given priority over the appellant's interests; and in a manner which was not applied to the respondent's witnesses or personnel in the same way. Having regard to the considerations of procedural fairness identified in the immediately preceding paragraph, this court considers that this was inappropriate. Its effect was to impinge adversely on the appellant's right to a fair hearing. We acknowledge that the presiding judge was seeking to assist with the training of pupil barristers, at the request of the Office of the Lord Chief Justice, at a time when barristers' training through pupillage was seriously impeded. Nonetheless, this interest should not have been permitted to outweigh the interests of the unrepresented party in this case.

[18] Turning to the McKenzie Friend issue, the appellant's right, again rooted in procedural fairness, was to be given the opportunity to elaborate on the particulars and basis of her application: in short, to outline the facility, or arrangement, which she was proposing and her reasons for doing so. The evidence before us suggests that she was denied this right. A helpful guide to the principles to be applied where a litigant in person seeks the assistance of a McKenzie Friend is found in Practice Note 3/2012 issued by the Lord Chief Justice (although we recognise this would not strictly apply in the tribunal whose decision is under appeal in these proceedings). It indicates that there is a presumption in favour of permitting an unrepresented litigant to have reasonable assistance from a layperson where this facility is sought.

[19] There is an allied consideration in this context, namely the judicial duty, of long standing, to provide reasons for decisions. A curt message conveyed through a court clerk is what the appellant got.

[20] The judgment of the tribunal is confined to the merits of the appellant's case. It is silent on procedural issues and the conduct of the hearing. Thus, it does not illuminate any of the issues addressed in the preceding paragraphs.

[21] Given the central thrust of the appellant's case this court has conceived it its duty to scrutinise the credibility and reliability of the appellant's key assertions. We have subjected these to careful scrutiny. In so doing, the presiding judge in this appeal has taken into account the demeanour of, and impression created by, the appellant when she addressed this court at a remote case management hearing. We

have also taken particular account of all written communications from and other materials, including the affidavit and written submissions, compiled by the appellant. The court's evaluative assessment is that these are all couched in balanced, measured, and persuasive terms. The court has also had regard to those aspects of the appellant's case which are unchallenged in the respondent's affidavits. The court can identify no indications of invention, distortion, or exaggeration on the part of the appellant. Balancing all of the foregoing, the court has no reason to reject the appellant's account of events at the first instance hearing which, in turn, provides the foundation for her central complaint of procedural unfairness.

[22] We are not persuaded by the respondent's submission that the appellant has not shown how she would have presented her case differently had she been afforded the assistance of a McKenzie Friend or the more limited facility of being supported by her witnesses remaining in attendance throughout the hearing. The onus is on the respondent to show that the outcome would inevitably have been the same; and we cannot proceed on the basis that the appellant would not have presented her case more persuasively or adduced different evidence had she been afforded the additional facilities she sought. The decision in *R v Thames Valley Police, ex parte Cotton* [1990] IRLR 344 is apposite in this context.

[23] Nor is there merit to the suggestion that since the appellant had presented a previous tribunal case on her own and without assistance, she was well able to do so again on this occasion. On the contrary, it seems to us that the unsuccessful outcome for the appellant of the previous proceedings may have been a reason why she felt more nervous, and more in need of assistance, in this further hearing. In the absence of an appropriate evidential foundation, an informed exercise in comparison is not possible. This suggestion, properly analysed, resolves to bare assertion.

[24] Furthermore, we found little assistance in the respondent's reliance on the case of *Galo v Bombardier Aerospace UK* [2016] NICA 25 in relation to the need to make reasonable adjustments for a party with a disability. Although Ms Andrews has raised medical concerns during the course of these appeal proceedings, we do not consider these relevant to her grounds of appeal relating to the fairness of the proceedings below. We have considered those grounds on the basis of elementary principles of procedural fairness.

Conclusion

[25] For the reasons given, taking together its several elements, which must be considered cumulatively, the appellant's complaint of procedural unfairness is established. The appeal succeeds in consequence. As the court's conclusion is based upon the issue of the procedural unfairness of the tribunal hearing and does not touch upon the legal merits of the tribunal's decision, the court is minded, in the exercise of our power under section 38(1)(b) of the Judicature (Northern Ireland) Act 1978, to remit the case for a fresh hearing before a differently constituted panel who will proceed in accordance with this judgment.

[26] While this court declines to express any view on the merits of the appellant's substantive claim before the tribunal, it is appropriate to note that the hearing addressed only a limited issue which fell for consideration in light of the tribunal's ruling of 18 March 2020 that the appellant was estopped from pursuing much of her intended claim on the grounds that this was an abuse of process (since those claims had been, or should have been, resolved in the course of her first set of tribunal proceedings). The appellant's most recent written submissions sought to enter into some detail about the merits of her dispute with her former employer. Mr Doherty's replying submissions properly focused on the pleaded grounds of appeal, which raised procedural issues rather than addressing the merits of the tribunal's reasoning. In light of our conclusion on the central procedural fairness ground it is unnecessary to address the other, largely unparticularised, grounds of appeal.

[27] The parties will have an opportunity to make representations on what the final order of the court should be and the issue of costs.